

# U.S. Customs and Border Protection



## **PROPOSED REVOCATION OF FOUR RULING LETTERS AND PROPOSED REVOCATION OF TREATMENT RELATING TO THE TARIFF CLASSIFICATION OF CERTAIN MINERAL STONES**

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

**ACTION:** Notice of proposed revocation of four ruling letters and proposed revocation of treatment relating to the tariff classification of certain mineral stones—specifically, amber, selenite, calcite and aragonite.

**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 four ruling letters concerning tariff classification of certain mineral stones, including amber, selenite, calcite and aragonite, 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 21, 2021.

**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:** 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), this notice advises interested parties that CBP is proposing to revoke four ruling letters pertaining to the tariff classification of certain mineral stones, including amber stones in natural state, sanded and buffed amber stones, selenite, calcites and aragonites. Although in this notice, CBP is specifically referring to revoke NY F86134, dated April 18, 2000 (Attachment A), NY N004112, dated December 28, 2006 (Attachment B), NY N004200, dated December 28, 2006 (Attachment C), and NY N015557, dated August 21, 2007 (Attachment D), this notice also covers any rulings on this merchandise which may exist, but have not been specifically identified. CBP has undertaken reasonable efforts to search existing databases for rulings in addition to the four identified. No further rulings have been found. Any party who has received an interpretive ruling or decision (i.e., a ruling letter, internal advice memorandum or decision, or protest review decision) on the merchandise subject to this notice should advise CBP during the comment period.

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

In NY F86134, CBP classified amber in heading 9705, HTSUS, specifically in subheading 9705.00.00, HTSUS, which provides for “Collections and collectors’ pieces of zoological, botanical, mineralogical, anatomical, historical, archeological, paleontological, ethnographic or numismatic interest”. CBP has reviewed NY F86134 and has determined the ruling letter to be in error. It is now CBP’s position that amber in natural state is properly classified in heading 2530, HTSUS, specifically in subheading 2530.90.80, HTSUS, which provides for “Mineral substances not elsewhere specified or included: Other: Other”. The sanded and buffed amber stones, however, are classified in heading 9602, HTSUS, specifically in subheading 9602.00.50, HTSUS, which provides for “Worked vegetable or mineral carving material and articles of these materials; molded or carved articles of wax, of stearin, of natural gums or natural resins, of modeling pastes, and other molded or carved articles, not elsewhere specified or included; worked, unhardened gelatin (except gelatin of heading 3503) and articles of unhardened gelatin: Other”.

In NY N004112 and NY N004200, CBP classified selenite stones in heading 9705, HTSUS, specifically in subheading 9705.00.00, HTSUS, which provides for “Collections and collectors’ pieces of zoological, botanical, mineralogical, anatomical, historical, archeological, paleontological, ethnographic or numismatic interest”. CBP has reviewed NY N004112 and NY N004200, and has determined the ruling letters to be in error. It is now CBP’s position that selenite stones are properly classified, in heading 2520, HTSUS, specifically in subheading 2520.10.00, HTSUS, which provides for “Gypsum; anhydrite; plasters (consisting of calcined gypsum or calcium sulfate) whether or not colored, with or without small quantities of accelerators or retarders: Gypsum; anhydrite”.

In NY N015557, CBP classified calcite and aragonite in heading 9705, HTSUS, specifically in subheading 9705.00.00, HTSUS, which provides for “Collections and collectors’ pieces of zoological, botanical, mineralogical, anatomical, historical, archeological, paleontological, ethnographic or numismatic interest”. CBP has reviewed NY N015557 and has determined the ruling letter to be in error. It is now CBP’s position that calcite and aragonite are properly classified, in heading 7103, HTSUS, specifically in subheading 7103.10.20, HTSUS, which provides for “Precious stones (other than diamonds) and semiprecious stones, whether or not worked or graded but not strung, mounted or set; ungraded precious stones (other than diamonds) and semiprecious stones, temporarily strung for convenience of transport: Unworked or simply sawn or roughly shaped: Unworked”.

Pursuant to 19 U.S.C. § 1625(c)(1), CBP is proposing to revoke NY F86134, NY N004112, NY N004200 and NY N015557, and to revoke or modify any other ruling not specifically identified to reflect the analysis contained in the proposed HQ H311301, set forth as Attachment E to this notice. Additionally, pursuant to 19 U.S.C. § 1625(c)(2), CBP is proposing to revoke any treatment previously accorded by CBP to substantially identical transactions.

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

Dated: March 22, 2021

ALLYSON R. MATTANAH  
*for*

CRAIG T. CLARK,  
*Director*

*Commercial and Trade Facilitation Division*

Attachments

NY F86134

April 18, 2000

CLA-2-97:RR:NC:SP:233 F86134

CATEGORY: Classification

TARIFF NO.: 9705.00.0090

MR. ZANE L. GOEHMAN  
6321 WINONA AVE.  
ST. LOUIS, MO 63109

RE: The tariff classification of amber from the Dominican Republic.

DEAR MR. GOEHMAN:

In your letter dated April 11, 2000, you requested a tariff classification ruling.

The merchandise to be imported consists of amber, in its natural state or sanded down and buffed. The amber will not be made into a finished article.

The applicable subheading for amber will be 9705.00.0090, Harmonized Tariff Schedule of the United States (HTS), which provides for collections and collectors' pieces of zoological, botanical, mineralogical, anatomical, historical, archeological, paleontological, ethnographic or numismatic interest, other. The rate of duty will be free.

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

A copy of the ruling or the control number indicated above should be provided with the entry documents filed at the time this merchandise is imported. If you have any questions regarding the ruling, contact National Import Specialist Lawrence Mushinske at 212-637-7061.

*Sincerely,*

ROBERT B. SWIERUPSKI

*Director,*

*National Commodity Specialist Division*

N004112

December 28, 2006

CLA-2-97:RR:NC:SP:233

CATEGORY: Classification; Marking

TARIFF NO.: 9705.00.0090

MS. TARA TOMPKINS  
EIGHTEEN KARAT INTERNATIONAL PRODUCT SOURCING INC.  
5292 - 272ND STREET  
LANGLEY, BRITISH COLUMBIA. CANADA V4W 1S3

RE: The tariff classification of natural mineral stones from Morocco.

DEAR MS. TOMPKINS:

In your letter dated November 23, 2006, you requested a tariff classification and country of origin marking ruling.

Samples were provided with your letter. The Selenite Stones, white (46539, 46540 and 46541) and Selenite Stones, orange (46542 and 46543) are natural mineral stones mined in Morocco. They were formed 140 - 200 million years ago. Selenite is a hydrous calcium sulfate. It is a glassy, well-crystallized form of gypsum. They are naturally occurring stones, not cultured. Other than being cut to size there is no further processing done on the stones following the manual extraction of the rock from the earth. The stones are not polished; they are imported in their natural state. These mineral stones are marketed as decorations or collectibles for the home. As you requested, the samples will be returned.

The applicable subheading for the Selenite Stones will be 9705.00.0090, Harmonized Tariff Schedule of the United States (HTSUS), which provides for collections and collectors' pieces of zoological, botanical, mineralogical, anatomical, historical, archeological, paleontological, ethnographic or numismatic interest, other. The rate of duty will be Free.

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

You have also inquired about the country of origin marking requirements. You claim that due to the nature of the minerals it is not possible to permanently mark them with the country of origin. You also claim that labels will not adhere to the surface, and that marking through stamping, engraving or similar methods would damage the mineral stones. At the time of importation, the stones will be wrapped in plastic bubble wrap for protection against damage, and will arrive in cardboard shipping boxes which are not suitable for presentation within a retail store. The mineral stones will be sold to retailers for open display on their shelves.

The marking statute, section 304, Tariff Act of 1930, as amended (19 U.S.C. 1304), provides that, unless excepted, every article of foreign origin (or its container) imported into the U.S. shall be marked in a conspicuous place as legibly, indelibly and permanently as the nature of the article (or its container) will permit, in such a manner as to indicate to the ultimate purchaser in the U.S. the English name of the country of origin of the article.

Part 134, Customs Regulations (19 CFR Part 134), implements the country of origin marking requirements and exceptions of 19 U.S.C. 1304. Section 134.41(b), Customs Regulations (19 CFR 134.41(b)), mandates that the ultimate purchaser in the U.S. must be able to find the marking easily and read it without strain. Section 134.1(d), defines the ultimate purchaser as gener-

ally the last person in the U.S. who will receive the article in the form in which it was imported. If an imported article is to be sold at retail in its imported form, the purchaser at retail is the ultimate purchaser. In this case, the ultimate purchaser of the mineral stones is the consumer who purchases the product at retail.

Section 134.32, Customs Regulations (19 CFR 134.32), Subpart D, sets forth certain classes of articles, which are excepted from individual country of marking requirements. Among these excepted articles are “articles which were produced more than 20 years prior to their importation to the United States.” The mineral stones have not been polished, cut or in any way improved. They have simply been excavated, and are therefore exempt from marking under this exception.

However, Section 134.22(a) Customs Regulations (19 CFR 134.22(a)), states that “when an article is excepted from the marking requirements by Subpart D of this part, the outermost container or holder in which the article ordinarily reaches the ultimate purchaser shall be marked to indicate the country of origin of the article whether or not the article is marked to indicate its country of origin.”

In this instance, you state the boxes or containers will not be used for the display of the mineral stones when sold to the ultimate purchaser. However, brochures will be available for the ultimate purchaser. The brochures will include information on the product itself and its origin.

The above scenario is adequate to enable the ultimate purchaser to determine the country of origin, and neither the mineral stones nor their containers need be marked with the country of origin.

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 Lawrence Mushinske at 646-733-3036.

*Sincerely,*

ROBERT B. SWIERUPSKI

*Director,*

*National Commodity Specialist Division*

N004200

December 28, 2006

CLA-2-97:RR:NC:SP:233

CATEGORY: Classification; Marking

TARIFF NO.: 9705.00.0090

MS. TARA TOMPKINS  
EIGHTEEN KARAT INTERNATIONAL PRODUCT SOURCING INC.  
5292 - 272ND STREET  
LANGLEY, BRITISH COLUMBIA. CANADA V4W 1S3

RE: The tariff classification of natural mineral stones from Morocco.

DEAR MS. TOMPKINS:

In your letter dated November 23, 2006, you requested a tariff classification and country of origin marking ruling.

Samples were provided with your letter. The Selenite Desert Roses Stones, (46544 and 46545) are natural mineral stones mined in Morocco. They were formed 140 - 200 million years ago. Selenite is a hydrous calcium sulfate. It is a glassy, well-crystallized form of gypsum. They are naturally occurring stones, not cultured. Other than being cut to size there is no further processing done on the stones following the manual extraction of the rock form the earth. The stones are not polished; they are imported in their natural state. These mineral stones are marketed as decorations or collectibles for the home. As you requested, the samples will be returned.

The applicable subheading for the Selenite Desert Roses Stones will be 9705.00.0090, Harmonized Tariff Schedule of the United States (HTSUS), which provides for collections and collectors' pieces of zoological, botanical, mineralogical, anatomical, historical, archeological, paleontological, ethnographic or numismatic interest, other. The rate of duty will be Free.

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

You have also inquired about the country of origin marking requirements. You claim that due to the nature of the minerals it is not possible to permanently mark them with the country of origin. You also claim that labels will not adhere to the surface, and that marking through stamping, engraving or similar methods would damage the mineral stones. At the time of importation, the stones will be wrapped in plastic bubble wrap for protection against damage, and will arrive in cardboard shipping boxes which are not suitable for presentation within a retail store. The mineral stones will be sold to retailers for open display on their shelves.

The marking statute, section 304, Tariff Act of 1930, as amended (19 U.S.C. 1304), provides that, unless excepted, every article of foreign origin (or its container) imported into the U.S. shall be marked in a conspicuous place as legibly, indelibly and permanently as the nature of the article (or its container) will permit, in such a manner as to indicate to the ultimate purchaser in the U.S. the English name of the country of origin of the article.

Part 134, Customs Regulations (19 CFR Part 134), implements the country of origin marking requirements and exceptions of 19 U.S.C. 1304. Section 134.41(b), Customs Regulations (19 CFR 134.41(b)), mandates that the ultimate purchaser in the U.S. must be able to find the marking easily and read it without strain. Section 134.1(d), defines the ultimate purchaser as generally the last person in the U.S. who will receive the article in the form in

which it was imported. If an imported article is to be sold at retail in its imported form, the purchaser at retail is the ultimate purchaser. In this case, the ultimate purchaser of the mineral stones is the consumer who purchases the product at retail.

Section 134.32, Customs Regulations (19 CFR 134.32), Subpart D, sets forth certain classes of articles, which are excepted from individual country of marking requirements. Among these excepted articles are “articles which were produced more than 20 years prior to their importation to the United States.” The mineral stones have not been polished, cut or in any way improved. They have simply been excavated, and are therefore exempt from marking under this exception.

However, Section 134.22(a) Customs Regulations (19 CFR 134.22(a)), states that “when an article is excepted from the marking requirements by Subpart D of this part, the outermost container or holder in which the article ordinarily reaches the ultimate purchaser shall be marked to indicate the country of origin of the article whether or not the article is marked to indicate its country of origin.”

In this instance, you state the boxes or containers will not be used for the display of the mineral stones when sold to the ultimate purchaser. However, brochures will be available for the ultimate purchaser. The brochures will include information on the product itself and its origin.

The above scenario is adequate to enable the ultimate purchaser to determine the country of origin, and neither the mineral stones nor their containers need be marked with the country of origin.

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 Lawrence Mushinske at 646-733-3036.

*Sincerely,*

ROBERT B. SWIERUPSKI

*Director,*

*National Commodity Specialist Division*

N015557

August 21, 2007

CLA-2-97:RR:NC:SP:233

CATEGORY: Classification

TARIFF NO.: 9705.00.0090

Ms. TARA TOMPKINS  
EIGHTEEN KARAT  
5292 272<sup>ND</sup> STREET  
LANGLEY, BRITISH COLUMBIA  
CANADA V4W 1S3

RE: The tariff classification of natural mineral stones from Canada.

DEAR Ms. TOMPKINS:

In your letter dated August 10, 2007 you requested a tariff classification ruling.

Samples were provided with your letter. The Calcite Geodes (items 47548, 47549 and 47550) and Argonite specimens are natural mineral stones mined in Morocco. The Calcite Geodes are naturally occurring rock formations that appear in sedimentary or volcanic rock. The Argonite Stones are also naturally occurring formations that have not been cultured or altered.

The applicable subheading for the Calcite Geodes and Aragonite specimens will be 9705.00.0090, Harmonized Tariff Schedule of the United States (HTSUS), which provides for "Collections and collectors' pieces of zoological, botanical, mineralogical, anatomical, historical, archeological, paleontological, ethnographic or numismatic interest, Other". The rate of duty will be free.

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

You have also inquired about the country of origin marking requirements. You claim that due to the nature of the minerals it is not possible to permanently mark them with the country of origin. You also claim that labels will not adhere to the surface and that marking through stamping, engraving or similar methods would damage the mineral stones. At the time of importation, the stones will be wrapped in plastic bubble wrap for protection against damage and will arrive in cardboard shipping boxes which are not suitable for presentation within a retail store. The mineral stones will be sold to retailers for open display on their shelves.

Noting our response to you on New York Binding Rulings N004112 and N004200, since brochures that include information on the stones including their origin will be available to the ultimate purchaser and the articles are over 20 years of age, only the outermost container or holder is required to be marked at time of importation.

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 Lawrence Mushinske at 646-733-3036.

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

HQ H311301  
OT:RR:CTF:CPMMA H311301 AJK  
CATEGORY: Classification  
TARIFF NO: 2520.10.00; 2530.90.80; 7103.10.20;  
9602.00.50

MS. TARA TOMPKINS  
EIGHTEEN KARAT INTERNATIONAL PRODUCT SOURCING INC.  
5292 272ND STREET  
LANGLEY, BRITISH COLUMBIA  
CANADA V4W 1S3

RE: Revocation of NY F86134, NY N004112, NY N004200, and NY N015557;  
Classification of Certain Mineral Stones

DEAR MS. TOMPKINS:

This letter is in reference to your New York Ruling Letters (NY) N004112, dated December 28, 2006, NY N004200, dated December 28, 2006, and NY N015557, dated August 21, 2007, issued to you by U.S. Customs and Border Protection (CBP), concerning the tariff classification of certain mineral stones—specifically, concerning selenite, calcite and aragonite—under the Harmonized Tariff Schedule of the United States (HTSUS). We have reviewed the aforementioned rulings and have determined that the classification of the merchandise was incorrect.

We have also reviewed NY F86134, dated April 18, 2000, concerning the tariff classification of amber, and have determined that the ruling was incorrect. For the reasons set forth below, we revoke the four ruling letters.

**FACTS:**

The amber was described in NY F86134 as follows:

The merchandise to be imported consists of amber, in its natural state or sanded down and buffed. The amber will not be made into a finished article.

The selenite stones were described in NY N004112 as follows:

The Selenite Stones, white (46539, 46540 and 46541) and Selenite Stones, orange (46542 and 46543) are natural mineral stones mined in Morocco. They were formed 140 - 200 million years ago. Selenite is a hydrous calcium sulfate. It is a glassy, well-crystallized form of gypsum. They are naturally occurring stones, not cultured. Other than being cut to size there is no further processing done on the stones following the manual extraction of the rock from the earth. The stones are not polished; they are imported in their natural state. These mineral stones are marketed as decorations or collectibles for the home.

The selenite desert roses stones in NY N004200 are substantially similar to the product described in NY N004112.

The calcite geodes and aragonite specimens were described in NY N015557 as follows:

The Calcite Geodes (items 47548, 47549 and 47550) and Argonite specimens are natural mineral stones mined in Morocco. The Calcite Geodes are naturally occurring rock formations that appear in sedimentary or volcanic rock. The Argonite Stones are also naturally occurring formations that have not been cultured or altered.

**ISSUE:**

Whether certain mineral stones—specifically, amber, selenite, calcite, and aragonite—are classified in heading 2520, HTSUS, as gypsum, heading 2530, HTSUS, as mineral substances, heading 7103, HTSUS, as precious or semiprecious stones, heading 9602, HTSUS, as worked mineral carving material, or heading 9705, HTSUS, as collectors' pieces of minerals.

**LAW AND ANALYSIS:**

Classification of goods under the HTSUS is governed by the General Rules of Interpretation (GRI). GRI 1 provides that classification shall be determined according to the terms of the headings of the tariff schedule and any relative section or chapter notes. In the event that the goods cannot be classified solely 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:

2520:	Gypsum; anhydrite; plasters (consisting of calcined gypsum or calcium sulfate) whether or not colored, with or without small quantities of accelerators or retarders:
2520.10.00:	Gypsum; anhydrite
2530:	Mineral substances not elsewhere specified or included:
2530.90:	Other:
2530.90.80:	Other
7103:	Precious stones (other than diamonds) and semiprecious stones, whether or not worked or graded but not strung, mounted or set; ungraded precious stones (other than diamonds) and semiprecious stones, temporarily strung for convenience of transport:
7103.10:	Unworked or simply sawn or roughly shaped:
7103.10.20:	Unworked
9602.00:	Worked vegetable or mineral carving material and articles of these materials; molded or carved articles of wax, of stearin, of natural gums or natural resins, of modeling pastes, and other molded or carved articles, not elsewhere specified or included; worked, unhardened gelatin (except gelatin of heading 3503) and articles of unhardened gelatin:
9602.00.50:	Other
9705.00.00:	Collections and collectors' pieces of zoological, botanical, mineralogical, anatomical, historical, archeological, paleontological, ethnographic or numismatic interest

The Legal Note to Chapter 25, HTSUS, provides, in pertinent part:

1. Except where their context or note 4 to this chapter otherwise requires, the headings of this chapter cover only products which are in the crude state or which have been washed (even with chemical substances eliminating the impurities without changing the structure of the product), crushed, ground, powdered, levigated, sifted, screened, concentrated by flotation, magnetic separation or other mechanical or physi-

cal processes (except crystallization), but not products which have been roasted, calcined, obtained by mixing or subjected to processing beyond that mentioned in each heading.

...

4. Heading 2530 applies, *inter alia*, to: ... amber ...

The Legal Note to Chapter 71, HTSUS, provides, in pertinent part:

3. This chapter does not cover:

...

(p) [C]ollectors' pieces (heading 9705) ..., other than natural or cultured pearls or precious or semiprecious stones.

The Legal Note to Chapter 96, HTSUS, provides, as follows:

2. In heading 9602 the expression "vegetable or mineral carving material" means:

...

(b) Amber, meerschaum, agglomerated amber and agglomerated meerschaum, jet and mineral substitutes for jet.

The Legal Note to Chapter 97, HTSUS, provides, as follows:

1. This chapter does not cover:

...

(c) Pearls, natural or cultured, or precious or semiprecious stones (headings 7101 to 7103).

\* \* \* \* \*

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 (August 23, 1989).

The General EN to Chapter 25, provides, in pertinent part:

As provided in Note 1, this Chapter covers, except where the context otherwise requires, mineral products only in the crude state or washed (including washing with chemical substances to eliminate impurities provided that the structure of the product itself is not changed), crushed, ground, powdered, levigated, sifted, screened or concentrated by flotation, magnetic separation or other mechanical or physical processes (not including crystallisation)...

The General EN to Chapter 71, provides, in pertinent part:

This Chapter includes:

(1) In headings 71.01 to 71.04, natural or cultured pearls, diamonds, other precious or semi-precious stones (natural, synthetic or reconstructed), unworked or worked, but not mounted, set or strung; also, in heading 71.05, certain waste resulting from the working of these stones.

The General EN to Chapter 97, provides, in pertinent part:

This Chapter covers:

...

- (C) Collections and collectors' pieces of zoological, botanical, mineralogical, anatomical, historical, archaeological, palaeontological, ethnographic or numismatic interest (heading 97.05)....

It should, however, be noted that such articles are classified in other Chapters of the Nomenclature if they do not comply with the conditions arising from the terms of the Notes or headings of this Chapter.

EN 25.20, provides, as follows:

Gypsum is a natural hydrated calcium sulphate generally white and friable....

EN 25.30(B) provides, in pertinent part:

- (2) Amber is a fossilised resin (also known as "succinite" or "Karabé"). It generally ranges in colour from yellow to deep orange....

EN 71.03 provides, in pertinent part:

The heading includes the precious or semi-precious stones listed in the Annex to this Chapter, the name of the mineralogical species being given with the commercial names; the heading is, of course, restricted to those stones and varieties of a quality suitable for use in jewellery, etc.

EN 96.02(B), which provides for worked mineral carving materials, states as follows:

This group covers mineral carving materials of the kind mentioned in Note 2 (b) to this Chapter.

The heading does not cover the following products which fall in heading 25.30:

- (i) Rough blocks or lumps of meerschaum or amber; ....

EN 97.05 provides, in pertinent part, as follows:

These articles are very often of little intrinsic value but derive their interest from their rarity, their grouping or their presentation. The heading includes:

- (A) Collections and collectors' pieces of zoological, botanical, mineralogical or anatomical interest, such as:

...

- (4) Specimens of minerals (not being precious or semi-precious stones falling in Chapter 71); ....

\* \* \* \* \*

### I. Amber

Heading 9705, HTSUS, which provides for collectors' pieces of zoological, botanical, mineralogical, anatomical, historical, archaeological, palaeontological, ethnographic or numismatic interest, covers articles that "derive their interest from rarity, their grouping or their presentation." EN 97.05. Amber, however, is generally common with the exception of very large pieces

of amber or amber with rare insects.<sup>1</sup> In regard to the instant amber stones, the description of the merchandise does not highlight their rarity or other unique characteristics that may qualify them as being rare. Thus, the instant amber stones are not classifiable in heading 9705, HTSUS, as collectors' pieces, due to their lack of rarity or unique interest for collectors.

Heading 2530, HTSUS, is a provision for mineral substances, including amber. EN 25.30; *see also* Note 4 to Chapter 25. To classify amber stones in heading 2530, HTSUS, Note 1 to Chapter 25 provides that they must be in crude state. Accordingly, the amber stones in natural state in NY F86134 are classified in heading 2530, HTSUS, as mineral substances. The sanded and buffed amber stones, however, are excluded from heading 2530, HTSUS, because they are no longer in crude state after undergoing the worked process of sanding down and buffing. The Legal Note 2(b) to Chapter 96, which encompasses minerals, provides that "vegetable or mineral carving material" in heading 9602, HTSUS, means "amber". Moreover, EN 96.02(B) states that heading 9602, HTSUS, "does not cover ... products which fall in heading 25.30 [including] (i) [r]ough blocks or lumps of ... amber". Accordingly, as the sanded and buffed amber stones are excluded from heading 2530, HTSUS, as mineral substance, heading 9602, HTSUS, is the only heading that wholly encompasses the instant amber stones that are further worked and are not in their crude state. Therefore, the sanded and buffed amber stones are classified in heading 9602, HTSUS, as worked mineral carving material.

## II. Selenite Stones

Heading 2520, HTSUS, is an *eo nomine* provision that provides for gypsums, which are natural hydrated calcium sulphates, such as the instant selenite stones in NY N004112 and NY N004200. *See* EN 25.20. Gypsums—which selenite is a variety—are one of the most abundant minerals and are not considered rare unless they are in the form of gem-quality crystals with transparency.<sup>2</sup> The instant selenite stones, however, are not colorless or transparent and thus, they lack unique interests for collectors due to their abundance. Accordingly, they are not considered rare within the context of heading 9705, HTSUS, which provides for collectors' pieces. By application of GRI 1, therefore, the selenite stones are excluded from heading 9705, HTSUS, which provides for collectors' pieces, and instead classified in heading 2520, HTSUS, as gypsums.

## III. Aragonite and Calcite

The EN's Annex to Chapter 71, HTSUS, lists various minerals that constitute precious or semiprecious stones under HTSUS. The Annex does not include organic materials, such as amber; however, the Annex specifically identifies aragonite and calcite. Under HTSUS, therefore, aragonites and calcites are classified as precious or semiprecious stones in heading 7103, HTSUS. Accordingly, heading 7103, HTSUS, is the only heading that wholly

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<sup>1</sup> *Amber Value, Price, and Jewelry Information*, International Gem Society, <https://www.gemsociety.org/article/gypsum-jewelry-and-gemstone-information/> (last visited Feb. 24, 2021).

<sup>2</sup> *Gypsum Value, Price, and Jewelry Information*, International Gem Society, <https://www.gemsociety.org/article/gypsum-jewelry-and-gemstone-information/> (last visited Feb. 24, 2021).

characterizes the instant aragonites and calcites, and is not classifiable in heading 9705, HTSUS. Although EN 97.05 provides that the heading includes “specimens of minerals”, Note 1 to Chapter 97 states that Chapter 97 does not cover precious or semiprecious stones in heading 7103, HTSUS. Accordingly, even if the instant aragonite and calcite are rare, they are excluded from heading 9705, HTSUS, because they are wholly classified in heading 7103, HTSUS. Under GRI 1, therefore, aragonite and calcite are, *prima facie*, classified in heading 7103, HTSUS, which provides for precious or semiprecious stones.

**HOLDING:**

By application of GRI 1, the amber stones in natural status are classified in heading 2530, HTSUS, specifically subheading 2530.90.80, HTSUS, which provides for “[m]ineral substances not elsewhere specified or included: [o]ther: [o]ther”. The 2021 column one, general rate of duty is free. However, the sanded down and buffed amber stones are classified in heading 9602, HTSUS, specifically subheading 9602.00.50, HTSUS, which provides for “[w]orked vegetable or mineral carving material and articles of these materials; molded or carved articles of wax, of stearin, of natural gums or natural resins, of modeling pastes, and other molded or carved articles, not elsewhere specified or included; worked, unhardened gelatin (except gelatin of heading 3503) and articles of unhardened gelatin: [o]ther”. The 2021 column one, general rate of duty is 2.7 percent *ad valorem*.

In addition, the selenite stones are classified in heading 2520, HTSUS, specifically subheading 2520.10.00, HTSUS, which provides for “[g]ypsum; anhydrite; plasters (consisting of calcined gypsum or calcium sulfate) whether or not colored, with or without small quantities of accelerators or retarders: [g]ypsum; anhydrite”. The 2021 column one, general rate of duty is free.

Lastly, the calcite and aragonite are classified in heading 7103, HTSUS, specifically subheading 7103.10.20, HTSUS, which provides for “[p]recious stones (other than diamonds) and semiprecious stones, whether or not worked or graded but not strung, mounted or set; ungraded precious stones (other than diamonds) and semiprecious stones, temporarily strung for convenience of transport: [u]nworked or simply sawn or roughly shaped: [u]nworked”. The 2021 column one, general rate of duty is free.

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*.

**EFFECT ON OTHER RULINGS:**

NY F86134, dated April 18, 2000, NY N004112, dated December 28, 2006, NY N004200, dated December 28, 2006, and NY N015557, dated August 21, 2007, are hereby revoked.

*Sincerely,*

CRAIG T. CLARK,

*Director*

*Commercial and Trade Facilitation Division*

CC: Mr. Zane L. Goehman  
6321 Winona Ave.  
St. Louis, MO 63109

**PROPOSED MODIFICATION OF ONE RULING LETTER  
AND PROPOSED REVOCATION OF TREATMENT  
RELATING TO THE TARIFF CLASSIFICATION OF SINK  
BASKET STRAINERS**

**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 a sink basket strainer.

**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 New York Ruling Letter (NY) 889651, dated September 22, 1993, concerning the tariff classification of a plastic sink basket strainer 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 21, 2021.

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

**SUPPLEMENTARY INFORMATION:****BACKGROUND**

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

Pursuant to 19 U.S.C. § 1625(c)(1), this notice advises interested parties that CBP is proposing to modify one ruling letter pertaining to the tariff classification of a plastic sink basket strainer. Although in this notice, CBP is specifically referring to New York Ruling Letter (NY) 889651, dated September 22, 1993 (Attachment A), this notice also covers any rulings on this merchandise which may exist, but have not been specifically identified. CBP has undertaken reasonable efforts to search existing databases for rulings in addition to the one identified. No further rulings have been found. Any party who has received an interpretive ruling or decision (i.e., a ruling letter, internal advice memorandum or decision, or protest review decision) on the merchandise subject to this notice should advise CBP during the comment period.

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

In NY 889651, CBP classified a plastic sink basket strainer, identified as Sample A, in heading 3926, HTSUS, specifically in subheading 3926.90.95<sup>1</sup>, HTSUS, which provides for "Other articles of plastics and articles of other materials of headings 3901 to 3914: Other: Other." CBP has reviewed NY 889651 and has determined the ruling

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<sup>1</sup> Subheading 3926.90.95 has been renumbered as 3926.90.99 in the 2020 HTSUS.

letter to be in error with respect to the classification of Sample A. It is now CBP's position that Sample A is properly classified, in heading 3922, HTSUS, specifically subheading 3922.90.00, which provides for "Baths, shower baths, sinks, washbasins, bidets, lavatory pans, seats and covers, flushing cisterns and similar sanitary ware, of plastics: Other."

Pursuant to 19 U.S.C. § 1625(c)(1), CBP is proposing to modify NY 889651 and to revoke or modify any other ruling not specifically identified to reflect the analysis contained in the proposed Headquarters Ruling Letter ("HQ") H296172, 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.

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

Attachments

NY 889651

September 22, 1993

CLA-2-39:S:N:N6:221 889651

CATEGORY: Classification

TARIFF NO.: 3926.90.9590; 7324.90.0000;  
8481.80.5090

MR. ANDREW GOODMAN  
INTERNATIONAL MANUFACTURING CORPORATION  
P.O. BOX 9106  
1515 WASHINGTON STREET  
BRAINTREE, MA 02184

RE: The tariff classification of sink basket strainers and waste overflow apparatus from France.

DEAR MR. GOODMAN:

In your letter dated August 19, 1993, you requested a tariff classification ruling.

Three samples were included with your request. The first, labelled sample A, is a basket strainer for a kitchen sink. It is made entirely of plastics, except for the threaded metal portion which connects the upper and lower basket together and into which the strainer fits. The essential character of this basket strainer is imparted by the plastics.

The second sample, labelled sample B, is also a basket strainer for a kitchen sink. The upper portion of the basket, which will be fitted into the sink, the strainer, and the threaded connector between the upper and lower baskets are made from stainless steel. The lower portion of the basket, which connects to the drain tube, is made of plastics. The essential character of this basket strainer is imparted by the metal components.

The third sample, labelled sample C, is described as a combination pop-up waste overflow for a bath. It includes a floor drain for a bathtub, operated by a rotary handle. It is incorporated into an overflow drain which will be mounted inside the wall of the tub. The overflow is connected to the floor drain by flexible polyvinyl chloride plastic tubing.

The applicable subheading for sample A, the basket strainer made essentially of plastics, will be 3926.90.9590, Harmonized Tariff Schedule of the United States (HTS), which provides for other articles of plastics, other. The rate of duty will be 5.3 percent ad valorem.

The applicable subheading for sample B, the basket strainer made essentially of stainless steel, will be 7324.90.0000, HTS, which provides for sanitary ware and parts thereof, of iron or steel, other. The rate of duty will be 3.4 percent ad valorem.

The applicable subheading for sample C, the pop-up waste overflow, will be subheading 8481.80.5090, HTS, which provides for taps, cocks, valves and similar appliances, hand operated, of other materials, other. The rate of duty will be 4.4 percent ad valorem.

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

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

*Sincerely,*  
JEAN F. MAGUIRE  
*Area Director*  
*New York Seaport*

HQ H296172  
CLA-2 OT:RR:CTF:CPMM H296172 CkG  
CATEGORY: Classification  
TARIFF NO: 3922.90.00

MR. ANDREW GOODMAN  
INTERNATIONAL MANUFACTURING CORPORATION  
P.O. BOX 9106  
1515 WASHINGTON STREET  
BRAINTREE, MA 02184

RE: Proposed modification of NY 889651; classification of plastic basket strainer

DEAR MR. GOODMAN:

This is in reference to New York Ruling Letter (NY) 889651, dated September 22, 1993, concerning the tariff classification of two sink basket strainers and a waste overflow apparatus. In NY 889651, CBP classified three items, referred to as Samples A, B and C, in headings 3926, 7324, and 8481, HTSUS, respectively. We have reviewed NY 889651, and have determined that the classification of Sample A (a basket strainer of plastic) in heading 3926, HTSUS, was incorrect.

**FACTS:**

The merchandise at issue in NY 889651 was described as follows:

Three samples were included with your request. The first, labelled sample A, is a basket strainer for a kitchen sink. It is made entirely of plastics, except for the threaded metal portion which connects the upper and lower basket together and into which the strainer fits.

The second sample, labelled sample B, is also a basket strainer for a kitchen sink. The upper portion of the basket, which will be fitted into the sink, the strainer, and the threaded connector between the upper and lower baskets are made from stainless steel. The lower portion of the basket, which connects to the drain tube, is made of plastics.

Sink basket strainers are installed in the base of the sink basin. They direct wastewater into the drainage pipe and filter out large particles to prevent clogging.

**ISSUE:**

Whether the basket strainer are classifiable as sanitary ware of heading 3922, HTSUS, or as other articles of plastic in heading 3926, HTSUS.

**LAW AND ANALYSIS:**

Merchandise is classifiable under the HTSUS in accordance with the General Rules of Interpretation (GRIs). GRI 1 provides that classification shall be determined according to the terms of the headings and any relative Section or Chapter Notes. In the event that the goods cannot be classified solely on the basis of GRI 1, and if the headings or notes do not require otherwise, the remaining GRIs 2 through 6 may be applied.

GRI 3 states, in pertinent part:

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

...

(b) Mixtures, composite goods consisting of different materials or made up of different components . . . 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.

The HTSUS provisions under consideration are as follows:

- 3922: Baths, shower-baths, sinks, wash-basins, bidets, lavatory pans, seats and covers, flushing cisterns and similar sanitary ware, of plastics.
- 3926: Other articles of plastics and articles of other materials of headings 39.01 to 39.14.

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

EN 39.22 provides as follows:

This heading covers fittings designed to be permanently fixed in place, in houses, etc., normally by connection to the water or sewage systems. It also covers other sanitary ware of similar dimensions and uses, such as portable bidets, baby baths and camping toilets.

Flushing cisterns of plastics remain classified in this heading, whether or not equipped with their mechanisms.

However, the heading **excludes**:

(a) Small portable sanitary articles such as bed pans and chamber-pots (**heading 39.24**).

(b) Soap dishes, towel rails, tooth-brush holders, toilet paper holders, towel hooks and similar articles for bathrooms, toilets or kitchens; these articles fall in **heading 39.25** if intended for permanent installation in or on walls or other parts of buildings, otherwise in **heading 39.24**.

EN 73.24 provides, in pertinent part, as follows:

This heading comprises a wide range of iron or steel articles, **not more specifically covered** by other headings of the Nomenclature, used for sanitary purposes.

...

The heading includes, baths, bidets, hip-baths, foot-baths, sinks, wash basins, toilet sets; soap dishes and sponge baskets; douche cans, sanitary pails, urinals, bedpans, chamber-pots, water closet pans and flushing cisterns whether or not equipped with their mechanisms, spittoons, toilet paper holders.

\* \* \* \*

As a preliminary matter, we agree with the conclusion in NY 889651 that the correct classification for Sample B is heading 7324, HTSUS, as sanitary

ware of steel. We further agree that the essential character of Sample A is imparted by the plastic body, which constitutes the majority of the bulk of the good, and performs the essential function of channeling and filtering wastewater into the sink drain.

Within Chapter 39, two headings are implicated for Sample A; heading 3922, HTSUS, for sanitary ware of plastics, and heading 3926, HTSUS, for other articles of plastic. Specifically, heading 3922 covers “Baths, shower-baths, sinks, wash-basins, bidets, lavatory pans, seats and covers, flushing cisterns and similar sanitary ware, of plastics.” Sinks and wash-basins are types of sanitary ware described *eo nomine* in EN 39.22, and classified as such by CBP. See *e.g.*, NY R00296, dated May 6, 2004. Heading 3922 does not provide for parts of sanitary ware even if sink drains and strainers, as integral components of a kitchen sink, could be considered such a part. The question is, therefore, whether sink drains and strainers are included in the scope of “similar sanitary ware.”

The Macmillan Dictionary, available at [www.macmillandictionary.com](http://www.macmillandictionary.com), defines “sanitary” as “relating to people’s health, especially to the system of supply water and dealing with human waste.” “Sanitary ware” is also defined at [www.dictionary.reference.com](http://www.dictionary.reference.com) as: “plumbing fixtures, as sinks or toilet bowls, made of ceramic material or enameled metal.” The Explanatory Note to heading 3922 further states that heading 3922 covers “fittings designed to be permanently fixed in place, in houses, etc., normally by connection to the water or sewage systems. It *also* covers *other* sanitary ware of similar dimensions and uses, such as portable bidets, baby baths and camping toilets.” (emphasis added). EN 39.22 excludes, however, “Small portable sanitary articles such as bed pans and chamber-pots (**heading 39.24**), as well as items such as soap dishes, towel rails, toilet paper holders and similar articles for bathrooms, toilets or kitchens. Heading 3922 is therefore more limited in scope than heading 7324, which does include such items as soap dishes and toilet paper holders.

“Sanitary ware” for the purposes of heading 3922, HTSUS, therefore covers permanent fixtures such as toilets and showers (as well as specific components such as lavatory seats and covers), typically connected to the building’s plumbing system and used for the removal of waste from the home.

We have further consulted the standards jointly developed by the American Society of Mechanical Engineers (ASME) and the Canadian Standards Association (CSA) regarding plumbing supply fittings (ASME A112.18.1/CSA B125.1), which can be found on the ASME website at [www.asme.org](http://www.asme.org). The scope of the ASME A112.18.1/CSA B125.1 standard for plumbing supply fittings can be found in Part 1, Section 1.1, which states that the standard applies to plumbing supply fittings and accessories located between the supply line stop and the terminal fitting, including, in relevant part, “(g) Kitchen, sink, and lavatory supply fittings”. Part 3, entitled “Definitions and abbreviations”, at Section 3.1 Definitions, states, in relevant part: “The following definitions apply in this Standard:

Accessory—a component that can, at the discretion of the user, be readily added, removed, or replaced, and that, when removed, will not prevent the fitting from fulfilling its primary function. Note: Examples include aerators, hand-held shower assemblies, shower heads, and in-line flow controls.

\* \* \*

Fixture—a device for receiving water, waste matter, or both and directing these substances into a sanitary drainage system

As the instant drains connect to the home's water system in order to receive and direct wastewater into a sanitary drainage system, they are within the scope of the above definitions of sanitary ware and plumbing fixtures. They are not akin to the examples of portable sanitary articles such as bed pans, or fixtures such as toilet paper holders or soap dishes, which are excluded by EN 39.22. Such articles are easily replaceable and do not connect to a home's plumbing system or otherwise play a direct role in removing waste from the home.

The instant drains can also be distinguished from accessories of plumbing systems such as showerheads, which CBP has consistently classified outside of headings 3922 and 7324; unlike the instant drains, showerheads do not receive water or waste matter and direct it to a sanitary drainage system. See *e.g.*, Headquarter's Ruling Letter (HQ) H092556, dated July 10, 2015; NY N246906, dated November 18, 2013; NY N033873, dated August 21, 2008; NY I81474, dated May 22, 2002; NY H80605, dated June 5, 2001; and NY G85952, dated January 17, 2001.

**HOLDING:**

By application of GRI 1 and GRI 3, Sample A is classified in heading 3922, HTSUS, specifically subheading 3922.90.00, which provides for "Baths, shower baths, sinks, washbasins, bidets, lavatory pans, seats and covers, flushing cisterns and similar sanitary ware, of plastics: Other." The 2021 column one, general rate of duty is 6.3% *ad valorem*.

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

**EFFECT ON OTHER RULINGS:**

NY 889651, dated September 22, 1993, is hereby modified with respect to the classification of the product identified as Sample A.

*Sincerely,*

CRAIG T. CLARK,

*Director*

*Commercial and Trade Facilitation Division*

**PROPOSED REVOCATION OF THREE RULING LETTERS  
AND PROPOSED REVOCATION OF TREATMENT  
RELATING TO THE TARIFF CLASSIFICATION OF CHILD  
CAR SEAT CUSHIONS**

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

**ACTION:** Notice of proposed revocation of three ruling letters and proposed revocation of treatment relating to the tariff classification of child car seat cushions.

**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 U.S. Customs and Border Protection (CBP) intends to revoke three ruling letters concerning tariff classification of child car seat cushions 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 21, 2021.

**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:** 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), this notice advises interested parties that CBP is proposing to revoke three ruling letters concerning tariff classification of child car seat cushions. Although in this notice, CBP is specifically referring to New York Ruling Letters (NY) N132069, dated November 18, 2010 (Attachment A), NY N245061, dated August 30, 2013 (Attachment B), and NY N246761, dated November 13, 2013 (Attachment C), 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 three 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 N132069, NY N245061, and NY N246761, CBP classified child car seat cushions in heading 9401, HTSUS, specifically in sub-heading 9401.90.50, HTSUS, which provides for "[s]eats (other than those of heading 9402), whether or not convertible into beds, and

parts thereof: [p]arts: [o]ther: [o]ther”. CBP has reviewed NY N132069, NY N245061, and NY N246761, and has determined the ruling letters to be in error. It is now CBP’s position that child car seat cushions are properly classified in heading 9404, HTSUS, specifically in subheading 9404.90.20, HTSUS, which provides for “[m]attress supports; articles of bedding and similar furnishing (for example, mattresses, quilts, eiderdowns, cushions, pouffes and pillows) fitted with springs or stuffed or internally fitted with any material or of cellular rubber or plastics, whether or not covered: [o]thers: [p]illows, cushions and similar furnishings: [o]thers”.

Pursuant to 19 U.S.C. § 1625(c)(1), CBP is proposing to revoke NY N132069, NY N245061, and NY N246761 and to revoke or modify any other ruling not specifically identified to reflect the analysis contained in the proposed HQ H293786, set forth as Attachment D 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: March 24, 2021

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

Attachments

N132069

November 18, 2010

CLA-2-94:OT:RR:NC:N4:433

CATEGORY: Classification

TARIFF NO.: 9401.90.5020

R. KEVIN WILLIAMS

RODRIGUEZ, O'DONNELL, GONZALEZ & WILLIAMS, P.C.

ATTORNEYS & COUNSELORS AT LAW

8430 WEST BRYN MAWR AVENUE, SUITE 525

CHICAGO, IL 60631

RE: The tariff classification of infant car seat cushions from China.

DEAR MR. WILLIAMS:

In your letter dated November 5, 2010, on behalf of Graco Baby Products, c/o Newell Rubbermaid – Home and Family Group 3, you requested a tariff classification ruling. As requested, the submitted samples will be returned to you.

The merchandise at issue is two styles of infant car seat cushions, identified by Graco as the Comfort Sport and My Ride. Each of the seat cushions, are covers designed and shaped to go over a molded infant car seat shell with a molded foam insert. Each cushion is composed of polyurethane foam and polyester batting, and has two plastic clips per cushion that anchors the cushion to the bottom of the car seat frame. The seat cushions have two horizontal slits for each of the shoulders and one horizontal slit for the lap that secures the infant to the car seat by means of harness straps. The harness straps are not imported with the cushions. These cushions with their clips are imported together.

In understanding the language of the Harmonized Tariff Schedule of the United States (HTSUS), the Harmonized Commodity Description and Coding System Explanatory Notes (ENs) may be utilized. The ENs, although not dispositive, nor legally binding, provide a commentary on the scope of each heading of the HTSUS, and are the official interpretation of the Harmonized System at the international level. See T.D. 89-80, 54 Fed. Reg. 35127, 35128 (August 23, 1989).

A review of the ENs for heading 9401, HTSUS, the provisions for seats and parts of seats, reflects in pertinent part, that separately presented cushions and mattresses, sprung, stuffed or internally fitted with any materials or of cellular rubber or plastic whether or not covered, are excluded from heading 9401, even if they are clearly specialized as parts of upholstered seats – however when these articles are combined with other parts of seats they remain classified in this heading. Based on the reading of the ENs, we are of the opinion for both styles of infant car seat cushions, that the two plastic clips which are attached to each of the cushions fall within the meaning of articles combined with other parts of seats. Accordingly, the infant car seat cushions are classifiable under heading 9401, HTSUS.

Under the General Rules of Interpretation (GRIs), specifically at GRI 3(b), of the HTSUS, the infant car seat cushions are composed of different components [textile material and plastic] and is therefore considered a composite good. Composite goods under GRI 3(b) will be classified as if consisting of the material or component which gives them their essential character, insofar as this criterion is applicable. When the essential character of a composite good

can be determined, the whole product is classified as if it consisted only of that material or component which imparts the essential character to the composite good.

The ENs to the HTSUS, at GRI 3(b) (VIII), state that the factor which determines essential character will vary between different kinds of goods. It may for example, be determined by the nature of the materials or components, its bulk, quantity, weight or value, or by the role of a constituent material in relation to the use of the goods. In this case the textile material cut to shape with slits for use with a restraining system is a critical finishing component of the infant car seat allowing the infant to be placed comfortably and securely within the molded seat. As such, we are of the opinion that the textile material imparts the essential character for the infant car seat cushions.

The applicable subheading for the infant car seat cushions with clips, imported together, will be 9401.90.5020, Harmonized Tariff Schedule of the United States (HTSUS), which provides for "Seats (other than those of heading 9402), whether or not convertible into beds, and parts thereof: Parts: Other: Other; Of textile material, cut to shape." The rate of duty will be free.

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

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

A copy of the ruling or the control number indicated above should be provided with the entry documents filed at the time this merchandise is imported. If you have any questions regarding the ruling, contact National Import Specialist Neil H. Levy at (646) 733-3036.

*Sincerely,*

ROBERT B. SWIERUPSKI

*Director*

*National Commodity Specialist Division*

N245061

August 30, 2013

CLA-2-94:OT:RR:NC:N4:433

CATEGORY: Classification

TARIFF NO.: 9401.90.5021

CHRIS REYNOLDS

SENIOR MANAGER, TRADE SERVICES

BARTHCO INTERNATIONAL, INC., D/B/A OHL-INTERNATIONAL

5101 S. BROAD STREET

PHILADELPHIA, PA 19112

RE: The tariff classification of child safety seat covers and components, packaged for retail sales, from China or Thailand.

DEAR MR. REYNOLDS:

In your letter dated August 1, 2013, on behalf of Britax Child Safety, Inc., you requested a tariff classification ruling. As requested, the Marathon 70-G3 child safety seat and its cover set will be returned to you.

The merchandise concerned pertains to five cover sets packaged for retail sales designed for attachment and use with Britax's child safety seats. These cover sets have components that either cover over or attach to their respective child safety seat. All five cover sets have clips on the component identified as the {car seat cover} and these clips attach the cover to the frame of their respective child safety seat. To clarify, the car seat covers are upholstered cushion covers that form only part of the covering for child safety seats; the other components are needed to fully cover over and pad each of the child safety seats. From observation of the sample and an understanding of the illustrative literature only the car seat covers have clips to attach to the frame of the child safety seat, while the other components secure to the seat by means of Velcro, loops or slide-through slits.

Cover set # 1, Marathon 70-G3 consists of a one piece body pillow and car seat cover, a head pad, a body pillow, a belly pad and two comfort pads. Cover set # 2, Roundabout 55 consists of a car seat cover, body pillow, a belly pad and two comfort pads. Cover set # 3, Boulevard 70-G3 consists of a car seat cover, a head pillow, a body pillow, a belly pad and two comfort pads. Cover set # 4, Pavilion 70-G3 consists of a car seat cover, a head pad, a body pillow, a belly pad and two comfort pads. Cover set # 5, Advocate 70 consists of a car seat cover, a head pillow, a body pillow, a belly pad and two comfort pads.

When interpreting and implementing the Harmonized Tariff Schedule of the United States (HTSUS), the Explanatory Notes (ENs) of the Harmonized Commodity Description and Coding System may be utilized. The ENs, while neither legally binding nor dispositive, provide a guiding commentary on the scope of each heading, and are generally indicative of the proper interpretation of the HTSUS. CBP believes the ENs should always be consulted. See T.D. 89-80, 54 Fed. Reg. 35127, 35128 (August 23, 1989).

The ENs to heading 9401 "Seats (other than those of heading 9402), whether or not convertible into beds, and parts thereof," sub-section "Parts" state that separately presented cushions and mattresses, sprung, stuffed or internally fitted with any material or of cellular rubber or plastics whether or not covered, are excluded (heading 9404) even if they are clearly specialized as parts of upholstered seats (e.g., settees, couches, sofas). When these articles are combined with other parts of seats, however, they remain classified

in this heading. At a minimum, we find that the combining of the car seat covers with clips form dedicated parts of seats.

As for the other components of the cover sets, including the car seat covers with clips, we believe the “doctrine of entireties” is applicable. The doctrine of entireties as used in Customs law says that when an entry consists of parts which can be assembled to form an article that is different from any of the parts, the proper classification will be of the whole article, rather than the individual components. This principle is a corollary to the fundamental theory of customs jurisprudence that an imported article should be classified according to its true commercial character. The doctrine states that, if an entry consists of parts which, although unjoined, when assembled form an article different from any of the parts, then the proper classification is the one for the whole article and not for the parts separately.

Accepting the doctrine of entireties moves us away from the argument of cushions or other textile articles versus parts of seats, and leads to one conclusion that the cover sets having only one purpose that of covering Britax’s child safety seats are dedicated and irrevocable parts of such seats. See *United States v. Pompeo*, 43 CCPA 9 (1955) and *Bauerhin Technologies Limited Partnership, and John V. Carr & Sons Inc. v. The United States*, 96–1275,-1276 (1997).

The applicable subheading for the five cover sets will be 9401.90.5021, Harmonized Tariff Schedule of the United States (HTSUS), which provides for Seats (other than those of heading 9402), whether or not convertible into beds, and parts thereof: Parts: Other: Other: Other of textile material, cut to shape.” The rate of duty will be free.

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

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

A copy of the ruling or the control number indicated above should be provided with the entry documents filed at the time this merchandise is imported. If you have any questions regarding the ruling, contact National Import Specialist Neil H. Levy at (646) 733–3036.

*Sincerely,*

MYLES B. HARMON  
*Acting Director*

*National Commodity Specialist Division*

N246761

November 13, 2013

CLA-2-94:OT:RR:NC:N4:433

CATEGORY: Classification

TARIFF NO.: 9403.90.5021

CHRIS REYNOLDS

SENIOR MANAGER, TRADE SERVICES

BARTHCO INTERNATIONAL, INC., D/B/A OHL-INTERNATIONAL

5101 S. BROAD STREET

PHILADELPHIA, PA 19112

RE: The tariff classification of child safety seat covers and components, packaged for retail sales, from China or Thailand.

DEAR MR. REYNOLDS:

In your letter dated October 10, 2013, on behalf of Britax Child Safety, Inc., you requested a tariff classification ruling. As requested, the samples received will be returned to you.

The merchandise concerned pertains to three cover sets packaged for retail sales designed for attachment and use with Britax's child safety seats. These cover sets have components that either cover over or attach to their respective child safety seat. All three cover sets have clips on the component identified as the seat cover and these clips attach the cover to the frame (platform) of their respective child safety seat. To clarify, the seat cover(s) are upholstered cushion covers that form only part of the covering for child safety seats; other components are needed to fully cover over and pad each of the child safety seats. From observation of the samples and an understanding of the illustrative literature only the seat cover(s) have clips to attach to the frame of the child safety seat, while the other components secure to the seat by means of Velcro, loops or slide-through slits.

Cover set # 1, Frontier 90 consists of a seat cover, a headrest cover, a back cover, left and right side wing covers, a belly pad and two comfort pads. Cover set # 2, Pinnacle 90 consists of a seat cover, a headrest cover, a seat back, left and right side wing covers, a belly pad and two comfort pads. Cover set # 3, Pioneer 70 consists of a seat cover, a headrest cover, left and right side wing covers, a belly pad and two comfort pads.

When interpreting and implementing the Harmonized Tariff Schedule of the United States (HTSUS), the Explanatory Notes (ENs) of the Harmonized Commodity Description and Coding System may be utilized. The ENs, while neither legally binding nor dispositive, provide a guiding commentary on the scope of each heading, and are generally indicative of the proper interpretation of the HTSUS. CBP believes the ENs should always be consulted. See T.D. 89-80, 54 Fed. Reg. 35127, 35128 (August 23, 1989).

The ENs to heading 9401 "Seats (other than those of heading 9402), whether or not convertible into beds, and parts thereof," sub-section "Parts" state that separately presented cushions and mattresses, sprung, stuffed or internally fitted with any material or of cellular rubber or plastics whether or not covered, are excluded (heading 9404) even if they are clearly specialized as parts of upholstered seats (e.g., settees, couches, sofas). When these articles are combined with other parts of seats, however, they remain classified in this heading. At a minimum, we find that the combining of the seat cover(s) with clips form dedicated parts of seats.

As for the other components of the cover sets, including the seat cover(s) with clips, we believe the “doctrine of entireties” is applicable. The doctrine of entireties as used in Customs law says that when an entry consists of parts which can be assembled to form an article that is different from any of the parts, the proper classification will be of the whole article, rather than the individual components. This principle is a corollary to the fundamental theory of customs jurisprudence that an imported article should be classified according to its true commercial character. The doctrine states that, if an entry consists of parts which, although unjoined, when assembled form an article different from any of the parts, then the proper classification is the one for the whole article and not for the parts separately.

Accepting the doctrine of entireties moves us away from the argument of cushions or other textile articles versus parts of seats, and leads to one conclusion that the cover sets having only one purpose that of covering Britax’s child safety seats are dedicated and irrevocable parts of such seats. See *United States v. Pompeo*, 43 CCPA 9 (1955) and *Bauerhin Technologies Limited Partnership, and John V. Carr & Sons Inc. v. The United States*, 96–1275,-1276 (1997). See New York ruling N245061 dated August 30, 2013.

The applicable subheading for the three cover sets will be 9401.90.5021, Harmonized Tariff Schedule of the United States (HTSUS), which provides for Seats (other than those of heading 9402), whether or not convertible into beds, and parts thereof: Parts: Other: Other; Other of textile material, cut to shape.” The rate of duty will be free.

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

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

A copy of the ruling or the control number indicated above should be provided with the entry documents filed at the time this merchandise is imported. If you have any questions regarding the ruling, contact National Import Specialist Neil H. Levy at (646) 733–3036.

*Sincerely,*

GWENN KLEIN KIRSCHNER  
*Acting Director*

*National Commodity Specialist Division*

HQ H293786  
OT:RR:CTF:CPMMA H293786 AJK  
CATEGORY: Classification  
TARIFF NO: 9404.90.20

MR. R. KEVIN WILLIAMS  
RODRIGUEZ, O'DONNELL, GONZALEZ & WILLIAMS, P.C.  
ATTORNEYS & COUNSELORS AT LAW  
8430 WEST BRYN MAWR AVENUE, SUITE 525  
CHICAGO, IL 60631

RE: Revocation of NY N132069, NY N245061, and NY N246761; Modification of HQ 953673 and NY 882039 by Operation of Law; Classification of Child Car Seat Cushions and Canopies

DEAR MR. WILLIAMS:

This letter is in reference to your New York Ruling Letter (NY) N132069, issued to you by U.S. Customs and Border Protection (CBP) on November 18, 2010, concerning the tariff classification of cushions for child car seats under the Harmonized Tariff Schedule of the United States (HTSUS). We have reviewed your ruling classifying the cushions in subheading 9401.90.50, HTSUS, as parts of seats, and determined that the classification of the merchandise was incorrect.

We have also reviewed NY N245061, dated August 30, 2013, and NY N246761, dated November 13, 2013, classifying similar merchandise in subheading 9401.90.50, HTSUS, and have determined that the aforementioned rulings were incorrect. For the reasons set forth below, we revoke these three ruling letters. We also note that Headquarters Ruling Letter (HQ) 953673, dated October 6, 1993, concerning the tariff classification of cushions and canopies for child car seats, which was the subject of *Bauerhin Techs. Ltd. Pshp. v. United States*, 110 F.3d 774 (Fed. Cir. 1997), *aff'g*, 19 C.I.T. 1441 (1995), is modified by operation of law with respect to the classification of the canopies. In addition, NY 882039, dated February 4, 1993, concerning similar merchandise to that in HQ 953673 and issued before the decision in *Bauerhin*, is likewise modified by operation of law with respect to the classification of the canopies.

**FACTS:**

The child car seat cushions with clips were described in NY N132069 as follows:

The merchandise at issue is two styles of infant car seat cushions, identified by Graco as the Comfort Sport and My Ride. Each of the seat cushions, are covers designed and shaped to go over a molded infant car seat shell with a molded foam insert. Each cushion is composed of polyurethane foam and polyester batting, and has two plastic clips per cushion that anchors the cushion to the bottom of the car seat frame. The seat cushions have two horizontal slits for each of the shoulders and one horizontal slit for the lap that secures the infant to the car seat by means of harness straps. The harness straps are not imported with the cushions. These cushions with their clips are imported together.

The child car seat cushions with clips were described in NY N245061 as follows:

The merchandise concerned pertains to five cover sets packaged for retail sales designed for attachment and use with Britax's child safety seats. These cover sets have components that either cover over or attach to their respective child safety seat. All five cover sets have clips on the component identified as the {car seat cover} and these clips attach the cover to the frame of their respective child safety seat. To clarify, the car seat covers are upholstered cushion covers that form only part of the covering for child safety seats; the other components are needed to fully cover over and pad each of the child safety seats. From observation of the sample and an understanding of the illustrative literature only the car seat covers have clips to attach to the frame of the child safety seat, while the other components secure to the seat by means of Velcro, loops or slide-through slits.

Cover set # 1, Marathon 70-G3 consists of a one piece body pillow and car seat cover, a head pad, a body pillow, a belly pad and two comfort pads. Cover set # 2, Roundabout 55 consists of a car seat cover, body pillow, a belly pad and two comfort pads. Cover set # 3, Boulevard 70-G3 consists of a car seat cover, a head pillow, a body pillow, a belly pad and two comfort pads. Cover set # 4, Pavilion 70-G3 consists of a car seat cover, a head pad, a body pillow, a belly pad and two comfort pads. Cover set # 5, Advocate 70 consists of a car seat cover, a head pillow, a body pillow, a belly pad and two comfort pads.

The child car seat cushions with clips described in NY N246761 are substantially similar to the product described above.<sup>1</sup>

**ISSUE:**

Whether the child car seat cushions with clips are classified in subheading 9401.90, HTSUS, as parts of car seats, or subheading 9404.90, HTSUS, as cushions.

**LAW AND ANALYSIS:**

Classification of goods under the HTSUS is governed by the General Rules of Interpretation (GRI). GRI 1 provides that classification shall be determined according to the terms of the headings of the tariff schedule and any relative section or chapter notes. In the event that the goods cannot be classified solely 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:

9401:	Seats (other than those of heading 9402), whether or not convertible into beds, and parts thereof:
9401.90:	Parts:
9401.90.10:	Of seats of a kind used for motor vehicles

<sup>1</sup> A typographical error notes the classification in the "Tariff No." as 9403.90.5121. However, the holding section of the ruling states that "[t]he applicable subheading for the three cover sets will be 9401.90.5021, Harmonized Tariff Schedule of the United States (HTSUS), which provides for Seats (other than those of heading 9402), whether or not convertible into beds, and parts thereof: Parts: Other: Other; Other of textile material, cut to shape."

\*\*\*

9404: Mattress supports; articles of bedding and similar furnishing (for example, mattresses, quilts, eiderdowns, cushions, pouffes and pillows) fitted with springs or stuffed or internally fitted with any material or of cellular rubber or plastics, whether or not covered:

9404.90: Other:  
Pillows, cushions and similar furnishings:

9404.90.20: Other

Note 1 to Section XI, in which Chapter 63 is included, provides, in pertinent part:

1. This section does not cover:

...

(s) Articles of chapter 94 (for example, furniture, bedding, lamps and lighting fittings); ....

The Legal Note to Chapter 94, HTSUS, provides, in pertinent part:

2. The articles (other than parts) referred to in headings 9401 to 9403 are to be classified in those headings only if they are designed for placing on the floor or ground.

The following are, however, to be classified in the above-mentioned headings even if they are designed to be hung, to be fixed to the wall or to stand one on the other:

...

(b) Seats and beds.

3. ...

(b) Goods described in heading 9404, entered separately, are not to be classified in heading 9401, 9402 or 9403 as parts of goods.

\* \* \* \* \*

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 (August 23, 1989).

EN 94.01 provides, in pertinent part, as follows:

Subject to the exclusions mentioned below, this heading covers all seats (including those for vehicles, provided that they comply with the conditions prescribed in Note 2 to this Chapter), for example:

Lounge chairs, arm-chairs, folding chairs, deck chairs, infants' high chairs and children's seats designed to be hung on the back of other seats (including vehicle seats) ....

The Parts EN to heading 9401, HTSUS, provides:

The heading also covers identifiable parts of chairs or other seats, such as backs, bottoms and arm-rests (whether or not upholstered with straw or cane, stuffed or sprung), seat or backrest covers for permanent attachment to a seat, and spiral springs assembled for seat upholstery.

Separately presented cushions and mattresses, sprung, stuffed or internally fitted with any material or of cellular rubber or plastics whether or not covered, are excluded (heading 94.04) even if they are clearly specialised as parts of upholstered seats (e.g., settees, couches, sofas). When these articles are combined with other parts of seats, however, they remain classified in this heading. They also remain in this heading when presented with the seats of which they form part.

EN 94.04 provides, in pertinent part, as follows:

This heading covers:

...

- (B) Articles of bedding and similar furnishing which are sprung or stuffed or internally fitted with any material (cotton, wool, horsehair, down, synthetic fibres, etc.), or are of cellular rubber or plastics (whether or not covered with woven fabric, plastics, etc.) ....

\* \* \* \* \*

In *Bauerhin*, the U.S. Court of Appeals for the Federal Circuit reviewed cushions and canopies for child car seats, and classified them under headings 9404 and 9401, HTSUS, respectively. 110 F.3d at 775–6. Similar to the instant child car seat cushions, the cushions in *Bauerhin* contained plastic clips that were sewn into the cushions, were in the shape and form of child car seats, and were imported separately from the car seats with which they were parts. *See id.* at 775. According to Note 3(b) of Chapter 94, which states that “[g]oods described in heading 9404, entered separately, are not to be classified in heading 9401, 9402 or 9403 as parts of goods”, the Federal Circuit held that goods—such as the instant child car seat cushions with clips—are excluded from heading 9401 if they are classifiable in both headings 9401 and 9404, HTSUS. *See id.* at 777. Furthermore, the Parts EN to heading 9401, HTSUS, provides that “[s]eparately presented cushions and mattresses ... are excluded (heading 94.04) even if they are clearly specialised as parts of upholstered seats.” As stated in EN 94.04, heading 9404, HTSUS, covers “[a]rticles of bedding and similar furnishing which are stuffed or internally fitted with any material”. Specifically, subheading 9404.90.20, HTSUS, which provides for cushions, is an *eo nomine* provision that wholly characterizes cushions, such as those in the instant case. The *Bauerhin* court, therefore, classified the child car seat cushions with clips in subheading 9404.90.20, HTSUS, as cushions.

The instant child car seat cushions are similar to those described in HQ 953673, which was the ruling on the protested merchandise discussed in *Bauerhin* and affirmed by the Federal Circuit, as they contain clips, are imported separately from the child car seats, and are padded with other materials. In HQ 953673, CBP held that the clips that are sewn to cushions “are not part of the seats but rather form a unitary whole with the cushion.” Similarly, the clips that are part of the instant child car seat cushions are only utilized to secure the placement of the cushions in the child car seats and thus, do not form an actual part of the seats in which the cushions are used. In addition to HQ 953673, we found that similar child car seat cushions with clips were classified in subheading 9404.90.20, HTSUS, as cushions in NY C85243, dated March 26, 1998, NY D83542, dated October 29, 1998, and NY F88897, dated July 14, 2000. Thus, the child car seat cushions with clips are classified in subheading 9404.90.20, HTSUS, as cushions.

Pursuant to GRI 1, and in accordance with the decision in *Bauerhin*, the child seat cushions are classified in heading 9404, HTSUS, as cushions.

**HOLDING:**

By application of GRI 1, the child car seat cushions with clips are classified in heading 9404, HTSUS, specifically subheading 9404.90.20, HTSUS, which provides for “[m]attress supports; articles of bedding and similar furnishing (for example, mattresses, quilts, eiderdowns, cushions, pouffes and pillows) fitted with springs or stuffed or internally fitted with any material or of cellular rubber or plastics, whether or not covered: [o]thers: [p]illows, cushions and similar furnishings: [o]thers”. The 2021 column one, general rate of duty is six percent *ad valorem*.

In addition, the classification of the child car seat canopies in heading 6307, HTSUS, in HQ 953673 and NY 882039 has been modified by operation of law. The canopies are classified in heading 9401, HTSUS, specifically subheading 9401.90.10, HTSUS, which provides for “[s]eats (other than those of heading 9402), whether or not convertible into beds, and parts thereof: [p]arts: [o]f seats of a kind used for motor vehicles”, in accordance with the holding in *Bauerhin*. The 2021 column one, general rate of duty is free.

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 N132069, dated November 18, 2010, NY N245061, dated August 30, 2013, and NY N246761, dated November 13, 2013, are hereby revoked. In addition, HQ 953673, dated October 6, 1993, and NY 882039, dated February 4, 1993, are modified by operation of law with respect to the classification of the canopies.

*Sincerely,*

CRAIG T. CLARK,  
*Director*

*Commercial and Trade Facilitation Division*

CC: Mr. Chris Reynolds  
Senior Manager, Trade Services  
Barthco International, Inc., d/b/a OHL-International  
5101 S. Broad Street  
Philadelphia, PA 19112

## 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 JUUL Labs, Inc., (“JUUL”). Notice of the receipt of an application for “Lever-Rule” protection was published in the February 17, 2021 issue of the *Customs Bulletin*.

**FOR FURTHER INFORMATION CONTACT:** W. Richmond Beevers, Intellectual Property Enforcement Branch, Regulations & Rulings, (202) 325–0084.

### SUPPLEMENTARY INFORMATION:

#### BACKGROUND

Pursuant to 19 CFR 133.2(f), this notice advises interested parties that CBP has granted “Lever-Rule” protection for gray market electronic cigarettes; electronic smoking vaporizers; tobacco substitutes in liquid solution form; liquid nicotine used to refill electronic cigarettes; chemical flavorings in liquid form used to refill electronic cigarettes; and, cartridges sold filled with chemical flavorings in liquid form for electronic cigarettes, manufactured in China and not intended for sale in the United States, bearing the “JUUL” word mark (U.S. Trademark Registration No. 4,818,664/ CBP Recordation No. TMK 16–00860); the “JUUL (STYLIZED)” trademark (U.S. Trademark Registration No. 4,898,257/ CBP Recordation No. TMK 16–00874); the “JUUL LABS” word mark (U.S. Trademark Registration No. 5,776,153/ CBP Recordation No. TMK 19–01018); the “JUULPOD DESIGN” trademark (U.S. Trademark Registration No. 5,304,697/ CBP Recordation No. TMK 18–00062); the “DESIGN ONLY (JUUL DEVICE DESIGN)” trademark (U.S. Trademark Registration No. 5,299,392/ CBP Recordation No. TMK 18–00063); and/or, the “JUULPODS” word mark (U.S. Trademark Registration No. 5,918,490/ CBP Recordation No. TMK 21–00061).

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 electronic cigarettes; electronic smoking vaporizers; tobacco substitutes in liquid solution form; liquid nicotine used to refill electronic cigarettes; chemical flavorings in liquid form used to refill electronic cigarettes; and, cartridges sold filled with chemical flavorings in liquid form for electronic cigarettes, differ physically and

materially from the JUUL merchandise authorized for sale in the United States with respect to the following product characteristics: physical properties, operation, performance, labels, symbols, warnings, product codes, contact information, and measurements.

### **ENFORCEMENT**

Importation of the above-referenced subject gray market electronic cigarettes; electronic smoking vaporizers; tobacco substitutes in liquid solution form; liquid nicotine used to refill electronic cigarettes; chemical flavorings in liquid form used to refill electronic cigarettes; and, cartridges sold filled with chemical flavorings in liquid form for electronic cigarettes is restricted, unless the labeling requirements of 19 CFR § 133.23(b) have been satisfied.

Dated: April 6, 2021

ALAINA VAN HORN  
*Chief,*  
*Intellectual Property Enforcement Branch*  
*Regulations and Rulings, Office of Trade*

## 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 Monster Energy Company (“Monster”). Notice of the receipt of an application for “Lever-Rule” protection was published in the March 17, 2021 issue of the *Customs Bulletin*.

**FOR FURTHER INFORMATION CONTACT:** Lauren Phillips, Intellectual Property Rights Branch, Regulations & Rulings, (202) 325–0349.

### SUPPLEMENTARY INFORMATION:

#### BACKGROUND

Pursuant to 19 CFR 133.2(f), this notice advises interested parties that CBP has granted “Lever-Rule” protection for gray market Monster Energy 500ML bottled beverages which are bottled in Ireland, Netherlands and Poland, intended for sale in Europe, bearing the “M & DESIGN” trademarks (USPTO Registration No. 3,434,822/ CBP Recordation No. TMK 10 00656; Registration No. 3,434,821, CBP Recordation No. TMK 15–01224), “MONSTER ENERGY” trademark (USPTO Registration No. 3,044,315, CBP Recordation No. TMK 1501223) and “M DESIGN” trademark (USPTO Registration No. 5,580,962, CBP Recordation No. TMK 19–00076). This “Lever-Rule” protection is in addition to the protection previously granted on August 10, 2020 for importations of Monster Energy 250ML beverages, intended for sale in the Netherlands, bearing these trademarks.

In accordance with *Lever Bros. Co. v. United States*, 981 F.2d 1330 (D.C. Cir. 1993), CBP has determined that the above-referenced gray market Monster Energy 500ML bottled beverages differ physically and materially from the Monster Energy beverages authorized for sale in the United States with respect to the following product characteristics: physical properties, operation, performance, labels, symbols, warnings, product codes, contact information, and measurements.

#### ENFORCEMENT

Importation of the above-referenced subject gray market Monster Energy beverages is restricted, unless the labeling requirements of 19 CFR § 133.23(b) have been satisfied.

Dated: April 5, 2021

ALAINA VAN HORN  
*Chief,*  
*Intellectual Property Rights Branch*  
*Regulations and Rulings, Office of Trade*



# U.S. Court of International Trade

Slip Op. 21–33

VICENTIN S.A.I.C. et al., Plaintiffs and Consolidated Plaintiff, v.  
UNITED STATES, Defendant, and NATIONAL BIODIESEL BOARD FAIR  
TRADE COALITION, Defendant-Intervenor and Consolidated  
Defendant-Intervenor.

Before: Claire R. Kelly, Judge  
Consol. Court No. 18–00111  
PUBLIC VERSION

[Sustaining the U.S. Department of Commerce’s remand redetermination making a particular market situation adjustment for soybean input prices when determining constructed value.]

Dated: March 25, 2021

*Daniel L. Porter, Christopher A. Dunn, James P. Durling, and Valerie S. Ellis*, Curtis, Mallet-Prevost, Colt & Mosle LLP, of Washington, DC, for plaintiffs Vicentin S.A.I.C., Oleaginosa Morenos Hermanos S.A., and Molinos Agro S.A.

*Gregory J. Spak*, White & Case LLP, of Washington, DC, for consolidated plaintiff LDC Argentina S.A. Also on the brief was *Jessica Lynd*.

*Joshua E. Kurland*, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC, for Defendant. Also on the brief were *Jeffrey Bossert Clark*, Acting Assistant Attorney General, *Jeanne E. Davidson*, Director, and *L. Misha Preheim*, Assistant Director. Of Counsel was *Daniel J. Calhoun*, Assistant Chief Counsel, Office of the Chief Counsel for Trade Enforcement and Compliance, U.S. Department of Commerce, of Washington, DC.

*Myles S. Getlan*, Cassidy Levy Kent (USA) LLP, of Washington, DC, for defendant-intervenor and consolidated defendant-intervenor National Biodiesel Board Fair Trade Coalition. Also on the brief were *Jack A. Levy*, *Thomas M. Beline*, and *Chase J. Dunn*.

## OPINION

### Kelly, Judge:

Before the court for review are the final results of the U.S. Department of Commerce’s (“Commerce”) second remand redetermination pursuant to the court’s order in *Vicentin S.A.I.C. v. United States*, 44 CIT \_\_, 466 F. Supp. 3d 1227 (2020) (“*Vicentin II*”). See Final Results of Redetermination Pursuant to Ct. Remand [in *Vicentin II*] Confidential Version, Nov. 12, 2020, ECF No. 107–1 (“*Second Remand Results*”). In *Vicentin II*, the court remanded for further explanation or reconsideration Commerce’s decision—when determining the normal value (here, constructed value) of biodiesel from Argentina—to disregard reported costs for soybeans in Argentina, and to instead use world market prices for soybeans as a means of correcting for a cost

distortion caused by a particular market situation (“PMS”). See 44 CIT at \_\_\_, 466 F. Supp. 3d at 1242–46. Since Commerce countervailed the export tax regime giving rise to the PMS in a concurrent countervailing duty (“CVD”) proceeding, the court instructed Commerce to either reconsider its PMS adjustment or further explain why the adjustment is necessary given that the distortion caused by the subsidy may have already been cured by the CVD. See *id.* On remand, Commerce, under respectful protest,<sup>1</sup> conducts a “passthrough” analysis of prices for U.S. sales of subject Argentine biodiesel to demonstrate that the countervailed export tax regime did not affect the difference between the constructed value of the merchandise and U.S. prices in this instance. See *Second Remand Results* at 4–17. According to Commerce, a showing that the subsidy at issue did not affect U.S. prices assuages the court’s concerns that the CVDs remedying those subsidies also cures the same harm addressed by the PMS adjustment here. See *id.* For the following reasons, Commerce’s second remand redetermination is sustained.

## BACKGROUND

The court presumes familiarity with the facts as set out in its previous opinions ordering remand to Commerce, and now recounts the facts relevant to the court’s review of the *Second Remand Results*. See *Vicentin II*, 44 CIT at \_\_\_, 466 F. Supp. 3d at 1230–33; see also *Vicentin S.A.I.C. v. United States*, 43 CIT \_\_\_, \_\_\_, 404 F. Supp. 3d 1323, 1327–29 (2019) (“*Vicentin I*”). On March 1, 2018, Commerce published its final determination pursuant to its less-than-fair-value (“LTFV”) investigation of biodiesel from Argentina. See *Biodiesel from Argentina*, 83 Fed. Reg. 8,837 (Dep’t Commerce Mar. 1, 2020) (final determination of sales at [LTFV] and final affirmative determination of critical circumstances, in part) (“*Final Results*”) and accompanying Issues and Decisions Memo. for the [*Final Results*], A-357–820, Feb. 20, 2018, ECF No. 16–5 (“*Final Decision Memo*”). Commerce calculated estimated weighted-average dumping margins of 60.44 and 86.41 percent for mandatory respondents LDC Argentina S.A. (“LDC Argentina” or “LDC”) and *Vicentin S.A.I.C.*,<sup>2</sup> respectively, and an estimated all-others margin of 74.73 percent. *Final Results*, 83 Fed. Reg. at 8,838. Pursuant to U.S. Court of International Trade Rule 56.2, *Vicentin S.A.I.C.*, *Oleaginosa Morenos Hermanos S.A.*, and

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<sup>1</sup> By adopting a position “under protest,” Commerce preserves its right to appeal. See *Viraj Grp., Ltd. v. United States*, 343 F.3d 1371, 1376 (Fed. Cir. 2003).

<sup>2</sup> Commerce treated *Vicentin S.A.I.C.*, and companies *Renova S.A.*, *Oleaginosa Moreno Hermanos S.A.*, *Molinos Agro S.A.*, *Patagonia Energia S.A.*, *VFG Inversiones y Actividades Especiales S.A.*, *Vicentin S.A.I.C. Sucursal Uy*, *Trading Company X*, and *Molinos Overseas Commodities S.A.* as a single collapsed entity. See *Final Results*, 83 Fed. Reg. at 8,838 n.8 (citations omitted).

Molinos Agro S.A. (collectively “Vicentin”) as well as LDC Argentina, commenced this consolidated action challenging Commerce’s final determination. *See generally* [Vicentin’s] Mot. J. Agency R., Oct. 29, 2018, ECF No. 26; Rule 56.2 Mot. J. Agency R. on Behalf of Consol. Pl. [LDC Argentina], Oct. 29, 2018, ECF No. 25.

*Vicentin I* remanded Commerce’s final determination for further explanation or reconsideration. *See* 43 CIT at \_\_, 404 F. Supp. 3d at 1343. The court held that Commerce’s adjustment to constructed value to neutralize the value of renewable identification numbers (“RINs”)<sup>3</sup> reflected in prices for U.S. sales of biodiesel was unlawful. *See Vicentin I*, 43 CIT at \_\_, 404 F. Supp. 3d at 1329–35. Moreover, although the court held that Commerce’s finding that a PMS arising from the Government of Argentina’s (“GOA”) export tax regime distorted the reported costs of soybeans (a primary input in the production of biodiesel), as well as Commerce’s consequent reliance on market-determined prices for soybeans to determine the constructed value of biodiesel, were not precluded by statute, *see id.* at \_\_, 404 F. Supp. 3d at 1334–37, and that the PMS finding was lawful, *see id.* at \_\_, 404 F. Supp. 3d at 1337–40, the court held that Commerce’s determination was unsupported by substantial evidence because Commerce failed to reasonably explain how the purported market-distortion was not already cured by CVDs imposed on the export tax regime in a concurrent CVD case. *See id.* at \_\_, 404 F. Supp. 3d at 1340–43.

*Vicentin II* sustained in part and remanded in part Commerce’s first remand redetermination. *See* 44 CIT at \_\_, 466 F. Supp. 3d at 1233–46. The court sustained Commerce’s decision to neutralize the difference in value between U.S. sales of biodiesel and foreign market sales of biodiesel owing to premiums placed on RIN-eligible U.S. sales by reducing U.S. prices by an estimated value for RINs—as well as Commerce’s methodology for calculating the adjustment. *See id.* at \_\_, 466 F. Supp. 3d at 1233–42. However, the court remanded for further explanation or reconsideration Commerce’s refusal to explain why an

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<sup>3</sup> RINs are tradeable credits pursuant to a U.S. regulatory scheme administered by the Environmental Protection Agency (“EPA”). *See Vicentin I*, 43 CIT at \_\_, 404 F. Supp. 3d at 1328 (citing *Biodiesel From Argentina*, 82 Fed. Reg. 50,391 (Dep’t Commerce Oct. 31, 2017) (preliminary affirmative determination of sales at [LTFV], prelim. affirmative determination of critical circumstances, in part) (“*Prelim. Results*”) and accompanying Decision Memo. for the [*Prelim Results*] at 28–30, PD353, bar code 3632930–01 (Oct. 19, 2017)). The EPA requires that biodiesel producers or importers (“obligated parties”) meet an annual “renewable volume obligation,” pursuant to which obligated parties must submit RINs equal to the number of gallons of renewable fuel comprising their renewable volume obligation. *Id.* (citations omitted). RINs are generated through biodiesel production in the United States or importation of biodiesel. *Id.* (citations omitted). The obligated party that generates RINs may use them to satisfy its renewable volume obligation, or it may trade or sell them to other obligated parties. *Id.* (citations omitted).

unadjusted cost-based PMS remedy in this case was necessary even though the export tax regime giving rise to the cost distortion was countervailed by duties imposed pursuant to a concurrent CVD proceeding. *See id.* at \_\_, 466 F. Supp. 3d at 1242–46. The court observed that Commerce’s explication of the different purposes of the ADD and CVD regimes did not address the court’s concerns regarding the reasonableness of Commerce remedying the effects of a domestic subsidy that may have already been cured in the concurrent CVD proceeding. *See id.* at \_\_, 466 F. Supp. 3d at 1244.

On November 13, 2020, Commerce filed its second remand redetermination. *See generally Second Remand Results*. Commerce, under protest, sought to comply with the court’s remand order in *Vicentin II* by conducting a pass-through analysis of U.S. prices. *See id.* at 8–17. On December 14, 2020, LDC Argentina filed comments challenging the final results of Commerce’s second remand redetermination. *See Cmts. on [Second Remand Results]*, Dec. 14, 2020, ECF No. 112 (“LDC’s Br.”). On January 13, 2021, Defendant and Defendant-Intervenor National Biodiesel Board Fair Trade Coalition filed their replies to LDC’s comments. Def.’s Resp. Cmts. on [*Second Remand Results*], Jan. 13, 2021, ECF No. 114 (“Def.’s Br.”); Def.-Intervenor’s Cmts. on [*Second Remand Results*], Jan. 13, 2021, ECF No. 113 (“Def.-Intervenor’s Br.”).

## JURISDICTION AND STANDARD OF REVIEW

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) (2018)<sup>4</sup> and 28 U.S.C. § 1581(c) (2018), which grant the court authority to review actions contesting the final determination in an ADD investigation. 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). “The results of a redetermination pursuant to court remand are also reviewed ‘for compliance with the court’s remand order.’” *Xinjiaimei Furniture (Zhangzhou) Co. v. United States*, 38 CIT \_\_, \_\_, 968 F. Supp. 2d 1255, 1259 (2014) (quoting *Nakornthai Strip Mill Public Co. v. United States*, 32 CIT 1272, 1274, 587 F. Supp. 2d 1303, 1306 (2008)).

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<sup>4</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.

## DISCUSSION

### I. Commerce's Pass-Through Analysis is Reasonable

LDC submits that Commerce's focus on a "pass-through" analysis of U.S. prices is "misguided" and does not address the court's concerns that Commerce's cost-based PMS adjustment may remedy a distortion that was already cured by the concurrent CVD proceeding. *See* LDC's Br. at 1–13. Defendant and Defendant-Intervenor counter that Commerce's methodology is a reasonable means of addressing the court's concerns. *See* Def.'s Br. at 12–24; Def.-Intervenor's Br. at 9–11. For the following reasons, Commerce's pass-through analysis demonstrates that the PMS remedy is reasonable.

When investigating whether merchandise is (or is likely to be) sold in the U.S. at LTFV, Commerce makes a comparison between the export price (or constructed export price) of sales of the merchandise into the U.S. and its normal value. *See* 19 U.S.C. § 1677b(a). The "normal value" of the merchandise may be based upon home market or third-country sales that are made in the ordinary course of trade, or constructed value. *See* 19 U.S.C. § 1677b(a)(1)(B)–(C), (a)(4). Commerce may determine normal value based upon constructed value, rather than home market sales, where a PMS distorts prices in the home market. *See* 19 U.S.C. § 1677b(a)(1)(B)(ii)(III), (C)(ii); *see also id.* § 1677b(a)(4).<sup>5</sup> The statute further provides that, when calculating constructed value, the presence of a separate "cost-based" PMS permits Commerce to deviate from the typical methodology:

For purposes of paragraph (1), if a [PMS] exists such that the cost of materials and fabrication or other processing of any kind does not accurately reflect the cost of production in the ordinary course of trade, the administering authority may use another calculation methodology under this part or any other calculation methodology.

19 U.S.C. § 1677b(e). Therefore, when using constructed value, Commerce may resort to any other calculation methodology if a PMS renders the cost of materials and fabrication unsuitable for use as normal value. Commerce's determinations must be supported by substantial evidence, such that a reasonable mind might accept the evidence as adequate to support Commerce's conclusion while considering contradictory evidence. *See Consol. Edison Co. v. NLRB*, 305

<sup>5</sup> Commerce resorted to constructed value after finding that "domestic biodiesel sales prices are established by the government and are not based on competitive market conditions[.]" resulting in a PMS. Final Decision Memo at 16.

U.S. 197, 229 (1938); *see also Suramerica de Aleaciones Laminadas, C.A. v. United States*, 44 F.3d 978, 985 (Fed. Cir. 1994).

Although the statute empowers Commerce to use another methodology provided under the statute—or any other methodology it chooses—to establish constructed value in light of a PMS, the methodology it chooses must be reasonable. The court reviews Commerce’s determinations for substantial evidence, meaning that they are reasonable given the factual record in the case. *See Huaiyin Foreign Trade Corp. v. United States*, 322 F.3d 1369, 1374 (Fed. Cir. 2003) (citing *Atl. Sugar, Ltd. v. United States*, 744 F.2d 1556, 1562 (Fed. Cir. 1984)). The lack of a statutory directive does not render Commerce’s alternative methodology reasonable. *See Motor Vehicle Mfrs. Ass’n of U.S. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43–49 (1983) (“*Motor Vehicle*”). The problem posed by *Vicentin II* is whether Commerce’s imposition of an unadjusted PMS remedy is reasonable as a methodological and factual matter in this case.<sup>6</sup> *See Vicentin II*, 44 CIT at \_\_, 466 F. Supp. 3d at 1244–46.

Here, Commerce seeks to demonstrate the reasonableness of its unadjusted PMS remedy by conducting a “pass-through” analysis of U.S. sales. *See Second Remand Results* at 8–12. Commerce developed this pass-through analysis in order to comply with the statutory mandate in ADD investigations involving merchandise from a non-market economy (“NME”) country, where there is a concurrent CVD proceeding involving the same subject merchandise. *See* 19 U.S.C. § 1677f-1(f)(1); *see also, e.g., Wheatland Tube Co. v. United States*, 38 CIT \_\_, \_\_, 26 F. Supp. 3d 1372, 1378–88 (2014) (“*Wheatland*”). In ADD investigations involving an NME country where a countervailable subsidy has been provided with respect to the subject class or kind of merchandise, the statute provides for a reduction in ADDs where, *inter alia*, a “countervailable subsidy has been demonstrated to have reduced the average price of imports of the class or kind of merchandise during the relevant period[.]” 19 U.S.C. § 1677f-1(f)(1). Commerce’s “pass-through” analysis of U.S. sales determines whether the subsidy reduced the price of imports such that an offset may be necessary. *See Second Remand Results* at 9. According to Commerce, “in administering 19 U.S.C. § 1677f-1(f)(1) . . . Commerce has required the producer or exporter under examination to demonstrate: a ‘subsidies-to-cost link,’ e.g., the subsidy’s effect on cost of manufacture; and, a ‘cost-to-price link,’ e.g., the producer’s or export-

<sup>6</sup> Commerce argues there is no presumption that domestic subsidies typically reduce U.S. prices such that it is incumbent upon Commerce to prove otherwise. *See, e.g., Second Remand Results* at 8, 13–17. Whether there should be such a presumption is for Commerce to determine in the first instance. However, Commerce must provide an explanation as to why its methodology is reasonable. *See Motor Vehicle*, 463 U.S. at 48–49.

er's prices changed as a result of changes in cost of manufacture." *Id.* at 9 (citations omitted). Commerce also inquires whether "counter-vailable subsidies have been demonstrated to have reduced the average price of imports during the period under examination." *Id.* at 9–10. Implicit in any determination from Commerce that the subsidies did not affect the price of imports is the finding that CVDs do not affect the dumping margin. *See id.*; *cf.* 19 U.S.C. § 1677f-1(f) (providing for an adjustment of the impact of CVDs in cases where the domestic subsidies affected the price of imports).

LDC asserts that Commerce's remand redetermination does not respond directly to the court's inquiry. *See, e.g.*, LDC's Br. at 1, 4–5, 9. Indeed, Commerce elides several analytical steps when explaining how its demonstration that U.S. prices are unaffected by the export tax regime addresses the court's concern that the cost-based PMS remedy targets a distortion that Commerce has already cured. In adopting *Vicentin II*'s comparison to Commerce's methodology in NME proceedings, Commerce posits that if a "subsidy affects neither U.S. price nor normal value, the even-handedness of the subsidy's effects is maintained and no portion of the LTFV differential can be attributed to the subsidy." *Second Remand Results* at 9; *see also Vicentin II*, 44 CIT at \_\_\_, 466 F. Supp. 3d at 1245. Left unaddressed by Commerce's stated position, however, is how it would cohere with the court's concern regarding the protection afforded to the domestic industry when Commerce countervails a domestic subsidy. *See, e.g., Vicentin II*, 44 CIT at \_\_\_, 466 F. Supp. 3d at 1244 ("Commerce's use of an alternative methodology . . . may remedy the effects of domestic subsidy already remedied by the concurrent CVD case[.]"). As LDC submits, "once a particular benefit has been neutralized through the imposition of a CVD," it would not appear "reasonable to seek to neutralize it again in the [ADD] case." *See* LDC's Br. at 10; *see also id.* at 12 (arguing that the cost-distortion Commerce addresses with its PMS adjustment relates to the benefit that Commerce neutralized in the concurrent CVD proceeding).<sup>7</sup>

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<sup>7</sup> LDC argues that this case is distinguishable from the NME context, where a pass-through analysis would be appropriate. *See* LDC's Br. at 12–13. More specifically, in the NME context Commerce uses surrogate values for factors of production to build a normal value, which is different from what happens in this case where Commerce is using constructed value to build a normal value from costs in the home country, but seeking to provide a substitute for the actual costs of soybeans because of the PMS caused by the domestic subsidy. Despite the somewhat analogous actions of replacing a home market sales price based normal value with a substitute out of a concern that prices in the home market are not appropriate, LDC focuses on the fact that here the export tax gives rise to both the subsidy and the PMS adjustment. Thus, LDC argues that as the CVD cured the export tax subsidy, it therefore cured the PMS.

Although Commerce does not directly respond to the court's concerns that the CVDs imposed in the concurrent proceeding cure the distortion giving rise to the cost-based PMS adjustment here, it is reasonably discernible, based on several statements made throughout these proceedings and in this remand redetermination,<sup>8</sup> that Commerce's failure to do so stems from its position that, due to differences between the CVD and ADD regimes, it assumes CVDs that target domestic subsidies do not address artificially low U.S. prices. See *Final Results of Redetermination Pursuant to Ct. Remand [in Vincetin I]* at 25–26, Jan. 31, 2020, ECF No. 79–1 (“*Remand Results*”). And although the court and the parties have referred to the problem as one involving a potential double remedy, the problem as illustrated by Commerce's adoption of the pass-through methodology is one of determining whether the dumping margin is affected by duties imposed to countervail the domestic subsidy in the concurrent proceeding.<sup>9</sup> Commerce uses the pass-through analysis to ascertain

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LDC's argument appears to conflate the cost-distortion Commerce seeks to cure in this case with the broader array of benefits that Commerce may remedy in a CVD proceeding. See LDC's Br. at 12 (“...the ‘benefit’ that Commerce purports to neutralize in the subsidies case relates to the same soybean input cost.”). *Vincetin II* instructed Commerce to explain whether “any distortion created by the PMS in this case has not already been remedied by the concurrent CVD case.” 44 CIT at \_\_\_, 466 F. Supp. 3d at 1244. The PMS is the GOA's export tax regime and the distortion it causes is an artificially reduced price for soybeans in the home market. It is unclear the full array of benefits that companies may be afforded as a result of the export tax regime. The subsidy may have allowed benefiting companies to invest in new technologies or products, pay the workforce more, lower export prices, or any number of things. In light of the possibility that the cost-distortion itself was already addressed by imposition of CVDs, however, the court instructed Commerce to explain why its PMS adjustment in this case was nonetheless reasonable. In response, Commerce's pass-through analysis addresses whether the CVDs remedied lower U.S. prices by delinking any reduced costs of soybeans from the U.S. prices. In the absence of such a linkage, the court understands Commerce to have addressed its concern that the CVDs impact the relationship between U.S. prices and normal value for the dumping calculation.

<sup>8</sup> First, Commerce rejects the notion that domestic subsidies typically reduce U.S. prices. See, e.g., *Second Remand Results* at 8, 18. Second, Commerce references the proposition set forth in its initial remand redetermination that “CVD law imposes duties in an amount equal to the subsidy, rather than the effects of the subsidy, and does not remedy sales at [LTFV].” *Second Remand Results* at 5–6; see also *Final Results of Redetermination Pursuant to Ct. Remand [in Vincetin I]* at 24–27, Jan. 31, 2020, ECF No. 79–1. Finally, Commerce asserts that refusing a PMS adjustment “risks undermining the relief afforded to the domestic industry by Congress, given the complexity of tying subsidies in a foreign market to export prices in the United States.” *Second Remand Results* at 21; see also, e.g., *id.* at 15 & nn. 52–53. Reasonably discernible from these statements is Commerce's position that its methods for countervailing a domestic subsidy are such that duties imposed pursuant to the concurrent CVD proceeding likely do not redress the precise trade effect arising from the cost distortion that Commerce targets by rendering its cost-based PMS remedy in this antidumping case.

<sup>9</sup> Commerce calculates a dumping margin based on the difference between U.S. price and normal value of subject products imported into the United States. See 19 U.S.C. §§ 1677(34)–(35), 1677b, 1677a. In contrast Commerce imposes CVDs after calculating an *ad valorem* subsidy rate based on the amount of benefit allocated during the period of review or investigation divided by the sales value during the same period of the product to which

whether the imposition of a CVD in a subsidy case affects the analysis in the antidumping case. Only if the CVDs affect the dumping analysis would the potential for a double remedy arise.

In this case, Commerce finds the reported costs that would be used to construct the normal value of the subject merchandise inadequate because there exists a PMS that distorts the cost of soybeans. See Final Decision Memo at 26 (“Commerce continues to find that it is appropriate to make a PMS adjustment to soybean prices to correct for distortions that are caused by Argentina’s export tax regime and render soybean prices outside the ordinary course of trade.”); see also 19 U.S.C. § 1677b(e). Commerce therefore “rel[ies] on world market prices for soybeans which ha[ve] not been distorted by the GOA’s export tax, in determining the cost of soybeans.” *Remand Results* at 24. Further, Commerce now supplements its determination with record evidence regarding a respondent’s pricing behavior in the U.S. market by employing the pass-through analysis. See *Second Remand Results* at 8–12. Commerce finds that U.S. prices are adequate for purposes of calculating ADDs because U.S. prices are set based on considerations unrelated to any cost-benefit provided by the domestic subsidy. See *id.* at 9. By seeking to demonstrate the U.S. prices for LDC’s sales are unaffected by the export tax regime in Argentina, Commerce supplies facts from which a reasonable mind may infer that Commerce here imposes duties calculated based on an accurate dumping margin. Commerce’s methodology for its second remand redetermination is reasonable.

In objecting to the relevance of a pass-through analysis in this context, Commerce erects a straw man out of the court’s reference to *Low Enriched Uranium From France* in *Vicentin II*. See *Second Remand Results* at 13–17; see also *Vicentin II*, 44 CIT at \_\_\_, 466 F. Supp. 3d at 1244–45 (citing *Low Enriched Uranium From France*, 69 Fed. Reg. 46,501, 46,506 (Dep’t Commerce Aug. 3, 2004) (notice of final results of [ADD] admin. review) (“*Low Enriched Uranium From France*”). *Vicentin II* held that Commerce’s attempt to justify its imposition of an unadjusted PMS remedy by pointing to differences between the ADD and CVD regimes is not reasonable. See *id.* at \_\_\_, 466 F. Supp. 3d at 1242–45. To illustrate the need for further explanation, the court pointed to Commerce’s reasoning in *Low Enriched Uranium From France* as support for the proposition that “domestic

Commerce attributes the subsidy. See 19 C.F.R. § 351.525(a), (b)(3) (2015). For domestic subsidies, Commerce generally attributes the subsidy to all products sold by a firm, including products that are exported, subject to the additional provisions of 19 C.F.R. § 351.525(b). See *id.* § 351.525(b)(3); see also, e.g., [CVD] Investigation of Biodiesel from Argentina: Preliminary Calculations for [LDC] at 4–6, C-357–821, POR 01/01/16–12/31/2016, (Apr. 21, 2017) (ACCESS bar code 3610731–01) available at <https://access.trade.gov>.

subsidies are presumed to impact both sides of the LTFV equation, such that any price differential between normal value and U.S. Price is presumed to result from something other than the subsidy.” *Id.* at \_\_\_, 466 F. Supp. 3d at 1244–45 (citing *Low Enriched Uranium From France*, 69 Fed. Reg. at 46,506). Commerce’s lengthy refutation of the court’s reference to *Low Enriched Uranium From France* as espousing the view that Commerce has previously determined “all domestic subsidies are presumptively fully passed through to export prices or that the effect of subsidies on export prices can be determined with any degree of certainty” is thus misguided and distracts from the question posed by the court in *Vicentin II*. *Second Remand Results* at 14. *Vicentin II* asks Commerce to explain why its methodology is reasonable, when it would appear that domestic subsidies may affect both sides of the LTFV equation as acknowledged by Commerce in *Low Enriched Uranium From France*. See 44 CIT at \_\_\_, 466 F. Supp. 3d at 1242–45. Here, Commerce determines that the domestic subsidies did not affect either side of the LTFV equation. *Second Remand Results* at 12. That determination must be reasonable. In this case, by using a pass-through analysis, Commerce supports its determination by demonstrating that the domestic subsidy did not affect U.S. prices. As a result, Commerce reasonably addresses the court’s concern that its PMS adjustment potentially leads to an inaccurate dumping margin.

## II. Commerce’s Determination is Reasonable

LDC contends that Commerce’s analysis remains unsupported by substantial evidence and that Commerce failed to solicit information necessary to perform the analysis accurately. LDC’s Br. at 13–19. Defendant and Defendant-Intervenor argue that Commerce’s determination is supported by substantial evidence demonstrating that LDC’s U.S. prices were not affected by the GOA’s export tax regime. See Def.’s Br. at 12–24; Def.-Intervenor’s Br. at 11–15. Defendant adds that LDC failed to exhaust its argument that Commerce was required to solicit information necessary for conducting a pass-through analysis. See Def.’s Br. at 22.

Commerce determines the potential for a double remedy based on record evidence regarding whether there is a cost-to-price link and whether the domestic subsidy affects U.S. prices. See *Second Remand Results* at 9–10 (citing 19 U.S.C. § 1677f-1(f)(1)). Commerce’s determination is supported by substantial evidence where there is “such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.” *Nippon Steel Corp. v. United States*, 337 F.3d

1373, 1379 (Fed. Cir. 2003) (quoting *Consol. Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)). However, the “substantiality of evidence must take into account whatever in the record fairly detracts from its weight.” *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951) (“*Universal Camera Corp.*”). Nevertheless, “the possibility of drawing two inconsistent conclusions from the evidence does not invalidate Commerce’s conclusion as long as it remains supported by substantial evidence on the record.” *Zhaoqing New Zhongya Aluminum Co. v. United States*, 36 CIT 1390, 1392, 887 F. Supp. 2d 1301, 1305 (2012) (citing *Universal Camera Corp.*, 340 U.S. at 488).

Commerce points to statements made during LDC and Vicentin’s verification, as well as findings contained in the U.S. International Trade Commission’s (“ITC”) preliminary report in its investigation of biodiesel from Argentina, to support its determination that “there is no cost-to-price link and that the subsidy has not otherwise ‘reduced the average price of imports of the class or kind of merchandise[.]’” *Second Remand Results* at 10–12 (citing 19 U.S.C. § 1677f-1(f)(1)(B)). Namely, Commerce cites LDC’s explanation at verification that LDC’s U.S. affiliate agreed to U.S. sales of biodiesel that were “generally priced based on New York Mercantile Exchange (“NYMEX”) heating oil futures prices plus some specified premium[.]”<sup>10</sup> *Id.* at 10 (quoting Memo. re: CEP Sales Verification of [LDC] in ADD Investigation of Biodiesel from Argentina at 6, PD 413, CD 912, bar codes 3646257–01, 3646256–01 (Nov. 30, 2017) (“LDC CEP Verification Report”)).<sup>11</sup> Moreover, according to Commerce, officials at Vicentin

<sup>10</sup> Commerce also observes that [

]]. *Second Remand Results*

at 10 & n.38 (citing Memo. re: Verification of the Sales Responses of [LDC] in [ADD] Investigation of Biodiesel from Argentina at 9, PD 410, CD 909, bar codes 3645896–01, 3645895–01 (Nov. 29, 2017) (“LDC Sales Verification Report”). According to Commerce, company officials from LDC’s U.S. sales affiliate would later state “that U.S. companies typically prefer NYMEX heating oil prices, since biodiesel is regarded [as] fuel and heating oil reflects fuel prices, whereas Argentine transactions typically rely on CBOT soybean oil prices as they generally regard biodiesel less as fuel and more similar to a soybean product.” *Id.* (quoting LDC CEP Verification Report at 17).

<sup>11</sup> On June 25, 2018, Defendant filed indices to the public and confidential administrative records underlying Commerce’s final determination. These indices are located on the docket at ECF Nos. 16–2–3. On February 14, 2020, Defendant filed indices to the public and confidential administrative records underlying Commerce’s remand redetermination. These indices are located on the docket at ECF Nos. 80–2–3. On November 27, 2020 Defendant filed indices to the public and confidential administrative records underlying Commerce’s second remand redetermination. These indices are located on the docket at ECF Nos. 109–2–3. All references to documents from the initial administrative record are identified by the numbers assigned by Commerce in the June 25th indices, *see* ECF No. 16, and preceded by “PD” or “CD” to denote the public or confidential documents, respectively. All references to the administrative record for the remand determination are identified by the numbers assigned in the February 14th indices, *see* ECF No. 80, and preceded by “PR” or “CR” to denote remand public or confidential documents, respectively. All references to the administrative record for the second remand redetermination are identified by the

“explained that the company may sell biodiesel at a flat price or based on a Chicago Board of Trade (“CBOT”) future price, plus or minus a premium.”<sup>12</sup> *Second Remand Results* at 10–11 (quoting Memo. re: Verification of the Sales Questionnaire Responses of [Vicentin] at 26 [sic], PD 414, CD 913, bar codes 3646347–01, 3646345–01 (Nov. 30, 2017) (“Vicentin Verification Report”). Commerce notes that the ITC Preliminary Report’s description of the industry confirms these explanations, pointing specifically to the report’s finding that “[b]iodiesel has traditionally been marketed primarily as an additive or alternative to petroleum-based diesel fuel, and, as a result, biodiesel prices have been influenced by the price of petroleum-based diesel fuel, adjusted for government incentives supporting renewable fuels, rather than biomass based diesel production costs.” *Second Remand Results* at 11 (quoting Petitioner’s PMS Allegation Ex. 9 at VI-7, PDs 189, 191–92, bar codes 3604083–01, 3604083–03–04 (Aug. 2, 2017) (“ITC Prelim. Report”).

According to Commerce, pricing information from ITC Preliminary Report and other record sources also “demonstrates Argentine prices for U.S. shipments correspond to the overall U.S. market, and not to the cost of soybeans in Argentina.” *Second Remand Results* at 11–12. The report indicates that the average price of Argentine biodiesel dropped from 2014 to 2015, and then rose in 2016. *See id.* (citing ITC Prelim. Report at Tables C-1 & IV-2). Citing a U.S. Department of Agriculture report contained in the petition, Commerce observes that the “export tax on Argentine soybeans fell from 35 percent to 30 percent” during this same time period. *Id.* at 12. (citing Petitioner’s Letter, “ADD and CVD Petitions” Vol. II, Ex. GEN-30 at 4, PDs 3–5, bar codes 3554221–03–5 (Mar. 23, 2017) (“Petition Vol. II”). Commerce reasons that “[i]f the presumptions underlying the double remedy theory were true, Argentine prices to the United States should have risen during this period.” *Id.* However, here, Commerce’s assertion that the export tax on soybeans from 35 percent to 30 percent during the same time period does not appear to be supported by the page that Commerce cites from the report, as the relevant statement indicates that the reduction would have occurred either on or after December of 2015. *See* Petition Vol. II, Ex. GEN-30 at 4. As such, Commerce’s reliance on the reduction of export taxes on Argentine soybeans to support its findings is not persuasive. Nevertheless,

numbers assigned in the November 27th indices, see ECF No. 109, and preceded by “PRR” or “CRR” to denote second remand public or confidential documents, respectively.

<sup>12</sup> Commerce observes that [[

]] *Second Remand Results* at 11 (citing Vicentin Verification Report at 27).

Commerce otherwise provides enough evidence for a reasonable mind to conclude that the benefit of subsidized soybeans is not passed-through to U.S. prices.

Indeed, Commerce highlights record evidence that the drop in Argentine biodiesel prices from 2014 to 2015, followed by the increase prices in 2016, tracks prices for other imports of biodiesel during this time period. *Id.* Information published by the U.S. Department of Agriculture and the U.S. Census Bureau depicts a similar pattern in U.S., Argentine, and Indonesian biodiesel prices in the United States from 2014 through 2016. *Id.* (citing Petition Vol. II at Ex. GEN-28). “As the record demonstrates LDC and Vicentin price their U.S. shipments in a manner designed to compete with (or undercut) U.S. prices for petro-diesel and biodiesel, and not based on the domestic subsidy, Commerce concludes there is no significant link between the subsidy and U.S. prices.” *Id.*

Commerce’s determination is supported by substantial evidence and sufficiently addresses the question posed by the court’s remand order. It is reasonable to infer, based on LDC and Vicentin’s statements during verification regarding U.S. prices for Argentine biodiesel being tied to oil futures, as corroborated by evidence from the ITC Preliminary Report and sources from the petition, that any downward pressure on soybean costs owing to Argentina’s export tax regime is not passed-through to U.S. prices. If a company prices its U.S. sales based on external price movements, a reasonable mind can conclude that the company is not incorporating the benefit of a domestic subsidy. Although LDC argues that Commerce departed from agency practice and failed to solicit enough information to conduct its analysis, *see* LDC’s Br. at 15–20 (citing, *inter alia*, *Wheatland*, 38 CIT at \_\_, 26 F. Supp. 3d at 1385), as Defendant notes, LDC did not raise that argument before Commerce and thus failed to exhaust its administrative remedies with respect to that issue. *See* 28 U.S.C. § 2637(d); *Boomerang Tube LLC v. United States*, 856 F.3d 908, 912–13 (Fed. Cir. 2017); *see also* Def.’s Br. at 22. As such, Commerce’s second remand redetermination is sustained.

## CONCLUSION

For the foregoing reasons, Commerce’s second remand redetermination complies with the court’s order in *Vicentin II*, is in accordance with law and supported by substantial evidence, and is therefore sustained. Judgment will enter accordingly.

Dated: March 25, 2021

New York, New York

*/s/ Claire R. Kelly*  
CLAIRE R. KELLY, JUDGE

## Slip Op. 21–35

CARBON ACTIVATED TIANJIN CO., LTD. and CARBON ACTIVATED CORPORATION, et al., Plaintiffs, and BEIJING PACIFIC ACTIVATED CARBON PRODUCTS CO., LTD. and NINGXIA GUANGHUA CHERISHMET ACTIVATED CARBON CO., LTD., Plaintiff-Intervenors, v. UNITED STATES, Defendant, and Calgon Carbon Corporation and CABOT NORIT AMERICAS, INC., DEFENDANT-INTERVENORS.

Before: Mark A. Barnett, Judge  
Court No. 20–00007

[Sustaining in part and remanding in part the U.S. Department of Commerce’s final results in the eleventh administrative review of the antidumping duty order on certain activated carbon from the People’s Republic of China.]

Dated: April 2, 2021

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*Mollie L. Finnan*, Senior Trial Counsel, U.S. Department of Justice, Civil Division, Commercial Litigation Branch, of Washington, DC, for Defendant. With her on the brief were *Jeffrey B. Clark*, Acting Assistant Attorney General, *Jeanne E. Davidson*, Director, and *Claudia Burke*, Assistant Director. Of counsel were *Ian A. McInerney* and *Ayat Mujais*, Attorneys, Office of the Chief Counsel for Trade Enforcement & Compliance, U.S. Department of Commerce, of Washington, DC.

*Melissa M. Brewer*, Kelley Drye & Warren LLP, of Washington, DC, for Defendant-Intervenors. With her on the brief were *John M. Herrmann*, *R. Alan Luberd*, and *Julia A. Kuelzow*.

### OPINION AND ORDER

#### Barnett, Judge:

This matter is before the court following the U.S. Department of Commerce’s (“Commerce” or “the agency”) final results in the eleventh administrative review (“AR11”) of the antidumping duty order on certain activated carbon from the People’s Republic of China (“China”) for the period of review (“POR”) April 1, 2017, through March 31, 2018. *See Certain Activated Carbon From the People’s Republic of China*, 84 Fed. Reg. 68,881 (Dep’t Commerce Dec. 17, 2019) (final results of antidumping duty admin. review; 2017–2018) (“*Final Results*”), ECF No. 39–2, and accompanying Issues and Decision Mem., A-570–904 (Dec. 11, 2019) (“I&D Mem.”), ECF No. 39–3.<sup>1</sup>

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<sup>1</sup> The administrative record filed in connection with the *Final Results* is divided into a Public Administrative Record (“PR”), ECF No. 39–5, and a Confidential Administrative Record (“CR”), ECF No. 39–4. Parties filed joint appendices containing record documents cited in their briefs. *See* Public J.A., ECF Nos. 52 (Vol. I; Tabs 1–13), 52–1 (Vol. II; Tabs

Plaintiffs and Plaintiff-Intervenors (collectively, “Plaintiffs”)<sup>2</sup> challenge Commerce’s (1) selection of Malaysia instead of Romania as the primary surrogate country; (2) selection of surrogate values for Carbon Activated’s and DJAC’s inputs of bituminous coal and coal tar pitch; and (3) calculation of surrogate financial ratios. *See* Confidential Pls.’ and Pl.-Ints.’ Mot. for J. on the Agency R. Pursuant to Rule 56.2, ECF No. 43, and accompanying [Corrected] Confidential Mem. of Law in Supp. of Pls.’ and Pl.-Ints.’ Mot. for J. on the Agency R. Pursuant to USCIT Rule 56.2 (“Pls.’ Mem.”), ECF No. 59; Confidential Pls.’ and Pl.-Ints.’ Reply to Def. and Def.-Ints.’ Resps. to Pls.’ and Pl.-Ints.’ Rule 56.2 Mot. for J. on the Agency R. (“Pls.’ Reply”), ECF No. 50.

Defendant United States (“the Government”) and Defendant-Intervenors Calgon Carbon Corporation and Cabot Norit Americas, Inc. (together, “Calgon”) filed response briefs in support of Commerce’s determinations respecting each contested issue. *See* Def.’s Resp. to Pls.’ Rule 56.2 Mot. for J. on the Agency R. (“Def.’s Resp.”), ECF No. 45; Confidential Def.-Ints.’ Resp. Br. in Opp’n to Pls.’ Mot. for J. on the Agency R. (“Def.-Ints.’ Resp.”), ECF No. 48. At oral argument, the Government acknowledged that a remand with respect to financial ratios may be appropriate given Commerce’s recent consideration of similar adjustments on remand in the tenth administrative review (“AR10”) of the underlying order. Oral Arg. 1:38:55–1:40:05 (approximate time stamp from oral argument), *available at* <https://www.cit.uscourts.gov/sites/cit/files/031121–2000007-MAB.mp3> (last visited Apr. 2, 2021).

For the following reasons, the court sustains Commerce’s selection of surrogate data to value coal tar pitch and remands Commerce’s determinations with respect to surrogate country selection, selection of surrogate data to value bituminous coal, and calculation of financial ratios.

## BACKGROUND

Commerce initiated AR11 on June 6, 2018. *Initiation of Antidumping and Countervailing Duty Administrative Reviews*, 83 Fed. Reg. 26,258, 26,260 (Dep’t Commerce June 6, 2018). On July 3, 2018,

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14–15), 52–2 (Vol. III; Tabs 16–30); Confidential J.A. (“CJA”), ECF Nos. 57 (Vol. I; Tabs 1–9), 57–1 (Vol. II; Tabs 10–15), 57–2 (Vol. III; Tabs 16–30); Suppl. Confidential J.A. (“Suppl. CJA”), ECF No. 62. Citations are to the confidential joint appendices unless stated otherwise.

<sup>2</sup> Plaintiffs consist of Carbon Activated Tianjin Co., Ltd. (“Carbon Activated”), Carbon Activated Corporation, Datong Juqiang Activated Carbon Co., Ltd. (“DJAC”), Beijing Pacific Activated Carbon Products Co., Ltd., Ningxia Guanghua Cherishmet Activated Carbon Co., Ltd., Ningxia Mineral & Chemical Limited, and Shanxi Sincere Industrial Co., Ltd.

Commerce selected Carbon Activated and DJAC as mandatory respondents.<sup>3</sup> Selection of Respondents for Individual Review (July 3, 2018) at 5, PR 27, CJA Tab 2.

On June 14, 2019, Commerce issued its preliminary results. *Certain Activated Carbon From the People's Republic of China*, 84 Fed. Reg. 27,758 (Dep't Commerce June 14, 2019) (prelim. results of antidumping duty admin. review and prelim. determination of no shipments; 2017–2018) (“*Preliminary Results*”), PR 234, CJA Tab 21, and accompanying Decision Mem. for the Prelim. Results, A-570–904 (June 10, 2019) (“*Prelim. Mem.*”), PR 225, CJA Tab 19. Commerce calculated preliminary weighted-average dumping margins for Carbon Activated and DJAC in the amounts of 1.65 percent and 4.33 percent, respectively. *Prelim. Results*, 84 Fed. Reg. at 27,759. Commerce calculated a separate rate for non-examined respondents in the amount of 3.90 percent, equal to the weighted-average rate of the mandatory respondents based on U.S. sales volume. *Id.*

Commerce issued the *Final Results* on December 17, 2019. Following several changes to the *Preliminary Results*, Commerce calculated final weighted-average dumping margins for Carbon Activated and DJAC in the amounts of 1.02 percent and 0.86 percent, respectively. *Final Results*, 84 Fed. Reg. at 68,882. The separate rate was therefore reduced to 0.89 percent. *Id.*

This appeal followed. *See* Summons, ECF No. 1; Compl., ECF No. 7. The court heard oral argument on March 11, 2021. *See* Docket Entry, ECF No. 65.<sup>4</sup>

## JURISDICTION AND STANDARD OF REVIEW

The court has jurisdiction pursuant to section 516A(a)(2)(B)(iii) of the Tariff Act of 1930, as amended, 19 U.S.C. § 1516a(a)(2)(B)(iii) (2018) and 28 U.S.C. § 1581(c) (2018).<sup>5</sup> The court will uphold an agency determination that is supported by substantial evidence and otherwise in accordance with law. 19 U.S.C. § 1516a(b)(1)(B)(i).

## DISCUSSION

### I. Legal Framework for Surrogate Country and Surrogate Value Selection

An antidumping duty is “the amount by which the normal value exceeds the export price (or the constructed export price) for the

<sup>3</sup> When in reference to the underlying agency proceeding, the court refers to Carbon Activated and DJAC as “Respondents” and Calgon as “Petitioners.”

<sup>4</sup> Additional background information is summarized in each discussion section.

<sup>5</sup> Citations to the Tariff Act of 1930, as amended, are to Title 19 of the U.S. Code, and references to the U.S. Code are to the 2018 edition unless otherwise specified.

merchandise.” 19 U.S.C. § 1673. When an antidumping duty proceeding involves a nonmarket economy country, Commerce determines normal value by valuing the factors of production<sup>6</sup> used in producing the subject merchandise; general expenses; profit; and “the cost of containers, coverings, and other expenses” in a surrogate market economy country. *Id.* § 1677b(c)(1). In selecting these “surrogate values,” Commerce must, “to the extent possible,” use data from a market economy country that is at “a level of economic development comparable to that of the nonmarket economy country” and is a “significant producer[] of comparable merchandise.” *Id.* § 1677b(c)(4).

Commerce has adopted a four-step process for selecting a primary surrogate country:

- (1) the Office of Policy (“OP”) assembles a list [(“the OP List”)] of potential surrogate countries that are at a comparable level of economic development to the [non-market economy] country; (2) Commerce identifies countries from the list with producers of comparable merchandise; (3) Commerce determines whether any of the countries which produce comparable merchandise are significant producers of that comparable merchandise; and (4) if more than one country satisfies steps (1)–(3), Commerce will select the country with the best factors data.

*Jiaxing Brother Fastener Co. v. United States*, 822 F.3d 1289, 1293 (Fed. Cir. 2016) (second alteration original); *see also* Import Admin., U.S. Dep’t of Commerce, Non-Market Economy Surrogate Country Selection Process, Policy Bulletin 04.1 (2004) (“Policy Bulletin 04.1”), <http://enforcement.trade.gov/policy/bull04-1.html> (last visited Apr. 2, 2021). Commerce generally values all factors of production in a single surrogate country, referred to as the “primary surrogate country.” *See* 19 C.F.R. § 351.408(c)(2) (excepting labor). *But see Antidumping Methodologies in Proceedings Involving Non-Market Economies: Valuing the Factor of Production: Labor*, 76 Fed. Reg. 36,092, 36,093–94 (Dep’t Commerce June 21, 2011) (expressing a preference to value labor based on industry-specific labor rates from the primary surrogate country). Commerce prefers surrogate values that are “product-specific, representative of a broad-market average, publicly available, contemporaneous with the POR, and tax and duty exclusive.” I&D Mem. at 13 & n.68 (citation omitted); *see also* 19 C.F.R. § 351.408(c)(1),(4) (directing Commerce to select “publicly available”/“non-proprietary information” to value factors of production and

<sup>6</sup> The factors of production include but are not limited to: “(A) hours of labor required, (B) quantities of raw materials employed, (C) amounts of energy and other utilities consumed, and (D) representative capital cost, including depreciation.” 19 U.S.C. § 1677b(c)(3).

“manufacturing overhead, general expenses, and profit”). Commerce has broad discretion to determine what constitutes “the best available information” for the selection of surrogate values. *QVD Food Co. v. United States*, 658 F.3d 1318, 1323 (Fed. Cir. 2011).

## II. Primary Surrogate Country Selection

For the *Preliminary Results*, Commerce determined that Malaysia and Romania, among other countries on the OP List, constituted significant producers of comparable merchandise for the POR based on their respective export volumes. *See* Prelim. Mem. at 14. Commerce also found that Thailand constituted a significant producer of comparable merchandise based on net exports by volume. *See id.* at 15. Based on its subsequent analysis of surrogate value data, Commerce preliminarily selected Malaysia as the primary surrogate country and Romania as the secondary surrogate country. *See id.* at 15–16. Commerce selected Malaysian import data to value Respondents’ “raw materials, energy, and packing material inputs,” *id.* at 24, and used a financial statement from a Romanian company, Romcarbon S.A. (“Romcarbon”), to value financial ratios, *id.* at 26.

For the *Final Results*, Commerce continued to select Malaysia as the primary surrogate country notwithstanding Respondents’ arguments favoring Romania. I&D Mem. at 6–7. Commerce noted that both Malaysia and Romania are “at the same level of economic development as China.” *Id.* at 6. With respect to the significant producer criterion, however, Commerce departed from its preliminary analysis.

Commerce stated that it relied on “exports of comparable merchandise from the six OP List countries, as a proxy for production data.” *Id.* at 7. Commerce did not, however, explain its analysis of any country’s exports or incorporate its preliminary analysis. *See id.* at 7–8. Commerce concluded that the record demonstrated that Malaysia was “a significant producer of identical merchandise” during the POR, but that the record did not support a finding that Romania was a significant producer of comparable merchandise. *Id.* at 8. Commerce explained that the record contained “three Malaysian financial statements” indicating that the “principal business activity” for each company “is the manufacture of activated carbon,” *id.* at 7, whereas the record contained “only one financial statement . . . from a Romanian company,” *id.* at 8. Commerce noted that Romcarbon produced some activated carbon but primarily produced “polyethylene, polypropylene, polyvinyl chloride, polystyrene processing, filters and protective

materials.” *Id.*<sup>7</sup> Thus, while rejecting the Malaysian financial statements to value financial ratios, *id.* at 9, Commerce selected Malaysia as the primary surrogate country because “it provides stronger evidence of production of the subject merchandise in the form of multiple financial statements,” *id.* at 7–8. Commerce declined to compare the quality and availability of Malaysian and Romanian data for the purpose of primary surrogate country selection, finding the issue to be “moot.” *Id.* at 8.

Commerce used Malaysian data to value Respondents’ factors of production with exceptions for financial ratios and bituminous coal, for which the agency used Romanian data. *See* Surrogate Values for the Final Results (Dec. 11, 2019) (“Final SV Mem.”), Attach. 1, PR 265–66, CJA Tab 28.

### A. Parties’ Contentions

Plaintiffs raise several challenges to Commerce’s surrogate country selection. Plaintiffs first contend that Commerce failed to address its departure from the *Preliminary Results* with respect to Romania’s status as a significant producer. Pls.’ Mem. at 32. Plaintiffs further contend that “Commerce’s elimination of Romania was not ‘supported by substantial evidence.’” *Id.* Plaintiffs point to record evidence concerning Romcarbon’s share of Romanian consumption of activated carbon, which Plaintiffs argue can be used to ascertain total Romanian consumption of activated carbon in 2017 and, in turn, total Romanian production of activated carbon. *See id.* at 32–33. Plaintiffs also contend that Commerce’s selection of Malaysia rests on a misinterpretation of both Commerce policy, which disfavors the “comparison of production data,” *id.* at 34, and 19 U.S.C. § 1677b(c)(4), which permits the identification of more than one significant producer country and does not contain a preference for identical merchandise, *see id.* at 34–36; Pls.’ Reply at 9–10. Lastly, Plaintiffs contend that Commerce should have selected Romania as the primary surrogate country pursuant to statutory language indicating that the significant producer criterion need only be satisfied “to the extent possible” because Romania provided quality surrogate values for Respondents’ main inputs. Pls.’ Mem. at 36 (quoting 19 U.S.C. § 1677b(c)(4)).

The Government contends that Commerce’s selection of Malaysia as the primary surrogate country is supported by substantial evidence. Def.’s Resp. at 12. The Government points to evidence concern-

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<sup>7</sup> Plaintiffs assert that at least some of this merchandise may be considered comparable to the subject merchandise. Pls.’ Mem. at 33. Commerce did not, however, state its views on that issue.

ing Malaysia's export value and volume, *id.* at 14 (citing I&D Mem. at 7 & n.34), and the three Malaysian companies' production of identical merchandise, *id.* at 15. The Government further contends that "[s]ubstantial evidence in the record supports Commerce's ultimate conclusion that Romania was not a significant producer of comparable merchandise during the period of review," *id.* at 16, and Plaintiffs failed to exhaust their argument that Romcarbon's financial statements demonstrated that Romania was a significant producer, *id.* at 18–21; *see also* Def.-Ints.' Resp. at 11–12 & n.1.

Calgon contends that Plaintiffs' arguments amount to an impermissible request for the court to reweigh the evidence and rest on the erroneous conclusion that the record supports a finding that Romania is a significant producer of comparable merchandise. *See* Def.-Ints.' Resp. at 10–13.

In their Reply, Plaintiffs counter that the Government has advanced impermissible *post hoc* justifications for Commerce's decision with respect to the Government's analysis of export data. Pls.' Reply at 9. Plaintiffs further contend that the doctrine of administrative exhaustion should not preclude arguments concerning Romania's production of comparable merchandise because Commerce preliminarily found that Romania was a significant producer of comparable merchandise and Petitioners did not challenge that finding in their administrative case brief. *Id.* at 4–6.

### **B. Commerce's Selection of Malaysia as the Primary Surrogate Country Requires Reconsideration**

Commerce has failed to adequately explain or support with substantial evidence its selection of Malaysia and rejection of Romania as the primary surrogate country. While Commerce stated that it "analyzed exports of comparable merchandise from the six OP List countries," the agency neglected to explain its analysis or state any findings in that regard. *See* I&D Mem. at 7. The Government's assertion that Commerce based its determination on Global Trade Atlas and 2017 UN Comtrade data regarding export values and volume is not persuasive. *See* Def.'s Resp. at 14 (citing I&D Mem. at 7 & n.34). The Government relies on a footnote in the Issues and Decision Memorandum containing import and export volume data for each country on the OP List that merely substantiates Commerce's assertion that no country is a net exporter by volume. *See* I&D Mem. at 7 n.34. Commerce did not, however, analyze the data or reference the value of any country's exports. *See id.* The Government's assertion at oral argument that the court may instead infer Commerce's "analysis . . . from the record," Oral Arg. 8:25–8:47, also lacks merit. The standard of review requires *Commerce*, not the court, to "examine the record

and articulate a satisfactory explanation for its action.” *Yangzhou Bestpak Gifts & Crafts Co. v. United States*, 716 F.3d 1370, 1378 (Fed. Cir. 2013).

Commerce’s statements regarding Malaysian production of identical merchandise does not save its determination. Commerce’s “explanation must reasonably tie the determination under review to the governing statutory standard and to the record evidence by indicating what statutory interpretations the agency is adopting and what facts the agency is finding.” *CS Wind Vietnam Co. v. United States*, 832 F.3d 1367, 1376 (Fed. Cir. 2016). Section 1677b(c)(4)(B) “does not distinguish between identical and comparable merchandise” for purposes of identifying significant producer countries. *Foshan Shunde Yongjian Housewares & Hardwares Co. v. United States*, 37 CIT 256, 264, 896 F.Supp.2d 1313, 1322 (2013). Commerce’s conclusion that “Malaysia provides the best available information . . . because it is the only country on the OP List that is a significant producer of *identical* merchandise” suggests, however, that the agency favored the production of identical merchandise when selecting a primary surrogate country. I&D Mem. at 8 (emphasis added). Commerce failed to explain why any such preference comports with the plain statutory language or constitutes a permissible interpretation thereof.<sup>8</sup> Commerce also did not explain why production of identical merchandise by three companies was “significant” pursuant to section 1677b(c)(4). *See id.*; *cf.* Policy Bulletin 04.1 (explaining that Commerce’s decision “should be made consistent with the characteristics of world production of, and trade in, comparable merchandise (subject to the availability of data on these characteristics)”).

With respect to Commerce’s consideration of Romania, although “Commerce has the flexibility to change its position” from the *Preliminary Results* to the *Final Results*, the agency must “explain the basis for its change” and that explanation must be “supported by substantial evidence.” *Asociacion Colombiana de Exportadores de Flores v. United States*, 22 CIT 173, 185, 6 F. Supp. 2d 865, 880 (1998); *see also Peer Bearing Co. v. United States*, 22 CIT 472, 481–82, 12 F. Supp. 2d 445, 456 (1998).

For these *Final Results*, Commerce purported to reconsider the export quantities it had relied on for the *Preliminary Results*. I&D

<sup>8</sup> At oral argument, the Government relied on Policy Bulletin 04.1 to assert that Commerce maintains a preference for production of identical merchandise in its surrogate country selection process, but that this preference only arises when Commerce is comparing data quality. Oral Arg. 15:05–16:28. Policy Bulletin 04.1 merely states the steps Commerce must follow in order to identify the countries on the OP List subject to examination for significant production of comparable (inclusive of identical) merchandise. *See* Policy Bulletin 04.1. It does not support the existence of a policy preference concerning production of identical merchandise, either with respect to significant production or otherwise.

Mem. at 7; *see generally* Prelim. Mem. at 14. Without any analysis, however, Commerce reached the contrary conclusion that “the record . . . does *not* support a finding that Romania . . . is a significant producer of comparable merchandise.” I&D Mem. at 8 (emphasis added). Commerce failed to explain why its preliminary finding based on export quantity was no longer valid or cite substantial evidence for the change.<sup>9</sup>

Commerce appears to have based its decision on a comparison of the number of financial statements on the record from Romania as compared to Malaysia and differences in the principal production activities among the companies. *See id.* at 7–8. However, “Commerce’s practice is not to evaluate [t]he extent to which a country is a significant producer . . . against . . . the comparative production of the five or six countries on [Commerce’s] surrogate country list.” *Jacobi Carbons AB v. United States*, 43 CIT \_\_\_, \_\_\_, 365 F. Supp. 3d 1344, 1353 (2019) (citation omitted) (alterations original); *see also* Policy Bulletin 04.1.

The Government offers no persuasive defense of Commerce’s determination. The Government asserts that “Commerce reasonably concluded that Romania’s exports by value (102,387 USD) and quantity (3051 kg) were too small to reflect significant production on this record.” Def.’s Resp. at 16 (citing DJAC and Carbon Activated Surrogate Country Cmts. (Oct, 12, 2018) (“Respondents’ SC Cmts.”), PR 99, CJA Tab 6).<sup>10</sup> The Government further asserts that “Commerce reasonably concluded that Romanian production of activated carbon was not significant in terms of world production of, and trade in, comparable merchandise.” Def.’s Resp. at 17 (citing Policy Bulletin 04.1; *Fresh Garlic Prods. Assoc. v. United States*, 40 CIT \_\_\_, \_\_\_, 180 F. Supp. 3d 1233, 1244 (2016)). Notably, the Government does not cite to Commerce’s determination, which lacks any such analysis of Romanian production in the context of world production. The Government’s *post hoc* rationalizations are not a basis upon which the court may sustain Commerce’s determination. *See Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168–69 (1962).

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<sup>9</sup> The court takes no position on the soundness of Commerce’s preliminary conclusion respecting Romania or any other potential surrogate country. However, the court must ensure that Commerce’s change in position is not arbitrary. *See Asociacion Colombiana de Exportadores de Flores*, 22 CIT at n.20, 6 F. Supp. 2d at n.20 (explaining that “[a] change [in position] is arbitrary [when] the factual findings underlying the reason for [the] change are not supported by substantial evidence” or when the change is unsupported by a reasoned explanation that is “[c]onsistent with the statutory mandate”).

<sup>10</sup> Contrary to the Government’s assertion, the volume of Romanian exports in the cited source documentation is 34,000 kg, not 3051 kg. *See Respondents’ SC Cmts.*, Ex. 1; Prelim. Mem. at 14.

The Government also argues that the court should sustain Commerce’s selection of Malaysia as the primary surrogate country irrespective of any shortcomings in Commerce’s decision regarding Romania because Commerce expressed its clear view that the quality of the available data supports Malaysia. Oral Arg. 23:46–24:34; *cf.* Def.’s Resp. at 14 (arguing that Commerce based its selection of Malaysia, in part, on consideration of the fourth selection criterion—data quality). The Government misconstrues Commerce’s sequential surrogate country selection methodology and the court’s standard of review. Commerce selected Malaysia after concluding that Malaysia was a significant producer of identical merchandise and Romania was not a significant producer of comparable merchandise. *See* I&D Mem. at 7–8. Commerce subsequently considered Malaysian data quality in isolation and without reference to the comparable quality of Romanian data because Commerce found that Romania did not meet the significant producer requirement of section 1677b(c)(4)(B). *See id.* at 8.<sup>11</sup> Thus, the court cannot sustain Commerce’s determination on this basis.

Plaintiffs argue that record evidence concerning Romcarbon’s share of the domestic market establishes that Romania is a significant producer of comparable merchandise. Pls.’ Mem. at 32–33. It is not the court’s role to determine in the first instance whether the evidence favors Plaintiffs’ position. As discussed below, the question is whether Plaintiffs waived those arguments, as Defendant and Calgon contend, or should have the opportunity to present the arguments to Commerce.

Congress has directed the court to, “whe[n] appropriate, require the exhaustion of administrative remedies.” 28 U.S.C. § 2637(d). While exhaustion is not jurisdictional, *Weishan Hongda Aquatic Food Co. v. United States*, 917 F.3d 1353, 1363–64 (Fed. Cir. 2019), the statute “indicates a congressional intent that, absent a strong contrary reason, the [USCIT] should insist that parties exhaust their remedies before the pertinent administrative agencies,” *id.* at 1362 (quoting *Boomerang Tube LLC v. United States*, 856 F.3d 908, 912 (Fed. Cir. 2010)).

The Government argues that Respondents should have raised their domestic market share argument before Commerce because they “had full and fair notice of the agency’s intent to rely on Malaysia rather than Romania or another country.” Def.’s Resp. at 20; *cf.*

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<sup>11</sup> Commerce compared the Malaysian and Romanian financial statements on the record for purposes of its significant producer analysis, but otherwise declined to compare the quality of each country’s data. I&D Mem. at 7–8.

Def.-Ints.’ Resp. at 11–12 & n.1.<sup>12</sup> For the *Preliminary Results*, however, Commerce determined that Romania, among other countries, was a significant producer of comparable merchandise and reached its surrogate country decision based on an analysis of each countries’ respective data quality. Prelim. Mem. at 14–16. Petitioners did not advance arguments challenging Commerce’s findings regarding the significant producer criterion, *see generally* Pet’rs’ [Case] Br. (Oct. 7, 2019), CR 422, PR 253, CJA Tab 23, and Commerce did not signal any intention to revisit its analysis. Commerce need not “expressly notify interested parties any time it intends to change its methodology between its preliminary and final determinations” when there is “relevant data in the record” and interested parties advance “arguments related to that data before Commerce.” *Boomerang*, 856 F.3d at 913. However, “*Boomerang* does not require parties to anticipate issues that have not been raised by a party or the agency at that point.” *Calgon Carbon Corp. v. United States* (“*Calgon AR10*”), 44 CIT \_\_\_, \_\_\_, 443 F. Supp. 3d 1334, 1353 (2020)) (citing *Boomerang*, 856 F.3d at 913).

Here, Romania’s status as a significant producer was not among the issues raised by interested parties or Commerce prior to Commerce’s issuance of the *Final Results*. Thus, Plaintiffs’ arguments are not precluded by the doctrine of administrative exhaustion.<sup>13</sup>

In sum, Commerce has not provided an adequate explanation supported by substantial evidence giving effect to the statutory term “significant producer of comparable merchandise” pursuant to 19 U.S.C. § 1677b(c)(4)(B). The court is unable to discern Commerce’s reasons for rejecting Romania as a primary surrogate country; selecting Malaysia as the primary surrogate country; and avoiding any comparative analysis of data quality for that purpose. Accordingly, Commerce’s determination is remanded for reconsideration and further explanation.

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<sup>12</sup> The Government argues that “[P]laintiffs offer no legal authority that would require consideration or adoption of a single company’s share of its own domestic marketplace as a measure of significant producer status on a worldwide scale.” Def.’s Resp. at 20. Commerce, however, is not required to adopt any specific measure. Agency policy provides that “the standard for ‘significant producer’ will vary from case to case,” and thus leaves open the possibility that Commerce will consider alternative measures. Policy Bulletin 04.1.

<sup>13</sup> Plaintiffs also argued that Commerce should have selected Romania as the primary surrogate country even if the evidence did not support a finding that Romania was a significant producer. *See* Pls.’ Mem. at 36. Neither the Government nor Calgon directly responded to this argument. For the same reasons discussed above in relation to Plaintiffs’ arguments concerning Romcarbon’s domestic market share, the argument may be addressed by Commerce, as appropriate, on remand.

### III. Bituminous Coal

For the *Final Results*, Commerce selected Romanian import data under Harmonized Schedule (“HS”) 2701.12 as the surrogate value for bituminous coal after finding that the average unit value of Malaysian imports under HS 2701.12 was unreliable. I&D Mem. at 13–15. Commerce rejected Respondents’ request to use import data under HS 2701.19, which covers “Other Coal,” to value certain inputs of bituminous coal. *Id.* at 13–14. Respondents based their request on the application of Chapter 27, Subheading Note 2 (“Note 2”) to their inputs. *See id.* at 14. Note 2 limits HS 2701.12, *inter alia*, to bituminous coal with “a calorific value limit . . . equal to or greater than 5,833 kcal/kg.” *Id.* Respondents therefore reasoned that Commerce should value bituminous coal with a calorific value that is less than 5,833 kcal/kg under HS 2701.19. *Id.*

Upon review of the record, Commerce concluded that Note 2 applied solely to Thai import data and declined to apply Note 2 to another country’s import data. *Id.* at 14 & n.76 (citing Carbon Activated Resp. to Sec. D Suppl. Questionnaire (Pt. I) (Feb. 21, 2019) (“Carbon Activated’s 1SDQR (Pt. I)”)) at 19, CR 254–88, PR 162–65, CJA Tab 12); *see also* Carbon Activated’s 1SDQR (Pt. I), Ex. SD-27 (copy of Note 2). Commerce also found that Respondents had failed to demonstrate consumption of the type of sub-bituminous coal typically “used as a heat source” that would be covered by HS 2701.19. I&D Mem. at 14.

#### A. Parties’ Contentions

Plaintiffs contend that Commerce’s declination to recognize the applicability of Note 2 to all countries in the World Customs Organization (“WCO”) through the Harmonized System of Nomenclature contradicts Commerce practice and judicial precedent. Pls.’ Mem. at 17–19.<sup>14</sup> Plaintiffs also contend that Commerce erred in incorporating use as a consideration in its surrogate value selection because HS 2701.19 is not delimited by use. *Id.* at 20.

The Government contends that Commerce’s reliance on Romanian import data under HS 2701.12 is supported by substantial evidence. Def.’s Resp. at 22. The Government asserts that there is no record

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<sup>14</sup> Plaintiffs cite *Jiangsu Senmao Bamboo & Wood Industry Co. v. United States*, 42 CIT \_\_\_, \_\_\_, 322 F. Supp. 3d 1308, 1320 (2018); Issues and Decision Mem. for the Final Determination in the Antidumping Duty Investigation of Certain Stilbenic Optical Brightening Agents from the People’s Republic of China, A-570–972 (Mar. 19, 2012) at 2–6 (“*Stilbenic Mem.*”), available at <https://enforcement.trade.gov/frn/summary/prc/2012-7215-1.pdf> (last visited Apr. 2, 2021); and Issues and Decision Mem. for the Final Results of the 2011–2012 Admin. Review on Polyethylene Terephthalate Film, Sheet, and Strip from the People’s Republic of China, A-570–924 (June 24, 2014) at 14–20 (“*PET Mem.*”), available at <https://enforcement.trade.gov/frn/summary/prc/2014-155741.pdf> (last visited Apr. 2, 2021). *See* Pls.’ Mem. at 17–18; Pls.’ Reply at 2.

evidence demonstrating that Note 2 is identical for all WCO countries or that Respondents used the type of bituminous coal that would be covered by HS 2701.19. *See id.* at 22–23; *cf.* Def.-Ints.’ Resp. at 16–18.

Calgon contends that the precedent relied on by Plaintiffs is distinguishable. Def.-Ints.’ Resp. at 16–17. Calgon further contends that the inclusion of “Additional U.S. Notes” in the U.S. Harmonized Tariff System (“HTSUS”) supports Commerce’s decision not to assume that subheading notes are identical across countries. *See id.* at 17.

### **B. Commerce’s Selection of Surrogate Data to Value Bituminous Coal Requires Reconsideration and Further Explanation**

The court is unable to discern the path of Commerce’s reasoning on this issue and remands the matter for reconsideration and further explanation with respect to the applicability of Note 2 and Commerce’s understanding of the relevant parts of the record.

Commerce addressed Respondents’ request to apply Note 2 as a factual matter and found the request unsupported by the record. I&D Mem. at 14. Commerce did not, however, address Respondents’ argument that Note 2 applied to the tariff systems of countries other than Thailand given the harmonization of WCO tariff classification at the six-digit level. *See* Case Br. of [DJAC], [Carbon Activated] and Carbon Activated Corp. (Oct. 7, 2019) (“Respondents’ Case Br.”) at 27 n.38, CR 421, PR 250, CJA Tab 22.

Respondents’ argument is not without precedent. In prior determinations, Commerce has taken the position that products subject to international trade generally will enter WCO countries under the same six-digit subheading. *See PET* Mem. at 20 (stating that “[t]he International Convention on the Harmonized Commodity and Coding System applies the same [HS] six-digit prefix to products subject to international trade”); First Admin. Review of Sodium Hexametaphosphate from the People’s Republic of China: Issues and Decision Mem. for the Final Results, A-570–908 (Oct. 12, 2010) at 8 n.32, *available at* <https://enforcement.trade.gov/frn/summary/prc/2010-26458-1.pdf> (last visited Apr. 2, 2021) (“Hex Mem.”) (stating same). Commerce has relied on this principle to apply a subheading chapter note placed on an administrative record in connection with South African import data to Indonesian data for purposes of surrogate valuation. *See PET* Mem. at 20. Commerce also has considered the way in which the United States classifies an input to determine the correct six-digit heading under another country’s classification system for surrogate valuation. *See Stilbenic* Mem. at 4 & n.22; *Hex* Mem. at 7–8. Commerce’s rationale for rejecting Respondents’ argument on this issue,

without further explanation, is arbitrary; thus, a remand is necessary for Commerce to clarify or revise its position.<sup>15</sup>

Additionally, Commerce’s understanding of the record evidence concerning the characteristics of Respondents’ bituminous coal inputs is unclear. Commerce stated that “[R]espondents have not provided *any* evidence that they used [the type of bituminous coal that] would be categorized as HS 2701.19.” I&D Mem. at 14 (emphasis added). There is, however, some indication in the record that Respondents (or their respective suppliers) consumed bituminous coal with a calorific value that is less than 5,833 kcal/kg. See Carbon Activated Resp. to Sec. D Pts. II and III First Suppl. Questionnaire (Mar. 15, 2019) (“Carbon Activated’s SDQR Pts. II–III”), Ex. SD-15, CR 301–17, PR 180, CJA Tab 13; DJAC Suppl. Sec. D Resp. (Feb. 12, 2019) (“DJAC’s SDQR”) at 8, Exs. SD-12, SD-13, SD-56, CR 174–252, PR 148–56, CJA Tab 11. It is unclear whether Commerce considered this evidence or found it insufficient. Accordingly, on remand, Commerce must also reconsider and further explain its view of the record on this issue.<sup>16</sup>

#### IV. Coal Tar Pitch

For the *Preliminary Results*, Commerce valued coal tar pitch using Malaysian import data under HS 2706.00, which covers “Coal Tar.” I&D Mem. at 18; see also Surrogate Values for the Prelim. Results (June 10, 2019) (“Prelim. SV Mem.”), Attach. 1, PR 226–29, CJA Tab

<sup>15</sup> Parties’ remaining arguments are not persuasive. Calgon’s argument regarding the inclusion of “Additional U.S. Notes” in the HTSUS is based on information that is not part of the administrative record and was not the basis of an argument before Commerce. Def.-Ints.’ Resp. at 17 (citing Pls.’ Mem. at 17–18 & n.6, which in turn, cites a webpage as evidence of the HTSUS). While there is no indication that Note 2 is specific to Thailand, such arguments are better left for Commerce to consider and address in the first instance.

Plaintiffs’ reliance on *Jiangsu Senmao* is also misplaced. In that case, the court held that Commerce erred in rejecting a respondent’s administrative case brief because it contained purportedly untimely factual information in the form of HS Explanatory Notes (“ENs”). *Jiangsu Senmao*, 322 F. Supp. 3d at 1323–24. The court reasoned that “[t]he ENs are not evidence” or factual information used to value factors of production but are instead “an international legal reference essential to the proper interpretation of the HS nomenclature and [General Rules of Interpretation].” *Id.* at 1324. The court distinguished ENs from import data—factual information—used to value the factors of production. See *id.* Note 2 falls within the latter category. Cf. *Degussa Corp. v. United States*, 508 F.3d 1044, 1047 (Fed. Cir. 2007) (“The section and chapter notes are integral parts of the HTSUS, and have the same legal force as the text of the headings.”). However, as discussed, the inquiry does not end there to the extent that Commerce must address Respondents’ arguments concerning the harmonization of six-digit subheadings.

<sup>16</sup> The court further leaves to Commerce, on remand, to address Plaintiffs’ arguments concerning the valuation of bituminous coal inputs with an undetermined calorific value. See Pls.’ Mem. at 20–21 (asserting that, for such inputs, Commerce should use the average of Romanian data under HS 2701.12 and HS 2701.19); Pls.’ Reply at 3 (same).

20.<sup>17</sup> For the *Final Results*, Commerce instead used Malaysian import data under HS 2708.10, which covers “Pitch from Coal and Other Mineral Tars.” *Id.* at 18, 19. Commerce offered several rationales for its decision.

Commerce explained that Respondents each reported the input as “coal tar pitch” and not “coal tar” for certain suppliers, *id.* at 19, and that coal tar pitch “is commonly known as ‘pitch’ in the industry,” *id.* at 19 & n.112 (citation omitted). Regarding the production process, Commerce noted that two types of coal tar pitch—binder and impregnating grade—are derived from the fractionated distillation of coal tar. *Id.* at 19 & n.114 (citing First Surrogate Value Cmts. By [Respondents] (Nov. 9, 2018) (“Respondents’ SV Cmts.”), Ex. 5E, PR 109–14, CJA Tab 9). Commerce thus found “that HS 2706.00 covers coal tar, which is a by-product of the coke production process, whereas HS 2708.10 covers pitch, a product of the coal tar distillation process.” *Id.* at 19. Commerce rejected as unsupported Respondents’ “assertion that HS 2708.10 covers [only] 100 percent pure pitch distilled in a tar workshop.” *Id.* at 19 & n.115 (citing Respondents’ Case Br. at 29).

### A. Parties’ Contentions

Plaintiffs contend that Commerce’s reliance on commercial parlance instead of pitch content to select HS 2706.00 represents an unexplained departure from the agency’s approach in the prior administrative review, which was affirmed by the court. Pls.’ Mem. at 22–23 (citing *Calgon (AR10)*, 443 F. Supp. 3d at 1343–45); Pls.’ Reply at 14. Plaintiffs argue that HS 2706.00 must be construed to cover coal tar or coal tar pitch with less than 100 percent pitch content and “[HS] 2708.10 must be construed to cover 100[ percent] pure pitch.” *Id.* at 24. Concluding otherwise, Plaintiffs argue, could result in the same input being covered by both subheadings. *Id.* Plaintiffs also contend that Malaysian import data under both HS 2706.00 and HS 2708.10 are aberrant based on the predominance of Spanish exports in the average unit values and Commerce should instead rely on Russian import data under HS 2706.00. *See id.* at 24–27.

The Government contends that Commerce’s surrogate value selection is supported by substantial evidence. Def.’s Resp. at 24. The Government argues that “Commerce reasonably rejected the premise that coal tar and coal tar pitch are indistinguishable” based on the

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<sup>17</sup> In the narrative portion of its preliminary surrogate value memorandum, Commerce listed both coal tar and coal tar pitch as surrogate values with corresponding tariff provisions of HS 2706.00 and HS 2708.10, respectively. *See* Prelim. SV Mem. at 5. Commerce preliminarily used only HS 2706.00, however, to value Respondents’ coal tar pitch. Prelim. SV Mem., Attach. 1; *see also* I&D Mem. at 18 n.106 (noting the discrepancy).

process by which coal tar and pitch are produced and Respondents failed to establish that their respective inputs were covered by HS 2706.00. *Id.* at 25; *cf.* Def.-Ints.’ Resp. at 20–21. The Government also contends that Plaintiffs failed to present their arguments regarding the aberrancy of the Malaysian data to Commerce and those arguments are now barred by the doctrine of administrative exhaustion. Def.’s Resp. at 26–27; *cf.* Def.-Ints.’ Resp. at 22–23 & n.3.

Plaintiffs counter that the ENs to HS 2706.00 establish that coal tars with pitch content above 60 percent are covered by that subheading. Pls.’ Reply at 16; *see also id.* at 15–16 (averring that ENs are judicially noticeable pursuant to *Jiangsu Senmao*, 322 F. Supp. 3d at 1324). Plaintiffs also contend that the Government’s exhaustion argument lacks merit because Respondents challenged the aberrancy of HS 2706.00 before Commerce and lacked the opportunity to present to Commerce arguments concerning HS 2708.10. *Id.* at 16–17.

### **B. Commerce’s Selection of Surrogate Data to Value Coal Tar Pitch is Supported by Substantial Evidence**

Plaintiffs are correct that, in AR10, Commerce valued inputs of coal tar pitch using HS 2706.00. *Calgon (AR10)*, 443 F. Supp. 3d at 1343. In that proceeding, Commerce based its decision on pitch content and discounted evidence demonstrating that the respondents used coal tar pitch and a separate pitch input for the same production purpose. *Id.* at 1344. It is well settled, however, that “each administrative review is a separate exercise of Commerce’s authority that allows for different conclusions based on different facts in the record.” *Jiaying Brother*, 822 F.3d at 1299 (quoting *Qingdao Sea-Line Trading Co. v. United States*, 766 F.3d 1378, 1387 (Fed. Cir. 2014)). Thus, the question is whether Commerce has offered an adequate explanation “for treating similar situations differently.” *SKF USA Inc. v. United States*, 263 F.3d 1369, 1382 (Fed. Cir. 2001) (citation omitted).

This issue presents a close call. While Commerce’s determination may have benefitted from greater recognition that the agency had departed from its treatment of coal tar pitch in AR10, the court discerns from Commerce’s discussion an adequate explanation, supported by substantial evidence, for the change.

Respondents’ submissions in the underlying proceeding demonstrate that the distillation of coal tar yields coal tar pitch. I&D Mem. at 19 & n.114 (citing Respondents’ SV Cmts., Ex. 5E). Further distillation of coal tar pitch yields higher grades of pitch. *See* Respondents’ SV Cmts., Ex. 5E, Fig. 1 (a schematic illustration of the production of coal tar pitch and anthracene oil-based pitch beginning with the distillation of coal tar). Given that coal tar pitch is referred to as

“pitch” in commercial parlance, Commerce was within its discretion to identify HS 2708.10 instead of HS 2706.00 as the best available information. *See* I&D Mem. at 19; *QVD Food Co.*, 658 F.3d at 1323.

Plaintiffs’ assertion that HS 2706.00 covers coal tar and coal tar pitch with less than 100 percent pitch content and HS 2708.10 covers 100 percent pure pitch is unsupported by citations to record evidence. *See* Pls.’ Mem. at 24; I&D Mem. at 19. Plaintiffs’ argument that a contrary conclusion would result in the same input being covered under both headings also is not persuasive. *See* Pls.’ Mem. at 24. At the hearing, the court afforded Plaintiffs an additional opportunity to explain why their inputs of coal tar pitch are necessarily covered by HS 2706.00. Letter to Counsel (Mar. 3, 2021) (“Ltr. to Counsel”) ¶ 3(a)(i), ECF No. 61. Plaintiffs referred to record evidence concerning the processing of coal tar into coal tar pitch, but which also demonstrates that coal tar generally has a lower pitch content than the coal tar pitch consumed by Respondents. Oral Arg. 1:17:33–1:18:54, 1:23:11–1:27:55. *Compare* Pls.’ Mem. at 23 (citing Respondents’ SV Cmts., Ex. 5G), *and* Respondents’ Case Br. at 29–30 & nn.47–48 (citing Respondents’ SV Cmts., Ex. 5K), *with* Carbon Activated’s SDQR Pts. II–III, Ex. SD-6 (reflecting the pitch content of their inputs), *and* DJAC’s SDQR, Ex. SD-53 (same). This evidence is insufficient to require the distinction Plaintiffs seek to draw with respect to the competing subheadings and, thus, does not detract from the substantial evidence supporting Commerce’s determination.

Plaintiffs’ argument that the ENs to HS 2706.00 support a finding that coal tar pitch is covered by that subheading, Pls.’ Reply at 15–16, is precluded by the doctrine of administrative exhaustion. *See* 28 U.S.C. § 2637(d); *Weishan Hongda*, 917 F.3d 1362. Notwithstanding the ENs’ usefulness as a legal reference for purposes of tariff classification, *see* *Jiangsu Senmao*, 322 F. Supp. 3d at 1324, Respondents failed to argue the relevance of the ENs before Commerce. A remand to the agency to consider the ENs in the first instance would undermine the interest in judicial efficiency that administrative exhaustion is intended to protect. *See, e.g., Corus Staal BV v. United States*, 502 F.3d 1370, 1379 (Fed. Cir. 2007).

Plaintiffs likewise failed to exhaust their arguments regarding the aberrancy of Malaysian import data under HS 2708.10 based on the predominance of Spanish exports in the average unit values. Pls.’ Mem. at 25–26. Plaintiffs’ argument that they had “no opportunity” to present arguments concerning the reliability of this value to Commerce is unconvincing. Pls.’ Reply at 17. Respondents’ administrative case brief presented arguments against the use of HS 2708.10 based on Respondents’ understanding that Commerce had preliminarily

used that subheading to value Carbon Activated’s coal tar pitch. *See* Respondents’ Case Br. at 29–30. Respondents thus had ample opportunity to present this argument to Commerce and cannot now “seek[] a new ‘bite at the apple.’” *Calgon (AR10)*, 443 F. Supp. 3d at 1353–54; *see also Boomerang*, 856 F.3d at 913 (finding an abuse of the discretion afforded by 28 U.S.C. § 2637(d) when the court declined to require exhaustion of arguments the proponent of which had the opportunity to present to Commerce).<sup>18</sup>

Accordingly, Commerce’s determination to use Malaysian data under HS 2708.10 to value coal tar pitch is sustained.

## V. Financial Ratios

For the *Final Results*, as noted, Commerce valued financial ratios using Romcarbon’s 2017 financial statement. I&D Mem. at 6. At issue are various adjustments to the financial ratios. *See id.* at 21–23. Respondents requested Commerce to (1) offset pre-tax profit by the amounts listed under “Gain/(Loss) on adjustment of investment property at fair value” and “Gain/(Loss) on disposal of investment property”; (2) offset sales, general, and administrative expenses (“SG&A”) by the amount listed under “Other Gains”; and (3) allocate the amount listed under “Social Contributions” and “Meal Tickets” to labor costs instead of SG&A. Respondents’ Case Br. at 32–36. Commerce declined each request. I&D Mem. at 22–23. In so doing, however, Commerce treated Respondents’ request to offset pre-tax profit as a request to offset SG&A. *See id.* at 22.

In its response brief, the Government urged the court to sustain Commerce’s determinations as to the contested adjustments. Def.’s Resp. at 27–31. Following the Government’s filing of the response, the court sustained Commerce’s determination on remand in AR10 to make adjustments to the financial ratios based on Romcarbon’s financial statement that are similar to—if not the same as—certain adjustments Commerce declined to make in this case. *See* Pls.’ Reply at 19–22 (discussing *Calgon Carbon Corp., et al. v. United States, et al.*, Court No. 18-cv-00232, Final Results of Redetermination Pursuant to Court Remand at 8–13, 23 (CIT Aug. 5, 2020)); *Calgon Carbon Corp. v. United States*, 44 CIT \_\_\_, \_\_\_, 487 F. Supp. 3d 1359, 1362 (2020) (sustaining Commerce’s adjustments as uncontested and consistent with the court’s remand instructions).

<sup>18</sup> Commerce declined to consider Respondents’ argument that the Malaysian average unit value under HS 2706.00 is aberrant because it is higher than the Malaysian average unit value under HS 2708.10. I&D Mem. at 19. Commerce reasoned that the issue is moot given Commerce’s decision not to rely on HS 2706.00. *Id.* Because the court is sustaining Commerce’s decision to use HS 2708.10, the court need not address Plaintiffs’ arguments concerning an alternative basis for finding HS 2706.00 to be aberrant or whether such arguments are foreclosed by the doctrine of administrative exhaustion.

At oral argument, the Government stated that it could not identify distinguishing features in the financial statements that merited different treatment in this administrative review. Oral Arg. 1:39:25–1:40:04; *see also* Ltr. to Counsel ¶ 4(a). The Government further stated that although there might be differences in other aspects of the factual record that would support different treatment, particularly in relation to indirect labor costs, any remand should encompass all aspects of the adjustments so as not to constrain Commerce’s redetermination. Oral Arg. 1:40:35–1:40:55. Calgon argued that the administrative record in AR11 as compared to AR10 supports certain distinctions but reserved its arguments for Commerce’s consideration on remand. Oral Arg. 1:41:31–1:42:30.

Accordingly, given the inconsistencies between Commerce’s determinations in AR10 and AR11 and the discrepancies in Commerce’s explanations for declining the adjustments, this issue is remanded for reconsideration.

### CONCLUSION AND ORDER

In accordance with the foregoing, it is hereby:

**ORDERED** that Commerce’s *Final Results* are sustained in part and remanded in part, consistent with this Opinion; it is further

**ORDERED** that Commerce’s selection of surrogate data to value coal tar pitch is sustained; it is further

**ORDERED** that, on remand, Commerce shall reconsider its selection of Malaysia as the primary surrogate country; it is further

**ORDERED** that, on remand, Commerce shall reconsider its selection of surrogate data to value bituminous coal; it is further

**ORDERED** that, on remand, Commerce shall reconsider the adjustments to the surrogate financial statements; it is further

**ORDERED** that Commerce shall file its remand redetermination on or before July 1, 2021; it is further

**ORDERED** that subsequent proceedings shall be governed by USCIT Rule 56.2(h); and it is further

**ORDERED** that any comments or responsive comments must not exceed 5,000 words.

Dated: April 2, 2021

New York, New York

*/s/ Mark A. Barnett*

MARK A. BARNETT, JUDGE

Slip Op. 21–36

PRIMESOURCE BUILDING PRODUCTS, INC., Plaintiff, v. UNITED STATES, et al., Defendants.

Before: Timothy C. Stanceu, Chief Judge  
Jennifer Choe-Groves, Judge  
M. Miller Baker, Judge  
Court No. 20–00032

[Granting summary judgment in favor of plaintiff. Judge Baker dissents.]

Dated: April 5, 2021

*Jeffrey S. Grimson*, Mowry & Grimson, PLLC, of Washington, D.C., for plaintiff. With him on the brief were *Kristin H. Mowry*, *Jill A. Cramer*, *Sarah M. Wyss*, *Bryan P. Cenko*, and *Wenhui Ji*.

*Jeanne E. Davidson*, Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, D.C., for defendants. With her on the brief were *Tara K. Hogan*, Assistant Director, and *Stephen C. Tosini*, Senior Trial Counsel.

**OPINION**

**Stanceu, Chief Judge:**

Plaintiff PrimeSource Building Products, Inc. (“PrimeSource”), a U.S. importer of steel nails, contested a proclamation issued by the President of the United States (“Proclamation 9980”) in January 2020. *Adjusting Imports of Derivative Aluminum Articles and Derivative Steel Articles Into the United States*, 85 Fed. Reg. 5,281 (Exec. Office of the President Jan. 29, 2020) (“*Proclamation 9980*”). Before the court is a “Joint Status Report” the parties submitted in response to our order in *PrimeSource Bldg. Prods., Inc. v. United States*, 45 CIT \_\_\_, Slip. Op. 21–8 (Jan. 27, 2021) (“*PrimeSource I*”). Joint Status Report (Mar. 5, 2021), ECF No. 108. In response to statements of the parties in the Joint Status Report, the court enters summary judgment in favor of plaintiff.<sup>1</sup>

**I. BACKGROUND**

The background of this action is set forth in our prior opinion and summarized briefly herein. See *PrimeSource Bldg. Prods., Inc. v. United States*, 45 CIT \_\_\_, Slip. Op. 21–8 (Jan. 27, 2021) (“*PrimeSource I*”).

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<sup>1</sup> Judge Baker dissents from the entry of summary judgment in favor of plaintiff for the reasons stated in his dissent from the court’s prior opinion and order. *PrimeSource Bldg. Prods., Inc. v. United States*, 45 CIT \_\_\_, Slip. Op. 21–8 (Jan. 27, 2021) (Baker, J., dissenting).

### A. Proclamation 9980

On January 24, 2020, President Donald Trump issued Proclamation 9980, which imposed a 25% duty on certain imported articles made of steel, including steel nails, and a 10% duty on certain imported articles made of aluminum. As authority for its imposition of duties on the articles, identified as “derivative aluminum articles” and “derivative steel articles,” Proclamation 9980 cited Section 232 of the Trade Expansion Act of 1962, 19 U.S.C. § 1862 (“Section 232”).<sup>2</sup> Proclamation 9980 also cited previous Presidential proclamations that invoked Section 232, including Proclamation 9704, *Adjusting Imports of Aluminum Into the United States*, 83 Fed. Reg. 11,619 (Exec. Office of the President Mar. 15, 2018) (“*Proclamation 9704*”), and Proclamation 9705, *Adjusting Imports of Steel Into the United States*, 83 Fed. Reg. 11,625 (Exec. Office of the President Mar. 15, 2018) (“*Proclamation 9705*”). *Proclamation 9980* ¶¶ 9–10, 85 Fed. Reg. at 5,283.

### B. Procedural History of this Litigation

On February 4, 2020, PrimeSource commenced this action, naming the United States, et al., as defendants and asserting five claims in contesting Proclamation 9980. Summons, ECF No. 1; Compl., ECF Nos. 8 (conf.), 9 (public). Defendants filed a Rule 12(b)(6) motion to dismiss an amended complaint on March 20, 2020 for failure to state a claim on which relief can be granted. Defs.’ Mot. to Dismiss for Failure to State a Claim, ECF No. 60 (“*Defs.’ Mot.*”). Plaintiffs opposed defendants’ motion to dismiss and moved for summary judgment on April 14, 2020. Rule 56 Mot. for Summ. J., Pl. PrimeSource Bldg. Prods. Inc.’s Mem. of Points and Authorities in Supp. of Mot. for Summ. J. and Resp. to Defs.’ Mot. to Dismiss for Failure to State a Claim, ECF No. 73–1. Defendants responded to plaintiff’s summary judgment motion on May 12, 2020. Defs.’ Reply in Supp. of their Mot. to Dismiss and Resp. to Pl.’s Mot. for Summ. J., ECF No. 78. On June 9, 2020, plaintiff replied in support of its summary judgment motion. Pl. PrimeSource Bldg. Prods. Inc.’s Reply Br. in Supp. of its Mot. for Summ. J., ECF No. 91.

### C. Our Decision in *PrimeSource I*

In *PrimeSource I*, we granted defendants’ motion to dismiss as to all of plaintiff’s claims in the amended complaint except one, stated as “Count 2,” in which plaintiff claimed that Proclamation 9980 was issued beyond the statutory time limits set forth in Section 232.

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<sup>2</sup> All citations to the United States Code are to the 2012 edition.

*PrimeSource I*, 45 CIT at \_\_, Slip Op. at 55. In Count 2, plaintiff argued that Proclamation 9980 was issued after the expiration of the 105-day time period set forth in Section 232(c)(1), which PrimeSource described as commencing upon the President's receipt, on January 11, 2018, of a report the Secretary of Commerce issued under Section 232(b)(3)(A) on the effect of certain steel articles on the national security of the United States (the "2018 Steel Report"). That report culminated in the President's issuance of Proclamation 9705 in March 2018, which imposed 25% duties on various steel articles, see *Proclamation 9705*, §§ 1–2, 83 Fed. Reg. at 11,625, but not on the derivative steel articles affected by Proclamation 9980 in January 2020.

We stated in *PrimeSource I* that "[d]efendants do not dispute that the 2018 Steel Report is, for purposes of Section 232(c), 19 U.S.C. § 1862(c), the report issued according to Section 232(b)(3)(A), 19 U.S.C. § 1862(b)(3)(A), upon which the President based his adjustment to imports of steel derivatives, including steel nails." *PrimeSource I*, 45 CIT at \_\_, Slip Op. at 20 (citing Defs.' Mot. 24–29). In denying defendants' motion to dismiss Count 2, we concluded that Proclamation 9980 does not comply with the limitation on the President's authority imposed by the 105-day time limitation of Section 232(c)(1) if that time period is considered to have commenced upon the President's receipt of the 2018 Steel Report. *Id.* at \_\_, Slip Op. at 44–45. We held that in this circumstance Count 2 stated a plausible claim for relief. *Id.* at \_\_, Slip Op. at 50.

After denying defendants' motion to dismiss as to the claim in Count 2, we denied plaintiff's motion for summary judgment on that remaining claim upon determining that there existed one or more genuine issues of material fact. Although concluding that Proclamation 9980 was untimely under Section 232(c)(1) when viewed solely as an action taken in response to the Steel Report, we also concluded that there were genuine issues of material fact that bore on the extent to which the subsequent "assessment" or "assessments" of the Commerce Secretary, as identified in Proclamation 9980, validly could be held to have served a function analogous to that of a Section 232(b)(3)(A) report. *Id.* at \_\_, Slip Op. at 54. We also noted that we did not know what form of inquiry or investigation the Commerce Secretary conducted prior to his submission of these communications to the President and whether, or to what extent, that inquiry or investigation satisfied the essential requirements of Section 232(b)(2)(A), 19 U.S.C. § 1862(b)(2)(A). *Id.*

In summary, we concluded in *PrimeSource I* that factual information pertaining to the Secretary's inquiry on, and his reporting to the

President on, the derivative articles would be required in order for us to examine whether and to what extent there was compliance by the President with the procedural requirements of Section 232 and whether any noncompliance that occurred was a “significant procedural violation.” *Id.* at \_\_, Slip Op. at 54–55 (quoting *Maple Leaf Fish Co. v. United States*, 762 F.2d 86, 89 (Fed. Cir. 1985) (requiring that a procedural violation be “significant” in order to serve as a ground for judicial invalidation of a Presidential action)). We added that “at this early stage of the litigation, we lack a basis to presume that these unresolved factual issues are unrelated to the issue of whether the President clearly misconstrued the statute or the issue of whether the President took action outside of his delegated authority.” *Id.* at \_\_, Slip Op. at 55. We noted that the “filing of a complete administrative record could be a means of resolving, or helping to resolve, these factual issues” and directed the parties to consult on this matter and file a scheduling order to govern the subsequent litigation. *Id.*

#### **D. The Joint Status Report**

On March 5, 2021, the parties submitted the Joint Status Report in lieu of a scheduling order. In it, defendants expressly waived “the opportunity to provide additional factual information that might show that the ‘essential requirements of Section 232(b)(2)(A), 19 U.S.C. § 1862(B)(2)(A)’ were met,” adding that “[d]efendants do not intend to pursue that argument.” Joint Status Report 2 (quoting *PrimeSource I*, 45 CIT at \_\_, Slip Op. at 54). Defendants informed the court that their “position continues to be that procedural preconditions for the issuance of Proclamation 9980 were met by the Secretary’s 2018 Steel Report and the timely issuance of Proclamation 9705, a position that the majority has already rejected.” *Id.* at \_\_, Slip Op. at 2–3. The Joint Status Report concludes by stating that “the parties agree and respectfully submit that there is no reason for this Court to delay entry of final judgment. In so representing, the parties fully reserve all rights to appeal any adverse judgment.” *Id.* at \_\_, Slip Op. at 3.

## **II. DISCUSSION**

### **A. Sua Sponte Entry of Summary Judgment according to USCIT Rule 56(f)**

Because we denied plaintiffs’ motion for summary judgment in *PrimeSource I*, no motion for summary judgment is now before us. Nevertheless, we may enter summary judgment for a party *sua sponte* under USCIT Rule 56(f), which provides that “[a]fter giving notice and a reasonable time to respond, the court may . . . consider

summary judgment on its own after identifying for the parties material facts that may not be genuinely in dispute.”

The United States Supreme Court in *Celotex Corp. v. Catrett*, 477 U.S. 317, 326 (1986) (“*Celotex*”) opined that “district courts are widely acknowledged to possess the power to enter summary judgments *sua sponte*.” In interpreting *Celotex*, the Court of Appeals for the Federal Circuit instructed that “[t]he *Celotex* Court also made clear that all that is required is notice [to the party with the burden of proof] that she had to come forward with all of her evidence.” *Exigent Tech., Inc. v. Atrana Sols., Inc.*, 442 F.3d 1301, 1308 (Fed. Cir. 2006) (brackets in original). In determining whether to enter summary judgment *sua sponte*, a court must ensure that prejudice will not accrue to the would-be losing party stemming from that party’s inability to present evidence of a genuine dispute of material fact. See *Celotex*, 477 U.S. at 326.

### **B. Defendants’ Waiver of the Opportunity to Present Evidence and of Any Defense Related to Procedures Subsequent to the 2018 Steel Report**

In this litigation, the parties, and defendants in particular, expressly have declined to pursue the opportunity to present additional evidence to demonstrate the existence of a genuine dispute of a material fact. Specifically, defendants waive any defense they might base on a showing that the “essential requirements of Section 232(b)(2)(A), 19 U.S.C. § 1862(b)(2)(A)’ were met.” Joint Status Report 2 (quoting *PrimeSource I*, 45 CIT at \_\_, Slip Op. at 54). Further, we note the significance of defendants’ statement in the Joint Status Report that their “position continues to be that procedural preconditions for the issuance of Proclamation 9980 were met by the Secretary’s 2018 Steel Report and the timely issuance of Proclamation 9705.” *Id.* at 2–3. This statement constitutes a waiver of any defense that the assessments of the Commerce Secretary, as described in Proclamation 9980, were the functional equivalent of a Section 232(b)(3)(A) report.

By joining in the statement that “the parties agree and respectfully submit that there is no reason for this Court to delay entry of final judgment,” *id.* at 3, defendants have waived any claim of prejudice that could result from the entry of summary judgment in favor of plaintiff, subject to their right to appeal. The parties have been given the full opportunity to “come forward” with any evidence of a dispute of material fact. A *sua sponte* order of summary judgment is, therefore, appropriate. See *Celotex*, 477 U.S. at 326.

The court further notes that defendants did not file an answer to plaintiff’s complaint or amended complaint. The court’s opinion in

*PrimeSource I* directed the parties to file a joint scheduling order to govern the remainder of the litigation, which normally would have included a date for the government to answer the complaint with respect to the remaining claim. Here, defendants having waived any argument that Proclamation 9980 was issued within the 105-day time period beginning on the President's receipt of a report qualifying under Section 232(b)(3)(A), there are no contested issues of fact. Therefore, the absence of an answer to the amended complaint is not a procedural bar to the entry of summary judgment.

**C. In the Absence of a Genuine Dispute as to any Material Fact, Plaintiff Is Entitled to Judgment as a Matter of Law**

Summary judgment is appropriate when “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). As discussed above, there is no longer a genuine issue of material fact as a result of the representations of the parties in the Joint Status Report. In particular, defendants have waived any defense grounded in a factual circumstance other than one in which the 2018 Steel Report is the only submission made by the Commerce Secretary that could satisfy the requirements of Section 232(b)(3)(A) and upon which Proclamation 9980 could have been based.

Plaintiff *PrimeSource* is now entitled to judgment as a matter of law. As we concluded in *PrimeSource I*, “the action taken by Proclamation 9980 to adjust imports of derivatives was not implemented during the 105-day time period set forth in § 1862(c)(1), if that time period is considered to have commenced upon the President's receipt of the Steel Report.” 45 CIT at \_\_, Slip Op. at 44. Because defendants no longer may raise as a defense that the procedural requirements of Section 232 were met based on any procedure other than one reliant upon the 2018 Steel Report, summary judgment in favor of plaintiff is warranted on the ground that Proclamation 9980 was issued after the President's delegated authority to impose duties on derivatives of steel products had expired. As we held in *PrimeSource I*, any determination the President could have made to adjust the duties on imports of derivatives of the articles named in Proclamation 9705 was required by the statute to have been made during the 90-day period commencing with the President's receipt of a report of the Commerce Secretary satisfying the requirements of Section 232(b)(3)(A), and any action to implement that determination was required to have been taken, if at all, during the 15-day period following that determination. *See* 45 CIT at \_\_, Slip Op. at 32 (holding that “the 90- and 15-day time limitations in Section 232(c)(1) expressly confine the

exercise of the President's discretion *regardless* of whether the President determines to adjust imports only of the 'article' named in the Secretary's report or, instead, to adjust imports of the 'article and its derivatives.'" (emphasis in original).

To declare Proclamation 9980 invalid, we must find "a clear misconstruction of the governing statute, a significant procedural violation, or action outside delegated authority." *Maple Leaf Fish Co.*, 762 F.2d at 89. Because the President issued Proclamation 9980 after the congressionally-delegated authority to adjust imports of the products addressed in that proclamation had expired, Proclamation 9980 was action outside of delegated authority. For the reasons we stated in *PrimeSource I*, 45 CIT at \_\_, Slip Op. at 45–49, we reject defendants' position that Congress intended for the time limitations in Section 232(c)(1) to be merely directory, and we find in the untimeliness of Proclamation 9980 a significant procedural violation. As a remedy, PrimeSource is entitled to a declaratory judgment that Proclamation 9980 is invalid as contrary to law and to certain other relief, as described below.

### III. CONCLUSION

We award summary judgment to PrimeSource on the remaining claim in this litigation, which was stated in Count 2 of the amended complaint. As relief on this claim, we will declare Proclamation 9980 invalid as contrary to law and, on that basis, direct that the entries affected by this litigation be liquidated without the assessment of duties pursuant to Proclamation 9980, with refund of any deposits for such duty liability that may have been collected pursuant to Proclamation 9980.<sup>3</sup> Also, should any entries of PrimeSource's merchandise at issue in this litigation have liquidated with the assessment of 25% duties pursuant to Proclamation 9980, PrimeSource is entitled to reliquidation of those entries and a refund of any duties deposited or paid, with interest as provided by law.

Judgment will enter accordingly.

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<sup>3</sup> Earlier in this litigation, upon the consent of both parties, this Court entered a preliminary injunction against the collection of 25% cash deposits on PrimeSource's entries of merchandise within the scope of Proclamation 9980 and against the liquidation of the affected entries. *Order* (Feb. 13, 2020), ECF Nos. 39 (Conf.), 40 (Public). This preliminary injunction will dissolve upon the entry of judgment. *Id.* If, despite the preliminary injunction, any cash deposits were made or collected, PrimeSource is entitled to a refund of these cash deposits, with interest as provided by law.

Dated: April 5, 2021  
New York, New York

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

*/s/ Jennifer Choe-Groves*  
JENNIFER CHOE-GROVES, JUDGE

## Slip Op. 21–38

SHANXI HAIRUI TRADE CO., LTD., SHANXI PIONEER HARDWARE INDUSTRIAL CO., LTD., SHANXI YUCI BROAD WIRE PRODUCTS CO., LTD., Plaintiffs, and DEZHOU HUALUDE HARDWARE PRODUCTS CO., LTD., Consolidated Plaintiff, and XI'AN METALS & MINERALS IMPORT & EXPORT CO., LTD., Plaintiff-Intervenor, v. UNITED STATES, Defendant, and MID CONTINENT STEEL & WIRE, INC., Defendant-Intervenor.

Before: Leo M. Gordon, Judge  
Consol. Court No. 19–00072

[Commerce's Final Results sustained.]

Dated: April 7, 2021

*Jeffrey S. Neeley* and *Stephen W. Brophy*, Husch Blackwell, LLP of Washington, DC for Plaintiffs Shanxi Hairui Trade Co., Ltd., Shanxi Pioneer Hardware Industrial Co., Ltd. and Shanxi Yuci Broad Wire Products Co., Ltd.

*Lizbeth R. Levinson*, *Ronald M. Wisla*, and *Brittney R. Powell*, Fox Rothschild LLP of Washington, DC for Plaintiff Dezhou Hualude Hardware Products Co., Ltd.

*Gregory S. Menegaz*, *J. Kevin Horgan*, and *Alexandra H. Salzman*, deKieffer & Horgan, PLLC of Washington, DC for Plaintiff-Intervenor Xi'an Metals & Minerals Import & Export Co., Ltd.

*Sosun Bae*, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice of Washington, DC for Defendant United States. With her on the brief were *Brian M. Boynton*, Acting Assistant Attorney General, *Jeanne E. Davidson*, Director, *Patricia McCarthy*, Assistant Director. Of counsel on the brief was *Ayat Mujais*, Attorney, Office of the Chief Counsel for Trade Enforcement & Compliance, U.S. Department of Commerce of Washington, DC.

*Adam H. Gordon* and *Ping Gong*, The Bristol Group PLLC of Washington, DC for Defendant-Intervenor Mid Continent Steel & Wire, Inc.

## OPINION

**Gordon, Judge:**

This action involves the final results of an administrative review conducted by the U.S. Department of Commerce (“Commerce”) of the antidumping (“AD”) order (“Order”) on certain steel nails from the People’s Republic of China (“PRC”). *See Certain Steel Nails from the People’s Republic of China*, 84 Fed. Reg. 24,751 (Dep’t of Commerce May 29, 2019) (amend. final results admin. review) (“*Final Results*”); *see also* Issues and Decision Memorandum (Dep’t of Commerce Apr. 17, 2019), available at <https://enforcement.trade.gov/frn/summary/prc/2019-08273-1.pdf> (last visited this date) (“*Decision Memorandum*”).

Before the court are motions for judgment on the agency record under USCIT Rule 56.2 filed by Plaintiffs Shanxi Hairui Trade Co., Ltd., Shanxi Pioneer Hardware Industrial Co., Ltd., Shanxi Yuci Broad Wire Products Co., Ltd. (collectively, “Shanxi”), Dezhou Hua-

lude Hardware Products Co., Ltd. (“Dezhou Hualude”), and Plaintiff-Intervenor Xi’an Metals & Minerals Import & Export Co., Ltd. (“Xi’an Metals”). See Shanxi’s Mot. for J. on the Agency R., ECF No. 31 (“Shanxi Br.”); Dezhou Hualude’s Mot. for J. on the Agency R., ECF No. 35 (“Dezhou Br.”); Xi’an Metals’ Mot. for J. on the Agency R., ECF No. 36 (“Xi’an Br.”); see also Def.’s Resp. Opp. Pl.’s Mot. for J. on the Agency R., ECF No. 38 (“Def.’s Resp.”); Def.-Intervenor Mid Continent Steel & Wire, Inc.’s Resp. to Pl.’s Mot. for J. on the Agency R., ECF No. 41 (“Def.-Intervenor’s Resp.”); Shanxi’s Reply in Supp. of Mot. for J. on the Agency R., ECF No. 45 (“Shanxi Reply”); Dezhou Hualude’s Reply in Supp. of Mot. for J. on the Agency R., ECF No. 46 (“Dezhou Reply”); Xi’an Metals’ Reply in Supp. of Mot. for J. on the Agency R., ECF No. 49 (“Xi’an Reply”).<sup>1</sup> The court has jurisdiction pursuant to Section 516A(a)(2)(B)(iii) of the Tariff Act of 1930, as amended, 19 U.S.C. § 1516a(a)(2)(B)(iii) (2018)<sup>2</sup>, and 28 U.S.C. § 1581(c) (2018). For the reasons set forth below, the court sustains the *Final Results*.

## I. Standard of Review

The court sustains Commerce’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 evidence, and the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency’s findings 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. 2021). Therefore, when addressing a substantial evi-

<sup>1</sup> All citations to parties’ briefs and the agency record are to their confidential versions unless otherwise noted.

<sup>2</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.

dence 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. 2020).

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 Commerce’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.”).

## II. Discussion

### A. Application of AFA to Dezhou Hualude

During the verification process for Dezhou Hualude’s supplier, Tianjin Lingyu, Commerce observed the presence of certain boxes of steel nails labeled “Made in Thailand” at Tianjin Lingyu’s plant. *Decision Memorandum* at 20. Commerce found this to be evidence of fraudulent transshipment activity aimed at the circumvention of the Order, stating:

we observed and photographed empty boxes ready for packaging and sealed boxes ready for shipping which were labeled as certain types of steel nails. The boxes were designated for importation into the United States (*i.e.*, identified as certain types of nails, in English, under the brands of two U.S. companies). The boxes were labeled “Made in Thailand.” ... Because the aforementioned nails were indeed produced by Tianjin Lingyu but falsely labeled as Thai origin at its Chinese factory, we find that this is evidence of fraudulent transshipment activity, and calls into question the veracity, completeness, and accuracy of all of the information provided by Tianjin Lingyu.

*Id.* Commerce further found that Dezhou Hualude “could or should have been aware” of Tianjin Lingyu’s fraudulent activities, and that by failing to deter such behavior on the part Tianjin Lingyu, Dezhou Hualude had significantly impeded the current proceeding pursuant to 19 U.S.C. § 1677e(a)(2)(C). *Id.* Consequently, Commerce applied partial AFA for all nails sold by Dezhou Hualude that were sourced from Tianjin Lingyu. *Id.*

Both Dezhou Hualude and Xi’an Metals contend that Commerce’s decision to apply partial AFA to Dezhou Hualude on the basis of Commerce’s discovery of boxes labeled “Made in Thailand” on the

premises of Dezhou Hualude's supplier was unreasonable. *See* Dezhou Br. at 10 (“[T]he record does not contain any evidence whatsoever that Tianjin Lingyu was involved in the alleged fraud or that these boxes were linked in any manner to Dezhou Hualude.”); *see also* Xi'an Br. at 4. Dezhou Hualude argues that the record shows that “Tianjin Lingyu was not responsible for the packaging and that it [sic] employees and management did not speak English,” suggesting that Tianjin Lingyu should not be held responsible for any mislabeling in English. Dezhou Br. at 10. Xi'an Metals notes that “[Commerce] found no discrepancies with Tianjin Lingyu books and records with respect to the costs of production.” Xi'an Br. at 4. Additionally, Dezhou Hualude contends that Commerce's determination that Dezhou Hualude impeded the investigation because it could or should have been aware of Tianjin's fraud is unreasonable, maintaining that “there would be no justification under the antidumping statute or other doctrine of law for holding Dezhou Hualude liable for its supplier's fraud.” Dezhou Br. at 10. Dezhou Hualude also argues that it was unreasonable for Commerce to attribute its observations of Tianjin Lingyu's plant to “Dezhou Hualude's sales data or Tianjin Lingyu's production data” because these observations were made outside of the applicable period of review. *Id.* at 11.

The Government maintains that Commerce's determination that Tianjin Lingyu was engaged in a fraudulent transshipment scheme during the period of review was reasonable and lawful. Def.'s Resp. at 8. In conducting its verification process, Commerce discovered physical evidence indicative of fraudulent transshipment, namely, the boxes labeled “Made in Thailand” at Tianjin Lingyu's plant. *See Decision Memorandum* at 21. In view of evidence clearly consistent with a fraudulent scheme, Plaintiffs' arguments regarding the supposedly inadvertent nature of Tianjin Lingyu's conduct and reference to certain linguistic gaps are unavailing. The existence of mislabeled boxes indicating their origin in another country not subject to the Order justifies Commerce's conclusion that Tianjin Lingyu is engaged in a fraudulent transshipment scheme. Further, Tianjin Lingyu's employees' purported inability to read English does not excuse participation in a fraudulent transshipment scheme. Given that Commerce found that the evidence on the record indicated that Tianjin Lingyu was involved with a fraudulent transshipment scheme, the court agrees that it was reasonable for Commerce to doubt the “veracity, completeness, and accuracy of all of the information provided by Tianjin Lingyu.” *See Decision Memorandum* at 21. Commerce explained that it “takes seriously its role in preventing fraud and evasion on its

proceedings, and cannot rely on information from parties who take part in such activities.” *Id.*

Dezhou Hualude notes that Commerce’s observations at the “Tianjin Lingyu verification plant tour occurred outside the current period of review [(“POR”)] of August 1, 2016 through July 31, 2017,” and argues that Commerce’s finding of fraud could not be reasonably attributed to “Dezhou Hualude’s sales data or Tianjin Lingyu’s production data during the POR.” Dezhou Br. at 11. Dezhou Hualude, however, fails to demonstrate that Commerce’s conclusion that Tianjin Lingyu’s fraudulent activity occurred during the POR was unreasonable. First, verifications take place outside the POR due to the retrospective nature of Commerce’s administrative reviews, meaning that the agency conducts reviews of entries of subject merchandise after that merchandise is imported into the United States. *See* 19 C.F.R. 351.212(a). By Dezhou Hualude’s rationale, issues discovered during verification could never be relied upon during administrative reviews.

Second, while Dezhou Hualude emphasizes the fact that the boxes were found outside the POR as support for the inference that any fraudulent scheme occurred outside the POR as well, Dezhou Hualude fails to establish that such conclusion is the one and only reasonable inference. The Government notes that Dezhou Hualude’s argument ignores the fact that “[a]lthough the labels on the boxes did not provide a date of sale, Commerce observed several boxes that appeared to have been sitting in the plant for a substantial amount of time, which led Commerce to believe that Tianjin Lingyu sold these falsely labeled boxes during the period of review.” Def.’s Resp. at 6 (citing Verification Report Addendum, CD<sup>3</sup> 261). Given that Plaintiffs have failed to demonstrate that it was unreasonable for Commerce to infer that Tianjin Lingyu engaged in fraudulent activity during the POR, the court sustains Commerce’s finding. *See Tianjin Wanhua Co. v. United States*, 41 CIT \_\_\_, \_\_\_, 253 F. Supp. 3d 1318, 1328 (2017) (emphasizing that claimants challenging Commerce’s determinations that choose among various options must demonstrate that their position is the “one and only reasonable” option on the record); *Mitsubishi Heavy Indus. Ltd. v. United States*, 275 F.3d 1056, 1062 (Fed. Cir. 2001) (“[T]he possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency’s finding from being supported by substantial evidence.” (quoting *Consolidated Edison, Co. v. NLRB*, 305 U.S. 197, 229, (1938))).

The more challenging question is whether it was reasonable for Commerce to apply AFA to Dezhou Hualude. Commerce found no

<sup>3</sup> “CD” refers to a document contained in the confidential administrative record.

record evidence indicating that Dezhou Hualude was in receipt of goods mislabeled as a part of Tianjin Lingyu's fraudulent transshipment activities. See *Decision Memorandum* at 21 (“[W]e... did not find any link between Dezhou Hualude and the U.S. companies identified on the fraudulently marked boxes of nails.”). Nor did Commerce point to any portion of the record demonstrating that Dezhou Hualude was aware of Tianjin Lingyu's fraudulent transshipment activities. The Government explained that Commerce has a practice of “attributing an unaffiliated party's failure to cooperate to the respondent and drawing an adverse inference when the respondent is in a position to induce the unaffiliated party.” Def.'s Resp. at 9. Consistent with this practice, Commerce determined that applying AFA to Dezhou Hualude based on Tianjin Lingyu's fraud was reasonable given Dezhou Hualude's status as “a significant customer” of Tianjin Lingyu. See *Decision Memorandum* at 21.

Having found that Dezhou Hualude was a “significant customer” of Tianjin Lingyu, Commerce determined that Dezhou Hualude was (1) aware or constructively aware of Tianjin's fraudulent transshipment scheme and (2) capable of inducing Tianjin's compliance. *Id.* While Dezhou Hualude emphasizes that there was no information in the record that it was aware of Tianjin Lingyu's engagement in any fraud, Dezhou Br. at 12–13, the court cannot conclude that it was unreasonable for Commerce to apply AFA to Dezhou Hualude given the totality of the record. Commerce found that the relationship between Dezhou Hualude and Tianjin Lingyu was so significant that the agency could conclude that Dezhou Hualude should be reasonably held to account for its significant customer/supplier relationship with Tianjin Lingyu and, thereby, Tianjin Lingyu's fraudulent activity. *Decision Memorandum* at 20. Specifically, Commerce explained:

Dezhou Hualude's sales of subject merchandise during the POR account for a significant portion of Tianjin Lingyu's total production quantity during the POR. Similarly, Tianjin Lingyu is the supplier of a substantial portion of Dezhou Hualude's sales of subject merchandise during the POR. Therefore, Dezhou Hualude is not only a significant customer of Tianjin Lingyu, but Tianjin Lingyu is a supplier of a substantial portion of Dezhou Hualude's sales of subject merchandise. As a result, we find that Dezhou Hualude could, or should, have been aware of Tianjin Lingyu's fraudulent transshipment activity, and therefore induced Tianjin Lingyu's cooperation by refusing to do business with Tianjin Lingyu. Further, we find that Tianjin Lingyu would not be sufficiently deterred from its fraudulent conduct if its

customer (*i.e.*, Dezhou Hualude) was unaffected by Tianjin Liangyu's non-cooperation.

*Id.* at 21. The Government argues that Commerce maintains the authority to apply adverse inferences to a respondent who was situated such that they could have deterred fraudulent conduct by an unaffiliated party. See *Decision Memorandum* at 21 n.105 (citing *Mueller Comercial de Mexico, S. de R.L. De C.V. v. United States*, 753 F.3d 1227, 1233 (Fed. Cir. 2014)); Def.'s Br. at 9. In *Mueller*, the U.S. Court of Appeals for the Federal Circuit ("Federal Circuit") noted that:

Mueller had an existing relationship with supplier Ternium. Therefore, Mueller could potentially have refused to do business with Ternium in the future as a tactic to force Ternium to cooperate... if the cooperating entity has no control over the non-cooperating suppliers, a resulting adverse inference is potentially unfair to the cooperating party.

*Id.* at 1235. As in *Mueller*, here Commerce found that Dezhou Hualude and Tianjin Lingyu had a significant customer/supplier relationship such that Dezhou Hualude could have potentially refused to do business with Tianjin Lingyu as a tactic to induce Tianjin Lingyu to desist from its participation in a fraudulent transshipment scheme. *Cf. Mueller*, 753 F.3d at 1233. However, Dezhou Hualude did not take such steps, therefore, Commerce's decision to rely on partial AFA with respect to Dezhou Hualude was reasonable. At the same time, under the circumstances, Commerce determined that "total AFA is not appropriate because we have no evidence that the issues identified above have impacted Dezhou Hualude's sales of subject merchandise produced by other suppliers." *Decision Memorandum* at 22.

Dezhou Hualude highlights that various concerns about the respondents' behavior and particular circumstances raised in *Mueller* are not present here. See Dezhou Reply at 3–7 (distinguishing the scenario in *Mueller*, where "uncooperative supplier could avoid its own AFA rate and funnel its sales though the cooperative mandatory respondent that was subject to a lower duty deposit rate," from circumstances in this matter). Dezhou Hualude argues that Commerce's determination here lacks "an inducement or a deterrent impact on Tianjin Lingyu" that would justify the application of application of AFA to Dezhou Hualude as a cooperative party. *Id.* at 7. Dezhou Hualude, however, omits the key consideration for Commerce's decision to apply AFA here, namely, Dezhou Hualude was a

significant customer of a supplier engaged in a fraudulent transshipment scheme involving subject merchandise.

As Commerce explained, it maintained “serious concerns with Tianjin Lingyu’s actions (*i.e.*, producing fraudulently marked boxes of nails and providing contradictory and inaccurate information at verification), which not only reflect a failure to cooperate that warrants application of an adverse inference, but also raise serious concerns regarding attempts to undermine the administrative process.” *Decision Memorandum* at 22. Commerce thus concluded that it “takes such issues seriously, and ... intend[s] to share with CBP evidence gathered in the course of our proceedings. In addition, [the agency] will continue to look into this matter further in any future proceeding involving Tianjin Lingyu.” *Id.* In *Mueller*, the court stated that “[t]o the extent that Commerce chooses to rely on inducement/evasion considerations, its approach must be reasonable[,]” and the court clarified that it did not “decide whether relying on inducement/evasion rationales to calculate Mueller’s rate would be reasonable in the circumstances of this case.” *Mueller*, 753 F.3d at 1236. Here, Commerce concluded that its discovery of evidence of a fraudulent transshipment scheme justified the use of partial AFA as to Dezhou Hualude so that it had an incentive to take steps to either induce Tianjin Lingyu to cease its fraudulent activities or cease using Tianjin Lingyu as a supplier. Based on the record, the court concludes that Commerce reasonably determined that Dezhou Hualude “could or should reasonably have been aware” of Tianjin Lingyu’s fraud and further that Dezhou Hualude should have exercised its influence to induce Tianjin Lingyu to desist from any fraudulent activity. *See Decision Memorandum* at 21. Accordingly, the court sustains as reasonable Commerce’s finding that Dezhou Hualude impeded the investigation and its consequent determination to apply partial AFA.<sup>4</sup>

### **B. Calculation of Sample Rate for Cooperative Non-Selected Respondents**

“If it is not practicable [for Commerce] to make individual weighted average dumping margin determinations” for each exporter or pro-

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<sup>4</sup> Since the court sustains Commerce’s application of partial AFA on this basis, Dezhou Hualude’s remaining arguments challenging Commerce’s analysis of its factors of production for water coating and the agency’s refusal to incorporate Tianjin Lingyu’s minor corrections to FOP’s at verification are rejected as moot. *See* Dezhou Br. at 13–16, 16–17; *Decision Memorandum* at 23 & 27 (“Since we are applying partial AFA for Dezhou Hualude’s sales of subject merchandise produced by Tianjin Lingyu, we find this issue moot and will not address it.... With respect to Tianjin Lingyu’s revised FOP database, as discussed above in Comment 4, because we are not relying on Tianjin Lingyu’s information for these final results and instead applying partial facts available to these sales, we are not accepting these minor corrections.”).

ducer “involved in the investigation or review”, 19 U.S.C. § 1677f-1(c)(2) authorizes Commerce to limit its examination of respondents to either (A) a statistically valid sample of respondents; or (B) respondents accounting for the largest volume of the subject merchandise under review. 19 U.S.C. § 1677f-1(c)(2). Commerce’s general practice during AD administrative reviews is to select respondents pursuant to § 1677f-1(c)(2)(B). *See Decision Memorandum* at 7; *see also Sample Methodology Notice*, 78 Fed. Reg. 65,963, 65,964 (“*Sample Methodology*”). When Commerce selects respondents pursuant to § 1677f-1(c)(2)(B), Commerce’s practice has been to look to 19 U.S.C. § 1673d(c)(5) for guidance when calculating the separate rate for respondents not examined in an administrative review (the “separate rate” or “sample rate”), even though § 1673d(c)(5) expressly applies to investigations (as opposed to administrative reviews).<sup>5</sup> *See Decision Memorandum* at 10; *see also* 19 U.S.C. § 1673d(c)(5)(A) (“For purposes of this subsection and section 1673b(d) of this title, the estimated all-others rate shall be an amount equal to the weighted average of the estimated weighted average dumping margins established for exporters and producers individually investigated, excluding any zero and de minimis margins, and any margins determined entirely under section 1677e of this title.”).

In 2013, Commerce adopted a new practice to normally select respondents pursuant to § 1677f-1(c)(2)(A) under certain conditions. Specifically, Commerce explained that it would proceed under § 1677f-1(c)(2)(A), rather than § 1677f-1(c)(2)(B) when the following conditions are met:

- (1) There is a request by an interested party for the use of sampling to select respondents;
- (2) the Department has the resources to examine individually at least three companies for the segment;
- (3) the largest three companies (or more if the Department intends to select more than three respondents) by import volume of the subject merchandise under review account for normally no more than 50 percent of total volume; and
- (4) information obtained by or provided to the Department provides a reasonable basis to believe or suspect that the average export

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<sup>5</sup> The statute also explicitly applies only to market economy proceedings, *see Decision Memorandum* at 10, but Commerce has adopted it in non-market economy proceedings as well. *See Yangzhou Bestpak Gifts & Crafts Co. v. United States*, 716 F.3d 1370, 1374 (Fed. Cir. 2013). Beyond mentioning that the express text of the statute only covers market economy proceedings, Commerce has not provided any rationale for why the calculation of the separate rate should be any different in light of the non-market economy context here. *See generally Decision Memorandum*.

prices and/or dumping margins for the largest exporters differ from such information that would be associated with the remaining exporters.

*Sample Methodology*, 78 Fed. Reg. at 65,964–65; *see also Decision Memorandum* at 8. Commerce explained that it was adopting this policy change due to the concern that since smaller exporters would not be selected for individual examination under § 1677f-1(c)(2)(B), they “may decide to lower their prices as they recognize that their pricing behavior will not affect the AD rates assigned to them.” *See Sample Methodology*, 78 Fed. Reg. at 65,964; *Decision Memorandum* at 7–8. Commerce further stated that under the new practice it would, on a case-by-case basis, include all determined rates, including those based entirely on AFA, in the separate rate calculated for non-selected respondents. *See Sample Methodology*, 78 Fed. Reg. at 65,968–69; *Decision Memorandum* at 10, 12–13.

In the *Final Results*, Commerce determined that it would select mandatory respondents for the review pursuant to 19 U.S.C. § 1677f-1(c)(2)(A) in accordance with its new practice. *Decision Memorandum* at 9 (“In short, we determined that given the large disparity between Stanley’s calculated margins and the margins assigned to the other respondents in the past eight administrative reviews, this raised the exact same evasion concern that was expressed in the *Sampling Methodology Notice*. Therefore, in light of these concerns, we appropriately relied on a statistically valid sample to select respondents in this review.”). Commerce determined that it was not bound by § 1673d(c)(5) because administrative reviews are conducted pursuant to 19 U.S.C. § 1677f-1(c)(2). *Id.* at 10, 12. Commerce stated that there is no statute that addresses the establishment of a rate to be applied to individual companies not selected for examination in an administrative review conducted pursuant to 19 U.S.C. § 1677f-1(c)(2). *Id.* at 10. Despite this broad statement, Commerce acknowledged that “in administrative reviews involving non-market economy countries, where Commerce does not employ sampling as discussed below, Commerce’s practice has been to look to section 735(c)(5) of the Act, which provides instructions for calculating the all-others rate in investigations, for guidance when calculating the separate rate for respondents not examined in an administrative review.” *Id.*

Commerce explained that it found § 1673d(c)(5) to be inapplicable in this proceeding as “Commerce has selected respondents through sampling under section 777A(c)(2)(A) of the Act, as opposed to relying on the largest producers/exporters under section 777A(c)(2)(B) of the

Act.” *Id.* at 11. Commerce noted that “[w]hile there are situations when it is not appropriate to include AFA or zero/de minimis rates in the rate to be applied to companies whose entries are not individually examined, Commerce’s determination on whether to include or exclude these rates in this case is based on Commerce’s method of respondent selection through sampling and the fact that this is an administrative review and not an investigation.” *Id.* Commerce concluded “that excluding AFA rates from the sample rate would give respondents the ability to manipulate the all others rate,” and that “including AFA rates in the sample rate” is important “to maintain the validity of the sample.” *Id.* Consequently, Commerce included the AFA rate assigned to Shandong Dinglong, a mandatory respondent that “received a rate based on AFA based on its withdrawal from the review,” in its calculation of the sample rate in the *Final Results*. *See id.* at 10, 12–13.

Commerce noted that its authority to exercise discretion in calculating the sample rate was affirmed by this Court when challenged in two prior cases. *See Decision Memorandum* at 10 n.43, 11, & 12 n.51 (citing *Asociacion Colombiana de Exportadores de Flores v. United States*, 13 CIT 13, 704 F. Supp. 1114 (1989), *aff’d*, 901 F.2d 1089 (Fed. Cir. 1990), and *Laizhou Auto Brake Equip. Co. v. United States*, 32 CIT 711 (2008)). In *Asociacion*, the court considered Commerce’s use of sampling and noted that Commerce was justified in including “in its all other rate best information rates for companies selected for the sample who did not respond to questionnaires.” *Asociacion*, 13 CIT at 21 n.11, 704 F. Supp. at 1121 n.11. The court explained that “[i]n a random sampling situation, to exclude such non-responding companies from the all other rate would undermine the overall methodology. This case is distinguishable from non-random sampling cases on this point.” *Id.*

In *Laizhou*, Commerce conducted an administrative review by selecting respondents pursuant to 19 U.S.C. § 1677f-1(c)(2)(A), and included in its calculation of the sample rate all individually investigated respondents, including two de minimis rates and one rate based on AFA. *Laizhou*, 32 CIT at 713–14, 724. The court affirmed Commerce’s inclusion of an AFA rate in the sample rate calculation, explaining that because administrative reviews conducted pursuant to § 1677f-1(c)(2)(A) require that a statistically valid pool of respondents be selected for calculating the rate for non-selected respondents, Commerce may compute “a statistically valid sample rate that is representative of the population as a whole” that “include[s] the margins determined for all selected respondents, even if that sample rate happens to be composed in part on a respondent’s rate which is

based on adverse facts available.” See *Laizhou*, 32 CIT at 723–24. The court rejected plaintiffs’ argument in *Laizhou* that Commerce’s approach “punishes fully cooperative parties by assigning them a rate unfairly inflated by the non-cooperation of another party,” reasoning that a “sample rate by its nature cannot meet the precision of an individualized rate as to any given party.” *Laizhou*, 32 CIT at 724 (internal quotations omitted). The court further noted that “companies that would otherwise have received an individualized rate lower than the sample rate will in a sense be punished while those that would otherwise have received a higher rate will benefit. This element is an inherent and accepted part of any sample.” *Id.*

Shanxi and Xi’an Metals (“separate rate Plaintiffs”) now challenge Commerce’s sample rate calculation methodology in the *Final Results*. While the separate rate Plaintiffs concede that *Asociacion* and *Laizhou* appear to support the lawfulness of Commerce’s sample rate calculation in the final results, the separate rate Plaintiffs “respectively request that the Court consider these opinions in light of the law, and the facts of this case,” arguing that “[a]n important issue appears not to have been addressed in these cases, specifically, whether Commerce’s methodology was consistent with the express requirements of the statute.” Shanxi Br. at 5. The separate rate Plaintiffs further note that subsequent decisions have called into question “the reasonableness of this methodology, as applied to this appeal.” *Id.*

The separate rate Plaintiffs argue that 19 U.S.C. § 1677f-1(c)(2) does not address how to calculate the sample rate, and that Commerce’s interpretation of § 1677f-1(c)(2) (and its refusal to apply § 1673d(c)(5) in this context) creates an unreasonable distinction that runs contrary to the statutory scheme as a whole. See Xi’an Br. at 6 (“This statutory scheme also makes no distinction between selecting mandatory respondents using a volume or sampling methodology.”); Shanxi Reply at 2–3 (arguing that Commerce’s interpretation “ignores the rules of statutory interpretation which provide that a statute must be read as a whole.”). They maintain that § 1677f-1(c)(2) merely establishes the methods that Commerce may choose from in selecting respondents for both administrative reviews and initial investigations, and that regardless of the respondent selection method, the separate rate calculation methodology is controlled by § 1673d. See Shanxi Br. 5–8. Therefore, the separate rate Plaintiffs contend that Commerce’s inclusion of Shandong Dinglong’s AFA rate in the sample rate of the *Final Results* was unlawful as Commerce’s

methodology violated the limitations of § 1673d(c)(5). *See id.* (citing § 1673d(c)(5) and Statement of Administrative Action accompanying the Uruguay Round Agreements Act, H.R. Doc. No. 103–316, vol. 1 at 873).

While the separate rate Plaintiffs first argue that “the plain language of the statute” dictates a ruling in its favor, their proposed statutory interpretation would have the court ignore the introductory clause of § 1673(c)(5)(A), which limits the requirements of that provision to investigations. *See Shanxi Br.* at 7; 19 U.S.C. § 1673(c)(5)(A); *see also Xi’an Br.* at 6–7. Contrary to the separate rate Plaintiffs’ contentions, the statute is silent as to the precise question of how Commerce should calculate the separate rate in administrative reviews, and the court must consider whether Commerce’s interpretation and application of the statute here is reasonable. *See Chevron*, 467 U.S. at 842–43 (“When a court reviews an agency’s construction of the statute which it administers, it is confronted with two questions. First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. ... if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency’s answer is based on a permissible construction of the statute.”).

Commerce explained that its interpretation of the proper sample rate calculation methodology under § 1677f-1(c)(2)(A) was reasonable because “excluding AFA rates from the sample rate would give respondents the ability to manipulate the all others rate,” and that “including AFA rates in the sample rate” is important “to maintain the validity of the sample.” *Id.* at 11. Commerce noted that “the underlying methodology in a random sampling context creates an expectation that the dumping behavior of the selected firms is representative of the population as a whole,” which Commerce maintains “is not present when respondents are selected based on the largest volume,” pursuant to § 1677f-1(c)(2)(B). *Id.* Commerce further noted that its selected methodology reflected its concerns about rate manipulation by non-selected respondents in this proceeding. Specifically, Commerce stated:

Commerce finds that it is appropriate in this review to include all rates to address concerns that the average export prices and/or dumping margins for the largest exporter (*i.e.*, Stanley) differs from the remaining exporters, and to include companies under review with relatively small import volumes that have effectively been excluded from individual examination. Prior to

our use of sampling, these companies maintained a “free-pass” by successfully obtaining a separate rate that would be based solely, or largely, on Stanley’s margin. Further, our experience in this proceeding, as outlined above, is that when we selected additional mandatory respondents, these companies either stopped cooperating after selection as a mandatory respondent, or would be found dumping at margins much higher than Stanley’s margin.

*Decision Memorandum* at 13. Given these concerns about the expected behavior of non-selected respondents, and particularly because of the specific enforcement concerns identified over the course of the proceeding, Commerce concluded:

Therefore, our use of sampling, and our decision to maintain all three rates, including an AFA rate, in the sample rate, is consistent with the evasion concerns expressed in the *Sampling Methodology Notice* and our specific evasion concerns regarding the large disparity between Stanley’s calculated margins and the margins assigned to the other respondents in the past eight administrative reviews. Indeed, the fact that one of the three mandatory respondents in this review provided a separate rate response, then withdrew from participation after it was selected as a mandatory respondent based on sampling, is reflective of our experience of the non-Stanley respondents in the history of this proceeding, as outlined above. This further demonstrates that the inclusion of the company’s AFA rate in the sample rate is indicative of the population as a whole.

*Id.*

As mentioned above, Commerce supported its rationale by relying on *Laizhou* and *Asociacion*, which affirmed Commerce’s inclusion of AFA rates in the sample rate. *See id.* at 11–12. Shanxi argues that *Laizhou* and *Asociacion* were decided prior to the decision by the Federal Circuit in *Albemarle Corp. v. United States*, 821 F.3d 1345 (Fed. Cir. 2016). The separate rate Plaintiffs maintain that *Albemarle* held that § 1673d(c)(5) applies equally in the context of administrative reviews as it does to investigations. Shanxi Br. at 3–4 (quoting *Albemarle*, 821 F.3d at 1352–53). In *Albemarle*, Commerce conducted an administrative review and selected respondents pursuant to 19 U.S.C. § 1677f-1(c)(2)(B). *See* 821 F.3d at 1348, 1353. The two individually examined respondents were assigned de minimis margins. *Id.* at 1349. Commerce proceeded to calculate separate rates for the non-selected respondents “based on the margins it had assigned them

during the previous review period.” *Id.* The Federal Circuit noted that even though Commerce was conducting an administrative review, Commerce could not reasonably avoid the rate calculation method established in 19 U.S.C. § 1673d(c)(5), as Commerce itself had found that § 1673d applied in the underlying proceeding. *See id.* at 1351–53. Therefore, since the individually examined respondents were assigned de minimis margins, the rate Commerce applied to non-selected respondents should be calculated pursuant to the “expected method” in § 1673d(c)(5)(B). *See id.* (“the expected method to calculate the separate rate in such circumstances is to average the individually examined respondents’ de minimis margins.”). The court rejected Commerce’s attempt to bypass the “expected method” § 1673d(c)(5)(B), noting that Commerce’s argument that there was no evidence demonstrating that the “separate rate respondents engaged in pricing behavior similar to the [mandatory respondents]” was “backwards.” *See id.* at 1353. The court clarified that in order for Commerce to deviate from the statute’s expected method, the burden was on Commerce to “find based on substantial evidence that there is a reasonable basis for concluding that the separate respondents’ dumping is different.” *Id.*

Although separate rate Plaintiffs here cite language in *Albemarle* that appears to support their preferred interpretation of 19 U.S.C. § 1677f-1(c)(2), their reliance on *Albemarle* is misplaced. *See Shanxi Br.* at 3–4; *Xi’an Br.* at 6. In *Albemarle*, Commerce determined that § 1673d(c)(5) applied in the underlying proceeding, but Commerce failed to provide a reasonable basis for deviating from that provision’s terms. *See id.* at 1352–53. Here, Commerce rejected the applicability of 19 U.S.C. § 1673d(c)(5)(A), stating that its separate rate calculation is solely based on the terms of § 1677f-1(c)(2)(A). *See Decision Memorandum* at 11–12. Accordingly, the decision in *Albemarle* is not outcome-determinative with respect to separate rate Plaintiffs’ challenges presented in this matter.

The separate rate Plaintiffs also argue that Commerce lacks discretion to include AFA rates when calculating the sample rate during administrative reviews conducted pursuant to 19 U.S.C. § 1677f-1(c)(2)(A). *Shanxi Reply* at 4; *see also Shanxi Br.* at 7–8. This argument is unpersuasive. The express prohibition on the inclusion of AFA rates found in § 1673d(c)(5)(A) for calculating the all-others rate in investigations is *not* found in any statutory provision covering administrative reviews. Congress, therefore, through omission, left Commerce with discretion of how to handle AFA rates when calculat-

ing the all-others rate in *administrative reviews*. And here, separate rate Plaintiffs omit any mention of Commerce's reasonable exercise of that discretion through its explanation that its rate calculation methodology was predicated on its "evasion concerns expressed in the *Sampling Methodology Notice* and our specific evasion concerns regarding the large disparity between Stanley's calculated margins and the margins assigned to the other respondents in the past eight administrative reviews." *Decision Memorandum* at 13. Commerce further emphasized "that one of the three mandatory respondents in this review provided a separate rate response, then withdrew from participation after it was selected as a mandatory respondent based on sampling, is reflective of our experience of the non-Stanley respondents in the history of this proceeding." *Id.*

19 U.S.C. § 1677f-1(c)(2)(A) authorizes Commerce to employ a statistically valid sampling method when choosing respondents to investigate, but does not instruct Commerce as to how to reach a statistically valid result in calculating the sample rate, the purpose of having a statistically valid sample in the first place. *See Laizhou*, 32 CIT at 713–14, 724. In light of the silence of § 1677f-1(c)(2) on the matter, separate rate Plaintiffs' argument that § 1673d(c)(5) should control Commerce's rate calculation methodology has some intuitive merit; however, the court cannot conclude that Congress intended to narrowly limit Commerce's rate calculation authority in such a manner, especially given the threat of evasion that Commerce identified in the underlying proceeding.

The separate rate Plaintiffs argue in the alternative that "[e]ven if the Court determines that Commerce's methodology is not contrary to the express terms of the statute, the methodology is unreasonable." Shanxi Br. at 9. Separate rate Plaintiffs state that "[w]hile the courts have held that Commerce is theoretically allowed to average a *de minimis* rate and an AFA rate to determine the margin for cooperative non-mandatory respondents when the statutory exception is applicable, the courts have consistently found the methodology unreasonable in practice." *Id.* Commerce determined that it is necessary to include AFA rates in calculating the sample rate in order "to maintain the validity of the sample." *Decision Memorandum* at 11. Commerce explained that "because a random sampling procedure was used, Commerce reasonably estimated, in accordance with statistical sampling principles, that other exporters in the population might also have received these rates, had the non-selected firms been individually examined," and concluded that exclusion of AFA rates would undermine the sample being "indicative of the population as a whole." *Id.* at 12.

Separate rate Plaintiffs cite to other decisions that held Commerce's separate rate calculation methodology to be unreasonable due to the inclusion of AFA rates in the calculation. *See* Shanxi Br. at 9 (citing *Yangzhou Bestpak Gifts & Crafts Co. v. United States*, 716 F.3d 1370 (Fed. Cir. 2013) and *Baroque Timber Indus. (Zhongshan) Co. v. United States*, 38 CIT \_\_\_, \_\_\_, 971 F. Supp. 2d 1333, 1342 (2014)). Separate rate Plaintiffs' reliance on these decisions is also misplaced as they did not involve Commerce's use of the sampling methodology under § 1677f-1(c)(2)(A). Here, Commerce determined that the inclusion of the results of AFA-rate respondents is necessary "to maintain the validity of the sample." *See Decision Memorandum* at 11–13.

Separate rate Plaintiffs maintain that "there is no basis to impute any measure of AFA" to Plaintiffs "just because one company declined to respond to the Department's request for information." Shanxi Br. at 10. Further, the separate rate Plaintiffs argue that Commerce's reason for including AFA rates, specifically when selecting respondents via sampling pursuant to § 1677f-1(c)(2)(A), ignores the fact that Commerce's alternate selection method (based on volume under § 1677f-1(c)(2)(B)) assumes that the largest volume exporters "will be representative of all other companies not selected for examination." *Id.* (citing *Albemarle*, 821 F.3d at 1353). Therefore, the separate rate Plaintiffs contend that Commerce cannot reasonably justify including AFA rates in the sampling context solely to ensure "representativeness." *See id.* at 10–11.

Administrative reviews conducted pursuant to 19 U.S.C. § 1677f-1(c)(2)(B) are assumed to be representative of all other companies not selected for examination. *See Albemarle*, 821 F.3d at 1353 ("The very fact that the statute contemplates using data from the largest volume exporters suggests an assumption that those data can be viewed as representative of all exporters."). 19 U.S.C. § 1677f-1(c)(2)(A) requires that Commerce use a statistically valid sample of individually investigated respondents when calculating an average rate for non-selected respondents. Pursuant to § 1677f-1(c)(2)(A), Commerce is obligated to ensure that the sampling process it uses results in a selection that is representative of non-selected respondents. *See* 19 U.S.C. § 1677f-1(c)(2)(A); *see also Laizhou*, 32 CIT at 724 ("Suffice it to say that the point of requiring selection from a statistically valid pool of respondents is to arrive at a statistically valid dumping rate."); *Decision Memorandum* at 11 ("the underlying methodology in a random sampling context creates an expectation that the dumping behavior of the selected firms is representative of the population as a whole."). Therefore, the volume-based selection of respondents under § 1677f-1(c)(2)(B) and Commerce's practice of applying the rate cal-

calculation method of § 1673d(c)(5)(A) are distinguishable from the scenario presented here, where Commerce has determined that under § 1677f-1(c)(2)(A) it may include AFA rates in the sample rate calculation on a case-by-case basis.

The separate rate Plaintiffs' argument also ignores the history of the previous eight administrative reviews in which other selected respondents were non-responsive. *See Decision Memorandum* at 13; *see also* Def.-Intervenor's Resp. at 14–15. Commerce explained that “[i]n determining to base respondent selection on sampling, we found that the information provided by the petitioner (*i.e.*, company margins from previous segments of the proceedings) provided a reasonable basis to believe or suspect that the average dumping margins for the exporter who has consistently been examined as one of the largest exporters in each review (Stanley) differ from dumping margins that would be associated with the remaining exporters.” *Decision Memorandum* at 9. Commerce also noted:

in each of the eight administrative reviews under this order, Stanley has consistently been one of the largest exporters, and has been selected as a mandatory respondent. In addition, Stanley has consistently been a cooperative respondent, and its average calculated weighted-average dumping margin over the previous eight administrative reviews is 7.02 percent. In contrast, in each of the eight administrative reviews, the other mandatory respondents either obtained a much higher calculated margin, did not qualify for a separate rate, or were otherwise non-cooperative and received a margin based on total [AFA]. ... the average margin for respondents other than Stanley, including non-calculated margins, is 106.77 percent. Even when we do not include those non-calculated margins, the average margin for respondents other than Stanley is 105.71 percent. Moreover, throughout the history of the proceeding, the China-wide rate, assigned to those respondents who have failed to demonstrate their independence from the China-wide entity, has remained 118.04 percent.

*Id.* Accordingly, Commerce concluded by determining that “our use of sampling, and our decision to maintain all three rates, including an AFA rate, in the sample rate, is consistent with the evasion concerns expressed in the *Sampling Methodology Notice* and our specific evasion concerns regarding the large disparity between Stanley’s calculated margins and the margins assigned to the other respondents in the past eight administrative reviews.” *Id.* at 13. Given Commerce’s findings as to the potential for evasion in this proceeding, the court

cannot conclude that Commerce acted unreasonably by determining that this pattern of non-responsiveness by smaller respondents randomly selected for review was representative of the likely behavior of non-selected respondents. Therefore, the court sustains as reasonable Commerce's sample rate calculation methodology in the *Final Results*.

### **III. Conclusion**

For the foregoing reasons, the court sustains the *Final Results*. Judgment will enter accordingly.

Dated: April 7, 2021

New York, New York

*/s/ Leo M. Gordon*

JUDGE LEO M. GORDON



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