

# U.S. Customs and Border Protection



## 19 CFR PART 177

### **REVOCATION OF ONE RULING LETTER AND REVOCATION OF TREATMENT RELATING TO THE TARIFF CLASSIFICATION OF SPIDER WEB LIGHTS**

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

**ACTION:** Notice of revocation of one ruling letter, and of revocation of treatment relating to the tariff classification of spider web lights.

**SUMMARY:** Pursuant to section 625(c), Tariff Act of 1930 (19 U.S.C. §1625(c)), as amended by section 623 of title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103-182, 107 Stat. 2057), this notice advises interested parties that U.S. Customs and Border Protection (CBP) is revoking one ruling letter concerning tariff classification of spider web lights under the Harmonized Tariff Schedule of the United States (HTSUS). Similarly, CBP is revoking any treatment previously accorded by CBP to substantially identical transactions. Notice of the proposed action was published in the *Customs Bulletin*, Vol. 55, No. 16, on April 28, 2021. No comments were received in response to that notice.

**EFFECTIVE DATE:** This action is effective for merchandise entered or withdrawn from warehouse for consumption on or after December 19, 2021.

**FOR FURTHER INFORMATION CONTACT:** Marina Mekheil, Chemicals, Petroleum, Metals and Miscellaneous Classification Branch, Regulations and Rulings, Office of Trade, at (202) 325-0974.

#### **SUPPLEMENTARY INFORMATION:**

##### **BACKGROUND**

Current customs law includes two key concepts: informed compliance and shared responsibility. Accordingly, the law imposes an obligation on CBP to provide the public with information concerning the

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

Pursuant to 19 U.S.C. §1625(c)(1), a notice was published in the *Customs Bulletin*, Vol. 55, No. 16, on April 28, 2021, proposing to revoke one ruling letter pertaining to the tariff classification of spider web lights. Any party who has received an interpretive ruling or decision (i.e., a ruling letter, internal advice memorandum or decision, or protest review decision) on the merchandise subject to this notice should have advised CBP during the comment period.

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

In New York Ruling Letter ("NY") N284187, dated March 24, 2017, CBP classified spider web lights in heading 9405, HTSUS, specifically in subheading 9405.30.00, HTSUS, which provides for "Lamps and lighting fittings including searchlights and spotlights and parts thereof, not elsewhere specified or included; illuminated signs, illuminated nameplates and the like, having a permanently fixed light source, and parts thereof not elsewhere specified or included: Lighting sets of a kind used for Christmas trees." CBP has reviewed NY N284187 and has determined the ruling letter to be in error. It is now CBP's position that spider web lights are properly classified, in subheading 9405.40.84, HTSUS, which provides for "Lamps and lighting fittings including searchlights and spotlights and parts thereof, not elsewhere specified or included; illuminated signs, illuminated nameplates and the like, having a permanently fixed light source, and parts thereof not elsewhere specified or included: Other electric lamps and lighting fittings: Other."

Pursuant to 19 U.S.C. §1625(c)(1), CBP is revoking N284187 and revoking or modifying any other ruling not specifically identified to reflect the analysis contained in Headquarters Ruling Letter ("HQ")

H289250, set forth as an attachment to this notice. Additionally, pursuant to 19 U.S.C. §1625(c)(2), CBP is revoking any treatment previously accorded by CBP to substantially identical transactions.

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

Dated: September 30, 2021

ALLYSON MATTANAH

*for*

CRAIG T. CLARK,

*Director*

*Commercial and Trade Facilitation Division*

HQ H289250

September 30, 2021

OT:RR:CTF:CPMM H289250 MMM

CATEGORY: Classification

TARIFF NO.: 9405.40.84, 9903.88.03

MR. JOSEPH STINSON

OMNI GLOBAL SOURCING SOLUTIONS, INC.

4050 S. 26TH ST., #200

PHILADELPHIA, PA 19112

RE: Revocation of NY N284187; Revocation of HQ H072441, NY N027262, HQ H070673, HQ H095410, HQ 952513, and HQ 953932 and modification of NY I83133, HQ H066795, HQ H0700671, and HQ 955758 by Operation of Law; Classification of spider web lights

DEAR MR. STINSON,

This is in reference to the New York Ruling Letter (NY) N284187, issued to you by U.S. Customs and Border Protection (CBP) on March 24, 2017, concerning classification of spider web lights from China under the Harmonized Tariff Schedule of the United States (HTSUS). We have reviewed your ruling, and determined that it is incorrect, and for the reasons set forth below, are revoking your ruling.

We have also reviewed Headquarters Ruling Letter (HQ) H072441, dated September 19, 2011, NY N027262, dated May 20, 2008, HQ H070673, dated September 19, 2011, HQ 095410, dated September 19, 2011, HQ 952513, dated April 26, 1993, HQ 953932, dated April 10, 1993, NY I83133, dated July 10, 2002, and HQ 955758, dated April 15, 1994 HQ H066795, dated March 30, 2010, and HQ H070671, dated September 19, 2011, all issued before the decision in *Target Gen. Merch., Inc. v. United States*, 392 F. Supp. 3d 1326, 1335 (Ct. Int'l Trade 2019), and to the extent they are inconsistent with the holding there, are revoked or modified by operation of law.<sup>1</sup>

Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. §1625(c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103-182, 107 Stat. 2057), a notice of the proposed action was published in the Customs Bulletin, Volume 55, No. 16, on April 28, 2021. No comment was received in response to this notice.

**FACTS:**

In your ruling NY N284187, CBP stated as follows in reference to the subject merchandise:

The merchandise is identified as the 24" UL Halloween Corner Spider Web Lights, Rite Aid Item #9041392, and Mfg. #ES65-771AST. The product is light strings comprised of two black insulated wire conductors measuring 6 feet, incorporating 20 sockets. Each socket has a miniature incandescent lamp that is available in two different colors; orange and

<sup>1</sup> In HQ H072441, NY N027262, HQ H070673, HQ H095410 and NY I83133, CBP classified black and white-corded light sets with orange and purple light bulbs. CBP classified all of the above merchandise in subheading 9405.30.00, HTSUS.

Also, in HQ 952513, HQ 953932, and HQ 955758, CBP classified light sets with plastic fittings in the form of objects such as pumpkins, witches, and skulls. CBP classified all of the above merchandise in subheading 9405.30.00, HTSUS.

purple. The lamps are equally spaced at approximately 5 inches apart along the triangular spider web light string. The corner web size is 24 inches by 24 inches. The light string is designed for both indoor and outdoor use and may be connected end-to-end with additional light strings.

CBP classified the merchandise in NY N284187 in subheading 9405.30.00, HTSUS.

#### **ISSUE:**

Whether the subject spider web light set should be classified under subheading 9405.40, HTSUS, as “other electric lamps,” or under subheading 9405.30, HTSUS, as “lighting sets of a kind used for Christmas trees?”

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

Merchandise imported into the United States is classified under the HTSUS. Tariff classification is governed by the principles set forth in the General Rules of Interpretation (GRIs) and, in the absence of special language or context which requires otherwise, by the Additional U.S. Rules of Interpretation. The GRIs and the Additional U.S. Rules of Interpretation are part of the HTSUS and are to be considered statutory provisions of law for all purposes.

GRI 1 requires that classification be determined first according to the terms of the headings of the tariff schedule and any relative section or chapter notes. In the event that the goods cannot be classified solely on the basis of GRI 1, and if the heading and legal notes do not otherwise require, the remaining GRIs 2 through 6 may then be applied in order. GRI 2(a) provides, in relevant part, that “[a]ny reference in a heading to an article shall be taken to include a reference to that article incomplete or unfinished, provided that, as entered, the incomplete or unfinished articles has the essential character of the complete or finished article.”

The Harmonized Commodity Description and Coding System Explanatory Notes (“ENs”) constitute the official interpretation of the Harmonized System at the international level. While neither legally binding nor dispositive, the ENs provide a commentary on the scope of each heading of the HTSUS and are generally indicative of the proper interpretation of these headings. See T.D. 89–80, 54 Fed. Reg. 35127, 35128 (August 23, 1989).

The 2020 HTSUS provisions under consideration are as follows:

<b>9405:</b>	Lamps and lighting fittings including searchlights and spot-lights and parts thereof, not elsewhere specified or included; illuminated signs, illuminated nameplates and the like, having a permanently fixed light source, and parts thereof not elsewhere specified or included:
9405.30.00	Lighting sets of a kind used for Christmas trees...
9405.30.0010	Miniature series wired sets...
9405.40	Other electric lamps and lighting fittings: Of base metal: Other:

9405.40.82

Light-emitting diode (LED) backlights modules, the foregoing which are lighting sources that consist of one or more LEDs and one or more connectors and are mounted on a printed circuit or other similar substrate, and other passive components, whether or not combined with optical components or protective diodes, and used as backlights illumination for liquid crystal displays(LCDs)

9405.40.84

Other...

In examining the competing subheadings within heading 9405, HTSUS, we note that subheading 9405.30.00, HTSUS, is a “principal use” provision within the meaning ascribed in *Target Gen. Merch., Inc. v. United States*, 392 F. Supp. 3d 1326, 1335 (Ct. Int’l Trade 2019).<sup>2</sup> In *Target Inc.*, the court concluded that because subheading 9405.30.00, HTSUS, is a principal use provision, it is therefore subject to Additional U.S. Rule of Interpretation 1(a), HTSUS, which states as follows:

A tariff classification controlled by use (other than actual use) is to be determined in accordance with the use in the United States at, or immediately prior to, the date of importation, of goods of that class or kind to which the imported goods belong, and the controlling use is the principal use.

The CIT in *Target Inc.*, in discussing principal use held, that based on the plain language of subheading 9405.30, that the provision applies only to lights used on Christmas trees and the goods must meet the following two requirements:

1) the good is a “lighting set,” including those goods that are part of the “general class of lights on strings,” and 2) the principal use of the lighting sets is for use on Christmas trees, not “lighting sets used for other purposes,” such as a general decoration or source of illumination.<sup>3</sup>

Therefore, to classify the subject merchandise, it is necessary to determine whether it belongs to the class or kind of goods that are recognized as being principally used for the decoration of Christmas trees. Courts have provided several factors to apply when determining whether merchandise falls within a particular class or kind of good. They include: (1) the general physical characteristics of the merchandise; (2) the expectation of the ultimate purchasers; (3) the channels of trade in which the merchandise moves; (4) the environment of the sale (e.g. the manner in which the merchandise is advertised and displayed); (5) the usage of the merchandise; (6) the economic practicality of so using the import; and (7) the recognition in the trade of this use.<sup>4</sup>

In *Target Inc.*, the CIT found that the merchandise in dispute, a black-corded light set (with green, purple, and orange light bulbs) and a white-corded light set (with red, blue, purple, amber, light blue, and green light bulbs), were not classified in subheading 9405.30 because “...the black-corded light sets are principally used as Halloween decorations and ... the white-

<sup>2</sup> See also *Primal Lite v. United States*, 15 F. Supp. 2d 915 (CIT 1998); aff’d 182 F. 3d 1362 (Fed. Cir. 1999).

<sup>3</sup> See also *Id.* at 918.

<sup>4</sup> See *United States v. Carborundum Company*, 63 CCPA 98, C.A.D. 1172, 536 F. 2d 373 (1976), cert. denied, 429 U.S. 979.

corded light sets are principally used for general decorative purposes” and neither light set is principally used on Christmas trees and their packaging do no suggest that the goods were designed for such use.<sup>5</sup>

Additionally, The CIT goes on to establish that green-corded light sets are “of a kind used for Christmas trees,” and the black and white-corded light sets are not commercially fungible to goods with green-corded lights sets, as their use, the consumer expectations, and the environment of sale of the black and white-corded lights sets are distinct from the green-corded lights sets.<sup>6</sup>

Furthermore, in *Primal Lite*, the CIT found that the merchandise at issue did not belong to the class or kind of merchandise used for Christmas trees because “plastic shapes in the form of objects such as fruits, vegetables, hearts, rearing horses, guitars and American flags” were included to be fitted over the lights and “are used for indoor and outdoor lighting decoration and illumination purposes unrelated to Christmas trees or the Christmas holiday.”<sup>7</sup>

The triangular spider web shaped corner light set in NY N284187 is likewise distinguishable from Christmas themed light sets. Not only is the cord not green, but the spider web’s triangular shape for use in a corner of a room or doorway prevents it from use on a Christmas tree. Hence, while the merchandise is not identical to the string light sets discussed in *Target Inc.* or *Primal Lite*, the analysis applies and the subject merchandise is correctly classified as other lighting fittings, described in subheading 9405.40.84, HTSUS. Furthermore, all prior rulings classifying black and white-corded light sets or containing non-Christmas light covers in subheading 9405.30, HTSUS, are revoked or modified by operation of law.

### **HOLDING:**

By application of GRIs 1 and 6, the spider web lights are classified in subheading 9405.40.84, HTSUS, which provides for: “Lamps and lighting fittings...and parts thereof not elsewhere specified or included: Other electric lamps and lighting fittings: Other: Other.” The 2020 column one general rate of duty for subheading 9405.40.84, HTSUS, is 3.9% *ad valorem*.

Pursuant to U.S. Note 20 to Subchapter III, Chapter 99, HTSUS, products of China classified under subheading 9405.40.84, HTSUS, unless specifically excluded, are subject to an additional 25% *ad valorem* rate of duty. At the time of importation, you must report the Chapter 99 subheading, i.e., 9903.88.03, in addition to subheading 9405.40.84, HTSUS, listed above.

The HTSUS is subject to periodic amendment so you should exercise reasonable care in monitoring the status of goods covered by the Note cited above and the applicable Chapter 99 subheading. For background information regarding the trade remedy initiated pursuant to Section 301 of the

<sup>5</sup> *Target Inc.* at 1335–1336.

<sup>6</sup> *Id* (The black-corded light sets are not commercially fungible with the green-corded light sets because the actual use, consumer expectations, and environment of sale demonstrate that the black-corded lights sets are more appropriately viewed as Halloween decorations. The white-corded lights sets are also not commercially fungible as the consumer expectations and environment of sale establish that the lights are not interchangeable with green-corded lights sets as they are sold year round and its advertisement does not mention the Christmas holiday.)

<sup>7</sup> *Primal Lite v. United States*, 15 F. Supp. 2d 915, 916 (CIT 1998).

Trade Act of 1974, you may refer to the relevant parts of the USTR and CBP websites, which are available at <https://ustr.gov/issue-areas/enforcement/section-301-investigations/tariff-actions> and <https://www.cbp.gov/trade/remedies/301-certain-products-china> respectively.

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

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

NY N284187, dated March 24, 2017, is hereby REVOKED.

HQ H072441, dated September 19, 2011, NY N027262, dated May 20, 2008, HQ H070673, dated September 19, 2011, and HQ H095410, dated September 19, 2011, are hereby REVOKED by operation of law in accordance with the holding in *Target, Inc.*

NY I83133, dated July 10, 2002, HQ H066795 dated March 30, 2010, and HQ H070671, dated September 19, 2011, are hereby MODIFIED by operation of law in accordance with the holding in *Target, Inc.*

HQ 952513, dated April 26, 1993, and HQ 953932, dated April 10, 1993, are hereby REVOKED by operation of law in accordance with the holding in *Primal Lite*.

HQ 955758, dated April 15, 1994, is hereby MODIFIED by operation of law in accordance with the holding in *Primal Lite*.

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

*Sincerely,*

ALLYSON MATTANAH

*for*

CRAIG T. CLARK,

*Director*

*Commercial and Trade Facilitation Division*

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

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

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

**SUMMARY:** Pursuant to section 625(c), Tariff Act of 1930 (19 U.S.C. § 1625(c)), as amended by section 623 of title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that U.S. Customs and Border Protection (CBP) intends to revoke one ruling letter concerning tariff classification of unframed automotive side mirrors 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 November 19, 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 one ruling letter pertaining to the tariff classification of unframed automotive side mirrors. Although in this notice, CBP is specifically referring to NY N253902, dated June 20, 2014 (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 N253902, CBP classified the unframed automotive side mirrors in heading 7009, HTSUS, specifically in subheading 7009.91.10, HTSUS, which provides for "Glass mirrors, whether or not framed, including rear-view mirrors: Rear-view mirrors for vehicles". CBP has reviewed NY N253902 and has determined the ruling letter to be in error. It is now CBP's position that the unframed automotive side

mirrors are properly classified, in heading 7009, HTSUS, specifically in subheading 7009.10.00, HTSUS, which provides for “Glass mirrors, whether or not framed, including rear-view mirrors: Rear-view mirrors for vehicles”.

Pursuant to 19 U.S.C. § 1625(c)(1), CBP is proposing to revoke NY N253902 and to revoke or modify any other ruling not specifically identified to reflect the analysis contained in the proposed HQ H318979, set forth as Attachment B to this notice. Additionally, pursuant to 19 U.S.C. § 1625(c)(2), CBP is proposing to revoke any treatment previously accorded by CBP to substantially identical transactions.

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

Dated: September 20, 2021

ALLYSON MATTANAH  
*for*

CRAIG T. CLARK,  
*Director*

*Commercial and Trade Facilitation Division*

Attachments

N253902

June 20, 2014

CLA-2-70:OT:RR:NC:2:226

CATEGORY: Classification

TARIFF NO.: 7009.91.1000

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

RE: The tariff classification of an unframed glass mirror from China

DEAR MR. GARDENIER:

In your letter, received in our office on May 26, 2014, you requested a tariff classification ruling regarding an unframed glass mirror.

A sample identified as #7021860, a glass mirror, was submitted to this office. The item is unframed and the reflecting surface measures less than 929 cm<sup>2</sup>.

In your letter, you stated that the item will be used as an exterior side view mirror. You advised our office that the vast majority of these products will be used in trucks.

In your letter, you suggested that the product should be classified as a rear view mirror for vehicles in subheading 7009.10.00, Harmonized Tariff Schedule of the United States (HTSUS). However, the product is not a rear view mirror; in fact, it is a side view mirror. Therefore, subheading 7009.10.00 is not applicable.

The applicable subheading for the unframed glass mirror will be 7009.91.1000, HTSUS, which provides for glass mirrors, whether or not framed...other: unframed: not over 929 cm<sup>2</sup> in reflecting area. The rate of duty will be 7.8 percent ad valorem.

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

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

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

*Sincerely,*

GWENN KLEIN KIRSCHNER

*Director*

*National Commodity Specialist Division*

HQ H318979  
OT:RR:CTF:CPMMA H318979 AJK  
CATEGORY: Classification  
TARIFF NO: 7009.10.0000

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

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

DEAR MR. GARDENIER:

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

**FACTS:**

The subject merchandise was described in NY N253902 as follows:

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

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

**ISSUE:**

Whether the unframed automotive side mirrors are classified in subheading 7009.10.0000, HTSUS, as rearview mirrors, or subheading 7009.91.1000, HTSUS, as unframed glass mirrors.

**LAW AND ANALYSIS:**

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

\* \* \* \* \*

The HTSUS provisions at issue are as follows:

7009	Glass mirrors, whether or not framed, including rear-view mirrors:
7009.10.00	Rear-view mirrors for vehicles
	Other:
7009.91	Unframed:

7009.91.10

Not over 929 cm<sup>2</sup> in reflecting area

\* \* \* \* \*

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

EN 70.09 provides, in pertinent part, as follows:

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

\* \* \* \* \*

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

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

S5.2.1 Field of view. Each passenger car shall have an outside mirror of unit magnification. The mirror shall provide the driver a view of a level road surface extending to the horizon from a line, perpendicular to a longitudinal plane tangent to the driver’s side of the vehicle at the widest point, extending 2.4 m out from the tangent plane 10.7 m behind the driver’s eyes, with the seat in the rearmost position. The line of sight may be partially obscured by rear body or fender contours. The location of the driver’s eye reference points shall be those established in Motor Vehicle Safety Standard No. 104 (§ 571.104) or a nominal location appropriate for any 95th percentile male driver.

...

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

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

**HOLDING:**

By application of GRI 1, the unframed automotive side mirrors are classified under heading 7009,

HTSUS, specifically subheading 7009.10.00, HTSUS, which provides for: "Glass mirrors, whether or not framed, including rear-view mirrors: Rear-view mirrors for vehicles". The 2021 column one, general rate of duty is 3.9% *ad valorem*.

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

**EFFECT ON OTHER RULINGS:**

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

*Sincerely,*

*for*

CRAIG T. CLARK,

*Director*

*Commercial and Trade Facilitation Division*

**19 CFR PART 177****MODIFICATION OF ONE RULING LETTER AND  
REVOCATION OF TREATMENT RELATING TO THE  
TARIFF CLASSIFICATION OF CERTAIN POLYPROPYLENE  
FIBRILLATED YARN**

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

**ACTION:** Notice of modification of one ruling letter, and of revocation of treatment relating to the tariff classification of certain polypropylene fibrillated yarn.

**SUMMARY:** Pursuant to section 625(c), Tariff Act of 1930 (19 U.S.C. § 1625(c)), as amended by section 623 of title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that U.S. Customs and Border Protection (CBP) is modifying one ruling letter concerning tariff classification of certain polypropylene fibrillated yarn under the Harmonized Tariff Schedule of the United States (HTSUS). Similarly, CBP is revoking any treatment previously accorded by CBP to substantially identical transactions. Notice of the proposed action was published in the *Customs Bulletin*, Vol. 55, No. 32, on August 18, 2021. No comments were received in response to that notice.

**EFFECTIVE DATE:** This action is effective for merchandise entered or withdrawn from warehouse for consumption on or after December 19, 2021.

**FOR FURTHER INFORMATION CONTACT:** Tatiana Salnik Matherne, Food, Textiles and Marking Branch, Regulations and Rulings, Office of Trade, at (202) 325–0351.

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

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

information necessary to enable CBP to properly assess duties, collect accurate statistics, and determine whether any other applicable legal requirement is met.

Pursuant to 19 U.S.C. § 1625(c)(1), a notice was published in the *Customs Bulletin*, Vol. 55, No. 32, on August 18, 2021, proposing to modify one ruling letter pertaining to the tariff classification of certain polypropylene fibrillated yarn. Any party who has received an interpretive ruling or decision (i.e., a ruling letter, internal advice memorandum or decision, or protest review decision) on the merchandise subject to this notice should have advised CBP during the comment period.

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

In NY N277404, dated August 12, 2016, CBP classified the polypropylene fibrillated yarn at issue in heading 5404, HTSUS, specifically in subheading 5404.90.0000, HTSUSA, which provides for "Synthetic monofilament of 67 decitex or more and of which no cross-sectional dimension exceeds 1 mm; strip and the like (for example, artificial straw) of synthetic textile materials of an apparent width not exceeding 5 mm: Other." CBP has reviewed NY N277404 and has determined the ruling letter to be in error. It is now CBP's position that the polypropylene fibrillated yarn at issue is properly classified in heading 5607, HTSUS, specifically in subheading 5607.49.2500, HTSUSA, which provides for "Twine, cordage, ropes and cables, whether or not plaited or braided and whether or not impregnated, coated, covered or sheathed with rubber or plastics: Of polyethylene or polypropylene: Other: Other, not braided or plaited: Other."

Pursuant to 19 U.S.C. § 1625(c)(1), CBP is modifying NY N277404 and revoking or modifying any other ruling not specifically identified to reflect the analysis contained in Headquarters Ruling Letter ("HQ") H319270, set forth as an attachment to this notice. Additionally, pursuant to 19 U.S.C. § 1625(c)(2), CBP is revoking any treatment previously accorded by CBP to substantially identical transactions.

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

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

*Attachment*

HQ H319270

October 4, 2021

OT:RR:CTF:FTM H319270 TSM

CATEGORY: Classification

TARIFF NO.: 5607.49.2500

MR. STEPHEN L. FODOR

CUSTOMS SERVICES & SOLUTIONS, INC.

5833 STEWART PKWY # 102 P.O. BOX 5644

DOUGLASVILLE, GA 30135

Re: Modification of New York Ruling Letter (“NY”) N277404; The Tariff Classification of Polypropylene Fibrillated Yarn from Turkey

DEAR MR. FODOR:

This is in reference to NY N277404, dated August 12, 2016, issued to you on behalf of your client, Cosmic International, Inc., concerning the tariff classification of a certain polypropylene fibrillated yarn.<sup>1</sup> In that ruling, U.S. Customs and Border Protection (“CBP”) classified the polypropylene fibrillated yarn at issue under heading 5404, HTSUS, and specifically under subheading 5404.90.0000, HTSUSA, which provides for “Synthetic monofilament of 67 decitex or more and of which no cross-sectional dimension exceeds 1 mm; strip and the like (for example, artificial straw) of synthetic textile materials of an apparent width not exceeding 5 mm: Other.”<sup>2</sup> Upon additional review, we have found this classification to be incorrect. For the reasons set forth below we hereby modify NY N277404 with regard to the tariff classification of the polypropylene fibrillated yarn at issue.

Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. § 1625 (c)(1)), as amended by section 623 of title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), a notice was published in the *Customs Bulletin*, Volume 55, No. 32, on August 18, 2021, proposing to modify NY N277404, and revoke any treatment accorded to substantially identical transactions. No comments were received in response to the notice.

**FACTS:**

In NY N277404, the polypropylene fibrillated yarn at issue was described as follows:

The first sample that was submitted, 9,999 Denier is described as virgin polypropylene fibrillated twine. The yarn is imported from Turkey.

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<sup>1</sup> We note that the polypropylene yarn at issue was subject to protest number 1703–20–102603. In that protest, Cosmic International, Inc. provided a sample of the yarn, stating that the sample represents the same merchandise as the merchandise at issue in NY N277404, because the same product is under consideration in both protest number 1703–20–102603 and NY N277404. The referenced sample was tested in the CBP laboratory, and we have relied on CBP laboratory report number SV20210537 in making a determination in this instance.

<sup>2</sup> We note that NY N277404 also classified another product, described as DTY500/144/2 HIM two-ply texturized polypropylene yarn. This product is not included in this modification.

**ISSUE:**

What is the tariff classification of the polypropylene fibrillated yarn at issue?

**LAW AND ANALYSIS:**

Classification under the HTSUS is determined in accordance with the General Rules of Interpretation (“GRIs”). GRI 1 provides that the classification of goods shall be determined according to the terms of the headings of the tariff schedule and any relative section or chapter notes. In the event that the goods cannot be classified solely 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 2021 HTSUSA provisions under consideration are as follows:

5404	Synthetic monofilament of 67 decitex or more and of which no cross-sectional dimension exceeds 1 mm; strip and the like (for example, artificial straw) of synthetic textile materials of an apparent width not exceeding 5 mm:	*	*	*
5404.90.0000	Other	*	*	*
5607	Twine, cordage, ropes and cables, whether or not plaited or braided and whether or not impregnated, coated, covered or sheathed with rubber or plastics:	*	*	*
	Of polyethylene or polypropylene:	*	*	*
5607.49	Other:	*	*	*
	Other, not braided or plaited:	*	*	*
5607.49.2500	Other	*	*	*

Note 3 to Section XI provides as follows:

- (A) For the purposes of this section, and subject to the exceptions in paragraph (B) below, yarns (single, multiple (folded) or cabled) of the following descriptions are to be treated as “twine, cordage, ropes and cables”:
- (a) Of silk or waste silk, measuring more than 20,000 decitex;
  - (b) Of man-made fibers (including yarn of two or more monofilaments of chapter 54), measuring more than 10,000 decitex;
  - (c) Of true hemp or flax:
    - (i) Polished or glazed, measuring 1,429 decitex or more; or
    - (ii) Not polished or glazed, measuring more than 20,000 decitex;
  - (d) Of coir, consisting of three or more plies;
  - (e) Of other vegetable fibers, measuring more than 20,000 decitex; or

(f) Reinforced with metal thread.

(B) Exceptions:

- (a) Yarn of wool or other animal hair and paper yarn, other than yarn reinforced with metal thread;
- (b) Man-made filament tow of chapter 55 and multifilament yarn without twist or with a twist of less than 5 turns per meter of chapter 54;
- (c) Silkworm gut of heading 5006 and monofilaments of chapter 54;
- (d) Metalized yarn of heading 5605; yarn reinforced with metal thread is subject to paragraph (A)(f) above; and
- (e) Chenille yarn, gimped yarn and loop wale-yarn of heading 5606.

\* \* \*

In understanding the language of the HTSUS, the Explanatory Notes (“ENs”) of the Harmonized Commodity Description and Coding System may be utilized. The ENs, although neither dispositive nor legally binding, provide a commentary on the scope of each heading, and are generally indicative of the proper interpretation of the Harmonized System at the international level. *See* T.D. 89–80, 54 Fed. Reg. 35127 (August 23, 1989).

EN to Section XI provides the following:

(3)(A) For the purposes of this Section, and subject to the exceptions in paragraph (B) below, yarns (single, multiple (folded) or cabled) of the following descriptions are to be treated as “twine, cordage, ropes and cables”:

- (a) Of silk or waste silk, measuring more than 20,000 decitex;
- (b) Of man-made fibres (including yarn of two or more monofilaments of Chapter 54), measuring more than 10,000 decitex;
- (c) Of true hemp or flax:
  - (i) Polished or glazed, measuring 1,429 decitex or more; or
  - (ii) Not polished or glazed, measuring more than 20,000 decitex;
- (d) Of coir, consisting of three or more plies;
- (e) Of other vegetable fibres, measuring more than 20,000 decitex; or
- (f) Reinforced with metal thread.

(B) Exceptions:

- (a) Yarn of wool or other animal hair and paper yarn, other than yarn reinforced with metal thread;
- (b) Man-made filament tow of Chapter 55 and multifilament yarn without twist or with a twist of less than 5 turns per metre of Chapter 54;
- (c) Silk worm gut of heading 50.06, and monofilaments of Chapter 54;
- (d) Metallised yarn of heading 56.05; yarn reinforced with metal thread is subject to paragraph (A) (f) above; and
- (e) Chenille yarn, gimped yarn and loop wale-yarn of heading 56.06.

\* \* \*

## GENERAL

In general, Section XI covers raw materials of the textile industry (silk, wool, cotton, man-made fibres, etc.), semi-manufactured products (such as yarns and woven fabrics) and the made up articles made from those products...

\* \* \*

### (I) CHAPTERS 50 TO 55

\* \* \*

#### (B) Yarns

##### (1) General.

Textile yarns may be single, multiple (folded) or cabled. For the purposes of the Nomenclature:

- (i) **Single yarns** means yarns composed **either of:**
  - (a) Staple fibres, usually held together by twist (**spun yarns**) or of
  - (b) One filament (**monofilament**) of headings 54.02 to 54.05, or two or more filaments (**multifilament**) of heading 54.02 or 54.03, held together, with or without twist (**continuous yarns**).
- (ii) **Multiple (folded) yarns** means yarns formed from two or more single yarns, including those obtained from monofilaments of heading 54.04 or 54.05 (twofold, threefold, fourfold, etc. yarns) twisted together in one folding operation. However, yarns composed solely of monofilaments of heading 54.02 or 54.03, held together by twist, are not to be regarded as multiple (folded) yarns.

The **ply** ("fold") of a multiple (folded) yarn means each of the single yarns with which it is formed.

- (iii) **Cabled yarns** means yarns formed from two or more yarns, at least one of which is multiple (folded), twisted together in one or more folding operations.

The **ply** ("fold") of a cabled yarn means each of the single or multiple (folded) yarns with which it is formed.

\* \* \*

- (2) **Distinction between single, multiple (folded) or cabled yarns of Chapters 50 to 55, twine, cordage, rope or cables of heading 56.07 and braids of heading 58.08.**

(See Note 3 to Section XI)

Chapters 50 to 55 do not cover all yarns. Yarns are classified according to their characteristics (measurement, whether or not polished or glazed, number of plies) in those headings of Chapters 50 to 55 relating to yarns, as twine, cordage, rope or cables under heading 56.07, or as braids under heading 58.08. Table I below shows the correct classification in each individual case:

**TABLE I**  
**Classification of yarns, twine, cordage, rope and cables of textile material.**

Type (*)	Characteristics determining classification	Classification
	* * *	
- Of man made fibres (including those yarns of two or more monofilaments of Chapter 54 (**))	(1) Measuring 10,000 decitex or less	Chapter 54 or 55
	(2) Measuring more than 10,000 decitex	Heading 56.07

**Footnotes.**

(\*) References to the various textiles materials apply also to such mixtures as are classified therewith under the provisions of Note 2 to Section XI (see Part (I) (A) of this General Explanatory Note).

(\*\*) Silk worm gut of heading 50.06, multifilament yarn without twist or with a twist of less than 5 turns per metre, and monofilament, of Chapter 54, and man made filament tow of Chapter 55 do not in any circumstances fall in heading 56.07.

\* \* \*

EN to heading 5607 provides in relevant part as follows:

This heading covers twine, cordage, ropes and cables, produced by twisting or by plaiting or braiding.

**(1) Twine, cordage, ropes and cables, not plaited or braided.**

Parts (I) (B) (1) and (2) (particularly the Table) of the General Explanatory Note to Section XI set out the circumstances in which single, multiple (folded) or cabled yarns are regarded as twine, cordage, ropes or cables of this heading.

\* \* \*

In NY N277404, the polypropylene fibrillated yarn at issue was classified under subheading 5404.90.0000, HTSUSA, which provides for “Synthetic monofilament of 67 decitex or more and of which no cross-sectional dimension exceeds 1 mm; strip and the like (for example, artificial straw) of synthetic textile materials of an apparent width not exceeding 5 mm: Other.” However, consistent with the foregoing discussion, we find this classification to be incorrect.

According to the record, the yarn at issue measures 9,999 denier. In the June 20, 2016 letter requesting a ruling concerning the tariff classification of this yarn, the requestor stated that 9,999 denier is described as 1,111 decitex. Upon review, we find this to be incorrect. Both denier and decitex are units of measure of fibers, yarns, and thread. Denier is defined as the mass in grams per 9,000 meters of yarn.<sup>3</sup> Decitex is defined as the mass in grams per 10,000 meters of yarn.<sup>4</sup> Therefore, we find that 9,999 denier converts to 11,110

<sup>3</sup> [https://www.apparelsearch.com/definitions/miscellaneous/denier\\_measurement\\_definition.htm](https://www.apparelsearch.com/definitions/miscellaneous/denier_measurement_definition.htm)

<sup>4</sup> <https://www.apparelsearch.com/education/measurements/textiles/fibers/tex.html>

decitex.<sup>5</sup> However, upon CBP laboratory testing and according to the CBP laboratory report no. SV20210537, the precise measurement of the sample of the yarn at issue was found to be 11,641 decitex. Based on the foregoing information, we conclude that it is undisputed that the yarn under consideration measures more than 10,000 decitex.

Yarns measuring more than 10,000 decitex are described in Note 3(A)(b) to Section XI and EN 3(A)(b) to Section XI, which provide that yarns of man-made fibers measuring more than 10,000 decitex are to be treated as “twine, cordage, ropes & cables.” Twine, cordage, ropes and cables are classified under heading 5607, HTSUS, which specifically provides for “Twine, cordage, ropes and cables, whether or not plaited or braided and whether or not impregnated, coated, covered or sheathed with rubber or plastics.” EN to heading 5607 further provides that “Parts (I) (B) (1) and (2) (particularly the Table) of the General EN to Section XI set out the circumstances in which single, multiple (folded) or cabled yarns are regarded as twine, cordage, ropes or cables of this heading.” Table I featured in Part (I)(2) of the General EN to Section XI, provides in relevant part that yarns of man-made fibers measuring 10,000 decitex or less, are classified under Chapters 54 or 55, HTSUS. However, yarns measuring more than 10,000 decitex are classified under heading 5607, HTSUS.

Upon review, we conclude that the yarn at issue measures 11,641 decitex and is composed of polypropylene, which is a man-made, artificial material.<sup>6</sup> Accordingly, consistent with Table I found in Part (I)(2) of the General EN to Section XI, it cannot be classified in any heading of Chapter 54, HTSUS. Rather, it is classified in heading 5607, HTSUS, and specifically in subheading 5607.49.2500, HTSUSA, which provides for “Twine, cordage, ropes and cables, whether or not plaited or braided and whether or not impregnated, coated, covered or sheathed with rubber or plastics: Of polyethylene or polypropylene: Other: Other, not braided or plaited: Other.”<sup>7</sup> See NY N207437, dated March 21, 2012 (classifying certain polypropylene yarn measuring 33,333 decitex under heading 5607, HTSUS); See also NY N265266, dated February 29, 2016 (classifying a certain polypropylene rope measuring 65,778 decitex under heading 5607, HTSUS).

### **HOLDING:**

By application of GRIs 1 and 6, we find that the polypropylene fibrillated yarn at issue is classified under heading 5607, HTSUS, and specifically under subheading 5607.49.2500, HTSUSA, which provides for “Twine, cordage, ropes and cables, whether or not plaited or braided and whether or not impregnated, coated, covered or sheathed with rubber or plastics: Of

<sup>5</sup> <https://hextobinary.com/unit/textile/from/deniertex/to/decitex>

<sup>6</sup> <https://www.collinsdictionary.com/us/dictionary/english/polypropylene>

<sup>7</sup> We note that although footnote \*\* to Table I, Part (I)(2) of the General EN to Section XI, excludes certain multifilament yarn without twist or with a twist of less than 5 turns per metre, and monofilament, of Chapter 54 from classification under heading 5607, HTSUS, the yarn at issue is not a multifilament or monofilament yarn. Rather, according to CBP laboratory report no. SV20210537, it is a twine composed of wholly fibrillated polypropylene. Fibrillated yarn is split into visible interconnecting fibrils (fiber-like tears or splits running lengthwise). See NY 083629, dated March 26, 1990, and HQ 089586, dated September 12, 1991 (finding that the term “fibrillation” requires a strip to be split into visible interconnecting fibrils).

polyethylene or polypropylene: Other: Other, not braided or plaited: Other.”  
The 2021 column one, general rate of duty is 9.8¢/kg + 5.3% *ad valorem*.

**EFFECT ON OTHER RULINGS:**

NY N277404, dated August 12, 2016, is hereby MODIFIED.

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

*Sincerely,*

*For*

CRAIG T. CLARK,

*Director*

*Commercial and Trade Facilitation Division*

## ENTRY/IMMEDIATE DELIVERY APPLICATION AND ACE CARGO RELEASE

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

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

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

**DATES:** Comments are encouraged and must be submitted (no later than December 6, 2021) to be assured of consideration.

**ADDRESSES:** Written comments and/or suggestions regarding the item(s) contained in this notice must include the OMB Control Number 1651-0024 in the subject line and the agency name. Please use the following method to submit comments:

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

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

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

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

utility; (2) the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used; (3) suggestions to enhance the quality, utility, and clarity of the information to be collected; and (4) suggestions to minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, e.g., permitting electronic submission of responses. The comments that are submitted will be summarized and included in the request for approval. All comments will become a matter of public record.

### Overview of This Information Collection

**Title:** Entry/Immediate Delivery Application and ACE Cargo Release.

**OMB Number:** 1651-0024.

**Form Number:** CBP Forms 3461 and 3461 ALT.

**Current Actions:** Revision.

**Type of Review:** Revision.

**Affected Public:** Businesses.

**Abstract:** All items imported into the United States are subject to examination before entering the commerce of the United States. There are two procedures available to effect the release of imported merchandise, including "entry" pursuant to 19 U.S.C. 1484, and "immediate delivery" pursuant to 19 U.S.C. 1448(b). Under both procedures, CBP Forms 3461, Entry/Immediate Delivery, and 3461 ALT are the source documents in the packages presented to Customs and Border Protection (CBP). The information collected on CBP Forms 3461 and 3461 ALT allow CBP officers to verify that the information regarding the consignee and shipment is correct and that a bond is on file with CBP. CBP also uses these forms to close out the manifest and to establish the obligation to pay estimated duties in the time period prescribed by law or regulation. CBP Form 3461 is also a delivery authorization document and is given to the importing carrier to authorize the release of the merchandise.

CBP Forms 3461 and 3461 ALT are provided for by 19 CFR 142.3, 142.16, 141.22, and 141.24. The forms and instructions for Form 3461 are accessible at: <https://www.cbp.gov/newsroom/publications/forms?title=3461&=Apply>.

*Ace Cargo Release* (formerly referred to as "Simplified Entry") is a program for ACE entry summary filers in which importers or brokers may file ACE Cargo Release data in lieu of filing the CBP Form 3461. This data consists of 12 required elements: Importer of record; buyer

name and address; buyer employer identification number (consignee number), seller name and address; manufacturer/supplier name and address; Harmonized Tariff Schedule 10-digit number; country of origin; bill of lading; house air waybill number; bill of lading issuer code; entry number; entry type; and estimated shipment value. The four optional data elements are: The container stuffing location, consolidator name and address, ship to party name and address, and the three Global Business Identifier (GBI) identifiers: (20-Digit Legal Entity Identifier (LEI), 9-digit Data Universal Numbering System (DUNS), and 13-digit Global Local Number (GLN)) for the entry filer and the manufacturer/producer, seller and shipper, and optionally, for the exporter, distributor and packager. The GBI identifiers are the new optional data elements that are being collected to better identify the legal entity that is interacting with CBP. The data collected under the ACE Cargo Release program is intended to reduce transaction costs, expedite cargo release, and enhance cargo security. ACE Cargo Release filing minimizes the redundancy of data submitted by the filer to CBP through receiving carrier data from the carrier. This design allows the participants to file earlier in the transportation flow. Guidance on using ACE Cargo Release may be found at <http://www.cbp.gov/trade/ace/features>.

It should be noted that ACE Cargo Release was previously called Simplified Entry.

*Type of Information Collection:* Form 3461 Entry/Immediate Delivery (Paper Only).

**Estimated Number of Respondents:** 12,307.

**Estimated Number of Annual Responses per Respondent:** 1.

**Estimated Number of Total Annual Responses:** 12,307.

**Estimated Time per Response:** 15 minutes (0.25 hours).

**Estimated Total Annual Burden Hours:** 3,077.

*Type of Information Collection:* ACE Cargo Release: Form 3461, 3461ALT (Electronic Submission).

**Estimated Number of Respondents:** 9,810.

**Estimated Number of Annual Responses per Respondent:** 2,994.

**Estimated Number of Total Annual Responses:** 29,371,140.

**Estimated Time per Response:** 10 minutes (0.166 hours).

**Estimated Total Annual Burden Hours:** 4,875,609.

Dated: September 30, 2021.

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

[Published in the Federal Register, October 6, 2021 (85 FR 55628)]

## GLOBAL BUSINESS IDENTIFIER (GBI)

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

**ACTION:** 60-Day Notice and request for comments; This is a new collection of information.

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

**DATES:** Comments are encouraged and must be submitted (no later than December 6, 2021) to be assured of consideration.

**ADDRESSES:** Written comments and/or suggestions regarding the item(s) contained in this notice must include the OMB Control Number 1651-0NEW in the subject line and the agency name. Please use the following method to submit comments:

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

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

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

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

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

### **Overview of This Information Collection**

**Title:** Global Business Identifier (GBI).

**OMB Number:** 1651-0NEW.

**Form Number:** N/A.

**Current Actions:** This is a new collection of information.

**Type of Review:** New Information Collection.

**Affected Public:** Businesses.

**Abstract:** U.S. Customs and Border Protection (CBP) is launching a Global Business Identifier (GBI) Evaluative Proof of Concept (EPoC) which aims to determine a single identifier solution that will uniquely discern main legal entity and ownership; specific business and global locations; and supply chain roles and functions. Entry filers must request permission to participate in the GBI EPoC and must obtain and submit all three GBI identifiers as part of the application. The identifiers provide additional information about trade entities and supply chain locations associated with U.S. imports, to CBP for enrollment into the GBI EPoC and, if selected, during the Entry process. The three identifiers are:

- Legal Entity Identifier (LEI)—owned and managed by the Global Legal Entity Identifier Foundation (GLEIF)
- Global Location Number (GLN)—owned and managed by GS1
- Data Universal Numbering System (DUNS)—owned and managed by Dun & Bradstreet (D&B)

GBI EPoC participants will also provide applicant information: Company/entity legal name, legal entity headquarters and/or manufacturing site address, business phone number (associated with provided address), company website, Manufacture/Shipper Identification Code (MID), and Authorized Economic Operator (AEO) identification number (optional).

Automated Broker Interface (ABI) filers (including brokers and self-filers) will be required to complete a GBI enrollment process, via ABI, prior to submitting the identifiers on an electronic entry (CBP Form 3461). Filers are responsible for the associated costs to obtain all three identifiers and will submit each identifier for the following supply chain roles:

- Manufacturer/Producer (required)
- Shipper (required)
- Seller (required)
- Exporter (optional)
- Distributer (optional)
- Packager (optional)

Section 484 of the Tariff Act of 1930, as amended (19 U.S. Code 1484) and Part 141, Code of Federal Regulations, Title 19 (19 CFR part 141), pertain to the entry of merchandise and authorize CBP to require information that is necessary for CBP to determine whether merchandise may be released from CBP custody. Provisions of the U.S. Code and CBP regulations, in various parts and related to various types of merchandise, specify information that is required for entry. For reference, Part 163, Code of Federal Regulations, Title 19 (19 CFR part 163 Appendix A) refers to a wide variety of regulatory provisions for certain information that may be required by CBP.

By testing the identifiers CBP will take its first step in determining whether to amend regulations to mandate the GBI solution. Furthermore, CBP will understand the utility of collecting and/or combining the identifiers' data and will be able to make an informed decision on whether to mandate the use of the GBI solution as an alternative for the Manufacturer/Shipper Identification Code (MID).

*Type of Information Collection:* Electronic Submission of GBI Data and Enrollment Information.

**Estimated Number of Respondents:** 100.

**Estimated Number of Annual Responses per Respondent:** 1.

**Estimated Number of Total Annual Responses:** 100.

**Estimated Time per Response:** 10 minutes.

**Estimated Total Annual Burden Hours:** 17.

Dated: September 30, 2021.

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

[Published in the Federal Register, October 6, 2021 (85 FR 55629)]

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

HYUNDAI ELECTRIC & ENERGY SYSTEMS CO., LTD., Plaintiff-Appellant v.  
UNITED STATES, ABB ENTERPRISE SOFTWARE INC., Defendants-  
Appellees

Appeal No. 2021–1009

Appeal from the United States Court of International Trade in No. 1:19-cv-00058-MAB, Judge Mark A. Barnett.

Decided: October 4, 2021

RON KENDLER, White & Case LLP, Washington, DC, argued for plaintiff-appellant. Also represented by DAVID EDWARD BOND.

KELLY A. KRZYSTYNIAK, Commercial Litigation Branch, Civil Division, United States Department of Justice, Washington, DC, argued for defendant-appellee United States. Also represented by BRIAN M. BOYNTON, JEANNE DAVIDSON, LOREN MISHA PREHEIM; DAVID W. RICHARDSON, Office of the Chief Counsel, United States Department of Commerce, Washington, DC.

MELISSA M. BREWER, Kelley Drye & Warren, LLP, Washington, DC, argued for defendant-appellee ABB Enterprise Software Inc. Also represented by ROBERT ALAN LUBERDA, DAVID C. SMITH, JR.

Before NEWMAN, REYNA, and HUGHES, *Circuit Judges*.

REYNA, *Circuit Judge*.

Hyundai Electric & Energy Systems Co. appeals a judgment of the U.S. Court of International Trade sustaining the U.S. Department of Commerce’s final results in the fifth administrative review of the antidumping duty order on large power transformers from the Republic of Korea. Hyundai challenges Commerce’s decision to cancel verification on the grounds that the information submitted by Hyundai was unverifiable, Commerce’s reliance on facts otherwise available, and Commerce’s use of an adverse inference in selecting from among the facts otherwise available. For the reasons stated below, we affirm.

## I

The U.S. Department of Commerce (“Commerce”) imposes anti-dumping duties on imported products that are sold or likely to be sold in the U.S. at “less than fair value” (“dumping”) when those sales threaten or cause material injury to a U.S. industry. 19 U.S.C. § 1673. In general, to determine whether such products are sold at less than fair value, Commerce undertakes an investigation to ascertain the

difference between the “normal value” of the imported goods, i.e., the sales price in the home market, and the price at which the goods are sold in the U.S. *Id.* §§ 1677(35), 1677b(a). If Commerce determines that a company is selling goods in the U.S. for less than their normal value, and if the U.S. International Trade Commission (“ITC”) determines that such dumping threatens or causes material injury to a U.S. industry,<sup>1</sup> Commerce issues an antidumping duty order imposing an appropriate antidumping duty rate to remedy the threat or injury. *Id.* §§ 1673d(a)(1), (b)(1), (c)(2). After Commerce issues such an order, an affected party may request an annual administrative review so that Commerce can update dumping margins, if appropriate, to address continued dumping, if any. *See* 19 U.S.C. § 1675.

Section 1677m governs Commerce’s conduct of administrative reviews and defines, in certain respects, how Commerce must treat information submitted by an interested party. For example, if an interested party promptly notifies Commerce after receiving an information request that it is “unable to submit the information requested in the requested form and manner,” and (among other things) proposes an alternative form, Commerce must consider the party’s proposal and may modify its requirements to avoid an “unreasonable burden” on the party. *Id.* § 1677m(c)(1). Commerce must also notify the interested party of a deficiency in its response and, if practicable, provide the party an opportunity to rectify the deficiency. *Id.* § 1677m(d). In certain circumstances, § 1677m prohibits Commerce from declining to consider submitted information even though it does not comply with all of Commerce’s requirements. *See id.* § 1677m(e). That prohibition applies where the information is “necessary to the determination” and all of the following requirements are met:

- (1) the information is submitted by the deadline established for its submission,
- (2) the information can be verified,
- (3) the information is not so incomplete that it cannot serve as a reliable basis for reaching the applicable determination,
- (4) the interested party has demonstrated that it acted to the best of its ability in providing the information and meeting the requirements established by the administering authority or the Commission with respect to the information, and
- (5) the information can be used without undue difficulties.

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<sup>1</sup> While the respective investigations of Commerce and the ITC are conducted concurrently, this appeal only involves Commerce’s less than fair value investigation.

*Id.*

Commerce is required to “verify all information relied upon” in making a final determination in an administrative review in certain circumstances, i.e., when a specified domestic interested party files a timely verification request and no verification was conducted in the two immediately preceding administrative reviews. *Id.* § 1677m(i); 19 C.F.R. § 351.307(b)(1)(v). Commerce’s regulations also provide that Commerce will conduct a verification when good cause exists. 19 C.F.R. § 351.307(b)(1)(iv). The regulations further set deadlines for the submission of “factual information,” which vary depending on the type of information. *Id.* § 351.301(c). For factual information other than the types specified in § 351.301(c)(1)-(4), § 351.301(c)(5) sets a submission deadline of “30 days before the scheduled date of the preliminary results in an administrative review, or 14 days before verification, whichever is earlier.” *Id.* § 351.301(c)(5).

Section 1677e applies when information requested by Commerce is incomplete or inaccurate. Under that section, Commerce must make determinations based on “facts otherwise available” when “necessary information is not available on the record,” *id.* § 1677e(a)(1), or when a party engages in the following conduct:

- (A) withholds information that has been requested by the administering authority or the Commission under this subtitle,
- (B) fails to provide such information by the deadlines for submission of the information or in the form and manner requested, subject to subsections(c)(1) and (e) of section 1677m of this title,
- (C) significantly impedes a proceeding under this subtitle, or
- (D) provides such information but the information cannot be verified as provided in section 1677m(i) of this title,

*id.* § 1677e(a)(2).<sup>2</sup>

Section 1677e also permits Commerce to draw an adverse inference “in selecting from among the facts otherwise available” when “an interested party has failed to cooperate by not acting to the best of its ability to comply with a request for information.” *Id.* § 1677e(b)(1)(A). In such a case, Commerce is not required to determine a dumping margin as if the interested party had complied. *Id.* § 1677e(b)(1)(B). Commerce may draw an adverse inference from various sources of

<sup>2</sup> Section 1677e(a) further specifies that the requirement to rely on facts otherwise available is subject to the requirements in Section 1677m(d), which requires Commerce to provide notice and, if practicable, an opportunity to rectify a deficiency in a party’s response to a request for information from Commerce.

information, including the petition, a final determination in the underlying investigation, any previous administrative review, or “any other information placed on the record.” *Id.* § 1677e(b)(2). If Commerce properly draws an adverse inference, then it may “use any dumping margin from any segment of the proceeding under the applicable antidumping order,” *id.* § 1677e(d)(1)(B); it may exercise discretion to apply “the highest” dumping margin if warranted based on “the situation that resulted in the administering authority using an adverse inference,” *id.* § 1677e(d)(2); and it is not required to estimate what the dumping margin would have been if the interested party had cooperated or to demonstrate that the dumping margin selected reflects the alleged commercial reality of the interested party, *id.* § 1677e(d)(3).

## II

### A

On October 16, 2017, Commerce initiated its fifth administrative review of the antidumping duty order on large power transformers (“LPTs”) from the Republic of Korea for the period of review (i.e., “POR”) of August 1, 2016, to July 31, 2017. Initiation of Antidumping and Countervailing Duty Administrative Reviews, 82 Fed. Reg. 48,051 (Oct. 16, 2017) (J.A. 26). Commerce selected Hyundai Heavy Industries Co. as a mandatory respondent. Hyundai Electric & Energy Systems Co. (“Hyundai”) later became the successor-in-interest to Hyundai Heavy Industries Co. J.A. 27985 n.1.

On December 13, 2017, Commerce issued its initial questionnaire seeking specific information related to Hyundai’s U.S. and home market sales of LPTs during the POR. This case involves two categories of information that Commerce requested from Hyundai, namely product-specific cost information and cost-reconciliation information.

#### Product-Specific Cost Information

In Section D of its initial questionnaire, Commerce requested information regarding Hyundai’s costs of producing LPTs. *See* J.A. 205–69. That section specifically sought information about, *inter alia*, Hyundai’s cost accounting system, including for example “the level of product specificity over which [Hyundai’s] cost accounting system normally captures production costs.” J.A. 211. It also asked Hyundai to “[i]dentify and quantify” the “differences between the reporting methodology and the normal books and records.” J.A. 217. In other words, Commerce sought information regarding any discrepancies between the cost data reported to Commerce and the cost data actu-

ally kept in Hyundai's normal books and records. *Id.* In response, Hyundai disclosed that it had shifted costs among projects in the ordinary course of business to show that each LPT project was profitable. J.A. 7687; Appellant's Br. 30.

On May 24, 2018, Commerce issued a supplemental questionnaire. J.A. 16748–50. In question 9, Commerce referenced Hyundai's cost shifting and requested a detailed disclosure of “the total costs recorded in [Hyundai's SAP accounting system], the total costs reported to the Department, and an itemization of the materials and related costs making up the difference” for each sale in the U.S. market and home market. J.A. 16748. Commerce also asked Hyundai to “[e]xplain in detail how [it] was able to identify and quantify the costs that were miss-recorded [sic] in [its] SAP system” and to “show how the adjustments in each project offset each other and reconcile in total.” J.A. 16748–49.

In response, Hyundai submitted Attachment SD-16, which included (i) a “Breakdown of Direct Material Cost by Material Type” on an annual basis from 2015 to 2017; (ii) a “Monthly Direct Material Cost” for the same three years; and (iii) a “Breakdown of Direct Material Cost by Project Number” for the month of March 2016, which preceded the period of review. J.A. 16909–12. Hyundai explained that the attachment showed the differences between the LPT projects' SAP bills of materials and their actual bills of materials. J.A. 16788. Hyundai further explained, “To prepare the reconciliation, Hyundai downloaded the BOMs [i.e., bills of materials] from both systems and by computer program was able to trace all materials in the [actual] BOMs to the SAP BOMs.” J.A. 16788–89.

On July 12, 2018, Commerce sent Hyundai a second supplemental questionnaire. J.A. 25047–50. Commerce explained, “You did not provide a response to question 9,” and it listed a schedule of required items:

- a. Total POR costs recorded in SAP and the total POR costs reported to [Commerce]. Ensure the total POR cost reported to [Commerce] agrees [with Hyundai's cost of production] file.
- b. For the difference between the SAP costs and the reported costs . . . itemize each specific material and conversion cost item which make up that difference. For example, identify all parts and raw materials that are included or excluded from other LPTs.
- c. For all SAP and reported cost itemized material and [conversion] cost differences, show which LPT project the itemized items were shifted to / from in SAP.

d. Explain in detail how [Hyundai was] able to identify and [quantify] the costs which were miss-recorded [sic] in SAP.

J.A. 25049.

Hyundai responded again on July 23, 2018. J.A. 27355–57, 27366–86. This time, Hyundai provided Attachment 2SD-1, a worksheet that divided the total cost differences by LPT project for reconciliation purposes into six categories: “(1) expenses recorded after the year of cost of goods sold (‘COGS’) recognition for the project; (2) recalculated silicon steel cost; (3) recalculated other material costs; (4) material costs incurred after the year of COGS recognition; (5) recalculated scrap; and (6) recalculated fixed overhead.” J.A. 27355–56, 27369. For a single category, “other material costs,” Attachment 2SD-1 purported to show given costs shifted to particular projects and described the corresponding types of materials. *See* J.A. 27370.

Regarding silicon steel costs, Hyundai explained that, “[u]nlike all other materials, silicon steel is fungible and it is not possible to trace the projects to and from which silicon steel cost might have been shifted.” J.A. 27356. Hyundai further stated that “actual silicon steel consumption is not recorded on a project basis, and only can be calculated manually by reference to the silicon steel processing reports.” *Id.* In Attachment 2SD-1, Hyundai provided data on shifting of steel costs for one sample LPT project. J.A. 27369–70. Hyundai also referenced earlier-submitted Attachment SD-18, which compared, for one LPT project, the “projected consumption” (calculated by engineers to “achieve the desired electrical properties”) and the “actual consumption” as stated in the steel processing report. J.A. 16789–90, 16925. Hyundai explained that “there can be differences between the core steel purchased for a particular transformer and the [silicon] steel consumed,” and it disclosed the “yield loss” for the sample provided in Attachment SD-18. J.A. 16789–90. With respect to the remaining four categories, Hyundai disclosed aggregate cost data.

#### Cost-Reconciliation Information

In its initial questionnaire, Commerce asked Hyundai to provide worksheets, similar to the sample Commerce provided, “that illustrate how the costs reported on the financial statements reconcile to the general ledger or trial balance, to the cost accounting system (*i.e.*, the source used to derive the reported costs), and to the reported costs.” J.A. 216–18. Hyundai responded by providing a worksheet called WS2 in Attachment D-20 that identified nine categories of costs

and, for each category, distinguished between “Subject Merchandise” and “Non-subject Merchandise.” J.A. 8033; *see also* J.A. 8.

Commerce issued a supplemental questionnaire that requested Hyundai to “[d]iscuss how [it] separated cost of sales on tab WS2 between MUC and non-MUC”<sup>3</sup> and to “[d]emonstrate and provide supporting documentation for the MUC and non-MUC breakout for [transformers].” J.A. 16750. Hyundai responded by providing Attachment SD-23, which showed the same information as that provided in Hyundai’s initial response. J.A. 17076.

Subsequently, after Commerce issued its preliminary results, Hyundai submitted a case brief in which it clarified for the first time that the line item for non-MUC for transformers included the cost of manufacturing for “1) non-subject merchandise; 2) third-country sales; 3) U.S. shipments that did not enter the United States during the POR; and, 4) home market shipments made outside the POR and window periods.” J.A. 28309. Hyundai did not separately identify these reconciliation items in its questionnaire responses.

## B

Commerce issued its preliminary results on August 31, 2018, assigning Hyundai a 60.81 percent *ad valorem* antidumping margin, the same margin assigned in the previous administrative review. J.A. 27985–8008. Commerce explained that it used an adverse inference in selecting from the facts otherwise available because Hyundai “had failed to cooperate by not acting to the best of its ability to comply with a request for information to reconcile reported costs at the individual LPT project-level to its normal records.” J.A. 27998. Commerce found that “[t]he missing information [wa]s necessary for Commerce to analyze Hyundai’s section D responses and to calculate a margin.” *Id.* Specifically, regarding product-specific costs, Commerce explained that Hyundai “failed to provide part-specific itemized cost differences.” J.A. 28002–03. In submitting Attachment 2SD-1, Hyundai “only provided the cost differences in aggregate” and averred that “it [wa]s not possible to trace” cost differences for silicon steel, the largest material input. J.A. 28003.

Commerce also explained, regarding cost reconciliation, that Hyundai had “failed to provide its cost reconciliation in the format requested” and failed to adjust the cost of production figures from fiscal year cost of goods sold to period-of-review cost of goods sold. *Id.* Commerce concluded that, despite having “many opportunities,” Hyundai “failed to provide support for the cost differences or an

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<sup>3</sup> “MUC” refers to merchandise under consideration, and “Non-MUC” refers to merchandise not under consideration.

accurate cost reconciliation” and therefore “Commerce was left with unreliable cost data.” J.A. 28004. Commerce also stated that “the information submitted by the established deadline cannot be verified,” *id.*, and shortly thereafter it sent Hyundai a letter confirming that it had decided not to conduct a verification. J.A. 28097.

On April 12, 2019, after the parties had submitted their case briefs following Commerce’s preliminary results, Commerce published its final results and an accompanying issues and decision memorandum. J.A. 28295–321. Commerce again assigned Hyundai a dumping margin of 60.81 percent *ad valorem*, J.A. 28320, and it “continue[d] to find that Hyundai failed to provide the information as requested, or to sufficiently address its manipulation of transformer costs, within its own normal books and records,” J.A. 28301.

Commerce first addressed the reliability of Hyundai’s product-specific costs and found that Hyundai inadequately responded to the initial questionnaire by “only identif[ying] the cost difference in aggregate for each [LPT] project” and by “fail[ing] to fully distinguish each quantity and value difference between its SAP[] costs and the costs reported to Commerce by cost type (*i.e.*, raw materials, direct labor, *etc.*)” J.A. 28304. It further found that Hyundai inadequately responded to Commerce’s supplemental questionnaire because “Hyundai again identified only the total POR cost differences” and, for one sample month outside the period of review, “Hyundai provided a table showing the difference between each project’s SAP[] BOM and the [actual] BOM, and not between SAP[] and the reported costs.” J.A. 28304.

Commerce likewise found that Hyundai inadequately responded to its second supplemental questionnaire by providing the requested level of detail for “only one of the six categories of cost, *i.e.*, other materials, that it identified as being manipulated.” J.A. 28305. Regarding the silicon steel category, Commerce explained that “Hyundai failed to demonstrate and support how each project’s reported silicon steel consumption quantities and per-unit input values were calculated, that they truly represent actual consumption, and how the per-unit input valuations differed from those recorded in SAP[].” *Id.* “Hyundai simply attributed the difference in quantities between the silicon steel processing report and the engineering calculations to yield losses”; however, Commerce rejected that attribution because “[y]ield losses are typically based on the difference between the consumption for the job and the actual amount in the final product, not between consumption at a preliminary processing stage and theoretical quantities.” J.A. 28306. Commerce further found that Hyundai

had failed to show cost differences as requested for the remaining four categories of costs identified by Hyundai. *Id.*

Commerce also rejected Hyundai's argument that the information provided was sufficient because "Commerce has previously relied on the very same information which Commerce now considers unreliable." *Id.* Commerce explained that in the earlier proceedings "Hyundai claimed that it was stopping the practice, however the shifting reoccurred in this segment." *Id.* Further, Commerce found reason in this administrative review to "take a closer look at [Hyundai's] continuing practice and [its] attempt to correct the manipulation" because, in the earlier proceedings, unlike these, "Hyundai indicated the manipulation was limited to select parts of the SAP[] system only." J.A. 28307.

Commerce then turned to Hyundai's cost reconciliation. *Id.* It found that Hyundai provided a cost reconciliation in response to Commerce's initial questionnaire that "a) did not comply with the format requested and b) did not provide requested details." J.A. 28309. Specifically, Commerce had asked Hyundai to "[l]ist each category of non-MUC separately" and reiterated that request in a supplemental questionnaire. *Id.* In the reconciliations Hyundai provided, however, Hyundai "did not provide details on each category of non-MUC" but instead "included a single line titled 'Non-MUC from Transformer' as a reconciling item with no explanation or support." *Id.* Commerce found it was not until Hyundai's case brief after the preliminary results that Hyundai explained that the single reconciling item included "1) non-subject merchandise; 2) third-country sales; 3) U.S. shipments that did not enter the United States during the POR; and, 4) home market shipments made outside the POR and window periods." *Id.* Commerce rejected as "nonsensical" Hyundai's argument that details on these [non-MUC] items are not relevant because Commerce would ultimately exclude them." J.A. 28310. Commerce stated that it "routinely analyze[s] costs excluded from reporting and request[s] supporting documents and detailed explanations of why the cost is appropriate to exclude." *Id.* Commerce also explained that, in a case such as this "where the respondent admits to manipulating its normal books and records, and the excluded costs include LPTs sold to third countries and merchandise made at the same facilities, it was even more crucial for Commerce to identify the detailed reconciling categories and related costs." *Id.*

Commerce next found that Hyundai had not acted to the best of its ability, and thus an adverse inference was warranted. J.A. 28312. Commerce explained that "Hyundai failed to provide the basic information necessary to perform the dumping calculations as described in

the preceding comments and to substantiate what the actual costs were for its transformers.” J.A. 28317. Hyundai’s failure to provide the basic information, Commerce found, prevented Commerce from calculating an accurate antidumping margin and from reversing the effects of Hyundai’s cost shifting. *Id.* Commerce found that Hyundai’s failures to disclose the requested information rendered verification “meaningless,” and it rejected Hyundai’s argument that it should conduct verification to accept new information that would establish the accuracy of its data and resolve the issues stemming from its cost shifting, J.A. 28313.

## C

On May 8, 2019, Hyundai sought judicial review in the U.S. Court of International Trade (“CIT”). Hyundai challenged certain aspects of Commerce’s final determination, including its (1) cancellation of verification, (2) application of facts otherwise available, and (3) use of an adverse inference. *Hyundai Elec. & Energy Sys. Co. v. United States*, 466 F. Supp. 3d 1303, 1307 (Ct. Int’l Trade 2020). On August 4, 2020, the CIT issued a decision sustaining Commerce’s final results in their entirety. *Id.* The CIT first determined that substantial evidence supported Commerce’s decisions to rely on facts otherwise available and cancel verification. *Id.* at 1309–18. The CIT pointed to Commerce’s findings that Hyundai had failed to provide adequate information on product-specific costs and cost reconciliation. *Id.*

Regarding Hyundai’s product-specific cost disclosures, the CIT noted Commerce’s finding that Hyundai had only provided adequate product specific cost information for one of the six cost categories identified by Hyundai, namely other material costs. *See id.* at 1310–13. The CIT also pointed to Commerce’s finding that Hyundai had not tracked the shifting of silicon steel costs from one project to another and had not properly accounted for the differences between the amounts reported in the silicon steel processing reports and the engineering documents. *Id.* at 1313–14. The CIT explained, as Commerce had found, Hyundai had also failed to adequately report product-specific costs on the four remaining cost categories identified by Hyundai; instead, Hyundai had provided sample and aggregate data. *Id.* at 1314–15.

Regarding Hyundai’s cost-reconciliation disclosures, the CIT rejected Hyundai’s arguments that it had provided information satisfying Commerce’s requests and that Commerce did not ask Hyundai for the level of detail that Commerce contends it did. *Id.* at 1316–17.

The CIT also determined that substantial evidence supported Commerce’s use of an adverse inference. *Id.* at 1318–20. The CIT rejected Hyundai’s argument that Commerce, in determining that Hyundai had failed to comply to the best of its ability, improperly overlooked the limitations of Hyundai’s cost accounting system. *Id.* at 1318–19. The CIT reasoned that, although Hyundai did not adequately report its cost-reconciliation and product-specific costs, that information “had to be available to Hyundai if it had accurately recaptured all costs—and indeed, in limited instances, Hyundai provided discrete samples detailing the adjustments for short periods of time and for limited categories of expenses.” *Id.* at 1319.

Hyundai appealed. We have jurisdiction under 28 U.S.C. § 1295(a)(5).

### III

We apply the same standard of review applied by the CIT. *Dupont Teijin Films USA, LP v. United States*, 407 F.3d 1211, 1215 (Fed. Cir. 2005); *SNR Roulements v. United States*, 402 F.3d 1358, 1361 (Fed. Cir. 2005). Accordingly, we uphold a determination by Commerce unless it is “unsupported by substantial evidence . . . or otherwise not in accordance with law.” 19 U.S.C. § 1516a(b)(1)(B)(i); *Dupont*, 407 F.3d at 1215; *SNR Roulements*, 402 F.3d at 1361; *see also Fujitsu Gen. Ltd. v. United States*, 88 F.3d 1034, 1038 (Fed. Cir. 1996). Substantial evidence means “such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.” *Matsushita Elec. Indus. Co. v. United States*, 750 F.2d 927, 933 (Fed. Cir. 1984) (quoting *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477 (1951)).

### A

Commerce’s decision to rely on facts otherwise available was supported by substantial evidence and not contrary to law. Section 1677e instructs Commerce to rely on facts otherwise available when, for example, “necessary information is not available on the record.” 19 U.S.C. § 1677e(a)(1). Commerce explained that information pertaining to both product-specific costs and reconciliation was missing from the record and prevented it from understanding Hyundai’s cost shifting and determining an antidumping margin. Regarding Hyundai’s product-specific costs, Commerce itemized the specific information it needed from Hyundai in the second supplemental questionnaire. In response, Hyundai identified six categories of costs but only provided the requested level of detail for a single category, other materials.

With respect to the silicon steel category, Hyundai failed to provide the details requested. Instead, it explained that it was “not possible to trace” cost shifting for silicon steel. Hyundai also attributed discrep-

ancies between projected consumption and actual consumption to “yield losses.” But as Commerce pointed out, Hyundai’s comparison of the projected consumption to the silicon steel processing reports would not result in a yield loss figure. And for the four remaining cost categories, Commerce observed that Hyundai had provided aggregate-level information that did not satisfy Commerce’s request.

As for Hyundai’s cost reconciliations, Hyundai provided the same single line item twice, and only after Commerce’s preliminary results did Hyundai articulate what that line item included. Commerce’s determination that necessary information was missing from the record and its decision to rely on facts otherwise available were supported by substantial evidence.

Hyundai argues that Commerce did not actually request details on each category of non-MUC for purposes of cost reconciliation. Appellant’s Br. 35. We are not persuaded. In its supplemental questionnaire, Commerce asked Hyundai to “[d]iscuss how you separated cost of sales on tab WS2 between MUC and non-MUC” and to “[d]emonstrate and provide supporting documentation for the MUC and non-MUC breakout for [transformers].” J.A. 16750. By their plain terms, these requests seek more detail than just the “category” of non-MUC as Hyundai contends.

Hyundai also contends that it in fact satisfied Commerce’s requests to fully demonstrate Hyundai’s cost shifting. Appellant’s Br. 37. But the record belies Hyundai’s argument. While there is no doubt that Hyundai provided certain information relating to its cost-shifting, we are not persuaded that Hyundai disclosed information that satisfied Commerce’s requests. Indeed, Hyundai provided the level of detail that Commerce requested with respect to one of the six cost categories, namely “other materials,” that Hyundai identified in its response to Commerce’s second supplemental questionnaire. Hyundai’s repeated disclosure of partial, aggregate, or sample information rather than complete and itemized information establishes that Commerce’s decision to rely on facts otherwise available was reasonable and supported by substantial evidence. *See* 19 U.S.C. § 1677e(a)(1).

## B

Commerce’s decision to cancel verification was also supported by substantial evidence and not contrary to law. Section 1677m(e) provides that Commerce is not obligated to conduct verification when, for example, the information cannot be verified, the information is so incomplete as to be unreliable, or the interested party has not acted to the best of its ability to meet Commerce’s requirements. 19 U.S.C. § 1677m(e). Such is the case here because Hyundai failed to provide

the information necessary for Commerce's analysis despite being given multiple opportunities to do so. Where necessary information is absent, Commerce need not conduct a verification in an attempt to obtain the missing information. *AMS Assocs., Inc. v. United States*, 719 F.3d 1376, 1380 (Fed. Cir. 2013) (concluding that Commerce did not err in declining to conduct verification where, "[w]ithout verifiable information on those matters, Aifudi was necessarily unable to carry its burden"); *Qingdao Sea-Line Trading Co. v. United States*, 766 F.3d 1378, 1386 (Fed. Cir. 2014) ("Commerce was unable to verify the index because Sea-line did not provide the correct source of the data."). Indeed, as the CIT has explained, consistent with Commerce's objective to verify the accuracy and completeness of submitted factual information under 19 C.F.R. § 351.307(d), Commerce typically accepts new information at verification under limited circumstances, i.e., "only when: (1) the need for that information was not evident previously; (2) the information makes minor corrections to information already on the record; or (3) the information corroborates, supports, or clarifies information already on the record." *Jinko Solar Co. v. United States*, 229 F. Supp. 3d 1333, 1356 (Ct. Int'l Trade 2017). Hyundai does not persuasively show that these circumstances are present.

Hyundai argues that Commerce erred in finding Hyundai's cost information unverifiable because, in the past, Commerce conducted verifications on submitted information similar to that submitted by Hyundai in this case. Appellant's Br. 29. We are not persuaded. We have rejected the notion that "Commerce is forever bound by its past practices." *Jiaxing Bro. Fastener Co. v. United States*, 822 F.3d 1289, 1299 (Fed. Cir. 2016). Instead, "each administrative review is a separate exercise of Commerce's authority that allows for different conclusions based on different facts in the record." *Qingdao*, 766 F.3d at 1387. Here, Commerce articulated sound reasons for seeking more detailed information regarding Hyundai's cost-shifting in this administrative review than in prior reviews, including its observation that cost shifting had a larger impact on this administrative review. J.A. 28306–07. Such concerns support the reasonableness of Commerce's requests for a greater amount of detail in this administrative review.

## C

Commerce's decision to use an adverse inference in selecting from among the facts otherwise available is also reasonable and supported by substantial evidence, and not contrary to law. The statement of administrative action on the Uruguay Round Agreements Act pro-

vides that “the purpose of the adverse inference provision is to encourage future cooperation and ensure that a respondent does not obtain a more favorable antidumping rate by failing to cooperate.” *Mukand, Ltd. v. United States*, 767 F.3d 1300, 1307 (Fed. Cir. 2014) (citing H.R. Rep. No. 103–316, at 200 (1994), *reprinted in* 1994 U.S.C.C.A.N. 4040, 4199). An adverse inference is warranted where an interested party fails to act to the best of its ability in responding to Commerce’s request. 19 U.S.C. § 1677e(b)(1)(A); *Nippon Steel Corp. v. United States*, 337 F.3d 1373, 1382 (Fed. Cir. 2003). The “best of its ability” standard requires an interested party to “put forth its maximum effort to provide Commerce with full and complete answers to all inquiries in an investigation.” *Nippon*, 337 F.3d at 1382; *see also Mukand*, 767 F.3d at 1306. The standard “does not condone inattentiveness, carelessness, or inadequate record keeping.” *Nippon*, 337 F.3d at 1382. “An adverse inference may not be drawn merely from a failure to respond, but only under circumstances in which it is reasonable for Commerce to expect that more forthcoming responses should have been made . . . .” *Id.* at 1383.

We have held that an adverse inference may be appropriate where an interested party has been notified of a defect in its questionnaire response yet continues to provide a defective response. *Maverick Tube Corp. v. United States*, 857 F.3d 1353, 1361 (Fed. Cir. 2017) (“Borusan had already failed to provide the information requested in Commerce’s original questionnaire, and the supplemental questionnaire notified Borusan of that defect. § 1677m(d) does not require more.”). Hyundai did so here when, in response to Commerce’s second supplemental questionnaire, it only provided the requested level of detail for one out of six cost categories of product-specific cost information. It also did so when it twice provided the same single line item for non-MUC with respect to transformers in its responses pertaining to cost reconciliation. Given these circumstances, Commerce’s determination that Hyundai did not act to the best of its ability in responding to Commerce’s requests is supported by substantial evidence.

Hyundai contends that it acted to the best of its ability in responding to Commerce’s requests. Hyundai states that it engaged in a “comprehensive effort to provide [Commerce] with” cost reconciliation information. Appellant’s Br. 48. Hyundai also contends that it could not have been more forthcoming in providing Commerce with product-specific cost tracing given the nature of its accounting. *Id.* at 49. We are not persuaded. To the extent that the shortcomings of Hyundai’s responses are attributable to its record keeping, that alone does not avoid an adverse inference. *Nippon*, 337 F.3d at 1382. That is all the more true where, as here, Commerce clearly and repeatedly

requested the information and identified the defects in Hyundai's responses, and the information that was ultimately missing from the record was foundational to Commerce's ability to perform the anti-dumping duty calculations in a sound manner. *See, e.g., Mukand*, 767 F.3d at 1307 ("Product-specific information is a necessary element in the dumping analysis, and it is standard procedure for Commerce to request product-specific data in antidumping investigations. It was thus reasonable for Commerce to expect from Mukand more accurate and responsive answers to the questionnaire.").

#### IV

We hold that Commerce's determinations to rely on facts otherwise available, to cancel verification, and to draw an adverse inference in selecting from among the facts otherwise available are supported by substantial evidence and otherwise not contrary to law. We therefore affirm the CIT's decision sustaining Commerce's final results. We have considered Hyundai's remaining arguments and find them unpersuasive.

#### AFFIRMED

#### COSTS

No costs.

# U.S. Court of International Trade

Slip Op. 21–129

AL GHURAIR IRON & STEEL LLC, Plaintiff, v. UNITED STATES, Defendant, and UNITED STATES STEEL CORPORATION, NUCOR CORPORATION, AND STEEL DYNAMICS, INC., Defendant-Intervenors.

Before: Timothy M. Reif, Judge  
Court No. 20–00142  
PUBLIC VERSION

[Denying plaintiff’s motion for judgment upon the agency record pursuant to USCIT Rule 56.2 and sustaining Final Determination.]

Dated: September 24, 2021

*Robert G. Gosselink*, Trade Pacific PLLC, of Washington, D.C., argued for plaintiff. With him on the brief was *Jonathan M. Freed*.

*Mollie L. Finnan*, Senior Trial Counsel, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, D.C., argued for defendant. With her on the brief were *Brian M. Boynton*, Acting Assistant Attorney General, *Jeanne E. Davidson*, Director, and *Claudia Burke*, Assistant Director. Of counsel on the brief was *Elio Gonzalez*, Senior Attorney, Office of the Chief Counsel for Trade Enforcement and Compliance, U.S. Department of Commerce, of Washington, D.C.

*Benjamin J. Bay*, Schagrin Associates, of Washington, D.C., argued for defendant-intervenors. With him on the brief were *Roger B. Schagrin* and *Luke A. Meisner*.

## OPINION

\* \* \*

### Reif, Judge:

This action arises from a challenge by plaintiff, Al Ghurair Iron & Steel LLC (“AGIS”) to certain aspects of the final results of the U.S. Department of Commerce’s (“Commerce”) final determination of circumvention of the antidumping duty and countervailing duty orders on corrosion-resistant steel products (“CORE”) from the People’s Republic of China (“China”). *See Certain Corrosion-Resistant Steel Products from the People’s Republic of China: Affirmative Final Determination of Circumvention Involving the United Arab Emirates*, 85 Fed. Reg. 41,957 (Dep’t of Commerce July 13, 2020) (“Final Determination”) and accompanying Issues and Decision Mem. (“IDM”).

Plaintiff filed a motion for judgment upon the agency record pursuant to U.S. Court of International Trade (“USCIT”) Rule 56.2 and asserts four principal claims related to Commerce’s Final Determination: (1) substantial evidence does not support that AGIS’ levels of investment and production facilities are minor or insignificant; (2)

substantial evidence does not support Commerce’s determination that the value of processing in the United Arab Emirates (“UAE”) represents only a small proportion of the value of the merchandise imported into the United States; (3) Commerce’s valuation of Chinese cold-rolled steel (“CRS”) and hot-rolled steel (“HRS”) substrates using Malaysian surrogate values was contrary to law; and, (4) Commerce ignored patterns of trade that confirm that AGIS was not circumventing the 2016 CORE Orders. See *Certain Corrosion-Resistant Steel Products from India, Italy, the People’s Republic of China, the Republic of Korea and Taiwan: Amended Final Affirmative Antidumping Determination for India and Taiwan, and Antidumping Duty Orders*, 81 Fed. Reg. 48,390 (Dep’t of Commerce July 25, 2016); see also *Certain Corrosion-Resistant Steel Products from India, Italy, Republic of Korea and the People’s Republic of China: Countervailing Duty Order*, 81 Fed. Reg. 48,387 (Dep’t of Commerce July 25, 2016) (collectively, “2016 CORE Orders”); Mem. Supp. Rule 56.2 Mot. Pl., AGIS, for J. upon Agency R. (“Pl. Br.”) at 17–38, ECF Nos. 34, 36; Reply Br. Pl. AGIS (“Pl. Reply Br.”), ECF Nos. 48, 49. Defendant United States and defendant-intervenors, United States Steel Corporation, Nucor Corporation and Steel Dynamics, Inc. (collectively, “defendant-intervenors”) respond that Commerce’s determination is supported by substantial evidence and is otherwise in accordance with law. See Def.’s Resp. to Pl.’s Rule 56.2 Mot. for J. on Agency R. (“Def. Br.”), ECF Nos. 42, 43; see also Steel Dynamics, Inc.’s Resp. Br. Opp’n to Pl.’s Mot. for J. on Agency R. (“Def.-Intervenor Br.”), ECF No. 44.

For the reasons discussed below, the court sustains Commerce’s Final Determination.

## BACKGROUND

Commerce issued the 2016 CORE Orders on July 25, 2016. To prevent evasion of the 2016 CORE Orders, Commerce initiated several circumvention inquiries with respect to imports from or activities in third countries — among them, the UAE — in August 2019. Preliminary Decision Mem., A-570–026 (Dep’t of Commerce Feb. 7, 2020) (“PDM”) at 1. Like Commerce’s other circumvention investigations, Commerce conducted this inquiry on a country-wide basis. IDM at 11–12. Imports of CRS and HRS substrates from China into the UAE increased following the initiation of the 2016 CORE investigations. *Id.* at 9. Consequently, Commerce commenced an investigation into whether plaintiff, as a CORE manufacturer located in the UAE, was circumventing the 2016 CORE Orders.

In its Final Determination, Commerce reaffirmed its Preliminary Determination from February 18, 2020 (“Preliminary Determina-

tion”), that CORE completed in the UAE from HRS and CRS manufactured in China were circumventing the antidumping duty (“AD”) and countervailing duty (“CVD”) orders on CORE from China. IDM at 1. Commerce determined preliminarily that action was appropriate to prevent evasion of the 2016 CORE Orders pursuant to 19 U.S.C. § 1677j(b)(1)(E). PDM at 25. The U.S. International Trade Commission (“Commission”) was notified of Commerce’s preliminary determination of circumvention on February 11, 2020, and the Commission did not request consultations with Commerce. Between February 24 and March 4, 2020, Commerce conducted verification in the UAE. IDM at 2. Commerce published its Final Determination on July 13, 2020. The only difference between Commerce’s Preliminary Determination and Final Determination was the selection and calculation of the surrogate value used for the Chinese inputs. *Id.* at 5. Commerce also addressed comments on its Preliminary Determination related to non-market economy (“NME”) methodology and other issues in its IDM on July 6, 2020. *Id.* at 20–25.

### ***I. Preliminary Determination***

On February 7, 2020, Commerce issued its PDM. Commerce determined preliminarily that imports into the United States of CORE, completed in the UAE from HRS and/or CRS products sourced from China, were circumventing the AD and CVD orders on CORE from China. PDM at 1.

#### **A. Level of investment, production process and production facilities**

Commerce compared the UAE producers’ investment in the CRS mill and CORE factory in the UAE to a Chinese company’s investment in integrated mills in China. *Id.* at 15. Commerce determined that the initial investment of approximately \$272 million for facilities in the UAE was minor compared to the average investment of \$3.6 billion for construction of integrated steel mills in China. *Id.* Commerce noted its previous comparative analyses that culminated in the determination that the production process and facilities in a third country were insignificant. *Id.* at 18–20. These determinations, in conjunction with information provided by AGIS, led Commerce to find preliminarily that the nature of the production process and extent of production facilities in the UAE were insignificant compared to those in China. *Id.* at 20.

## B. Value of processing in the UAE

Commerce found preliminarily that the value of the processing performed by AGIS in the UAE represented a small proportion of the value of the CORE exported to the United States under 19 U.S.C. § 1677j(b)(1)(C). *Id.* at 22. To evaluate the value added by AGIS, Commerce compared AGIS' metric ton (“\$/MT”) further processing costs to AGIS' \$/MT U.S. sales price. Preliminary Analysis Mem. (Feb. 7, 2020) (“PAM”) at 4–5, CR 47. Commerce found that the value-added percentage of processing HRS and CRS substrates into CORE was [[ ]]% and [[ ]]%, respectively. *Id.* Based on these percentages, Commerce determined that the value added by AGIS represented a small proportion of the total export value. PDM at 21–22.

## C. Use of surrogate values

Commerce determined that use of surrogate values was appropriate in this circumvention proceeding because it was initiated under the 2016 CORE Orders, which are NME proceedings. *Id.* at 8. Commerce's methodology presumes that NME costs and prices are inherently unreliable. Accordingly, Commerce chose to use surrogate values under section 781(b)(1)(D) of the Tariff Act of 1930, as amended, 19 U.S.C. § 1677j(b)(1)(D),<sup>1</sup> to calculate the value of the Chinese substrates. *Id.* In accordance with section 1677b(c)(4), Commerce selected Malaysia as the surrogate country for China because Malaysia has a similar level of economic development to that of China and is a significant producer of comparable merchandise. *Id.* at 8–9.

## D. Patterns of trade

Commerce considered changes in the pattern of trade by comparing data from two 49-month periods — the 49-month period prior to initiation of the circumvention inquiries with regard to the AD and CVD orders on CORE from China (June 2011 through June 2015) and the 49-month period after initiation (July 2015 through July 2019). *Id.* at 23–24. Commerce examined the average monthly volume of imports of CRS and HRS into the UAE from China and found that imports of CRS and HRS increased by 47.01% and 35.01%, respectively, after the initiation of the CORE investigation. *Id.* Additionally, Commerce examined the average monthly volume of exports of CORE from the UAE to the United States and found that exports increased by 5,752.06% during the same period. *Id.* at 24. Commerce determined that these data supported an affirmative finding of circumvention. *Id.*

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

## **II. Final Determination**

On July 13, 2020, Commerce issued its Final Determination. In its Final Determination, Commerce found that, consistent with its Preliminary Determination, the CORE at issue were circumventing the AD and CVD orders on CORE from China. IDM at 1.

### **A. Level of investment, production process and production facilities**

Commerce reaffirmed its preliminary finding that the level of investment required to complete CORE production in the UAE was minor compared to the level of investment required to produce the steel inputs in China. IDM at 17. Commerce noted “magnitudes of difference[]” between the two levels of investment. *Id.*

Commerce reaffirmed also its preliminary finding that the production process and production facilities in the UAE were minor compared to those in China. *Id.* at 18. The production stages required for the steel input in China were more numerous, more technologically complex and required substantially more investment than the production stages undertaken by the UAE company. *Id.*

### **B. Value of processing in the UAE**

In its Final Determination, Commerce continued to find that the value of the processing performed by AGIS in the UAE represented a small proportion of the value of CORE exported to the United States. *Id.* at 8. In consideration of AGIS’ argument, Commerce included profit, financial expenses and selling, general and administrative (“SG&A”) costs in its calculation of AGIS’ further processing costs and found that the value-added percentage of processing HRS and CRS substrates into CORE was [[]]% and [[]]%, respectively. Final Analysis Mem. (July 6, 2020) (“FAM”) at 2–4, CR 88, 89. Based on these new value-added percentages, adjusted to reflect AGIS’ requests, Commerce determined that the value-added percentage remained small. IDM at 20.

### **C. Use of surrogate values**

Commerce upheld its previous use of surrogate values. *Id.* at 21. Commerce claimed that this use was justified because the inquiry was initiated under the 2016 CORE Orders, which were NME proceedings. Since Commerce claimed that NME costs and prices were inherently unreliable, Commerce chose an NME methodology and used surrogate values. *Id.* Commerce reaffirmed also that it chose a surrogate country at a comparable level of economic development to China and with significant producers of comparable merchandise. *Id.*

### D. Patterns of trade

Commerce continued to find that the comparison of the pattern of trade from the 49-month period before the initiation of the 2016 CORE Orders with the 49-month period after the initiation supported a finding of circumvention. *Id.* at 8. Commerce examined also AGIS' import and export data during the same time periods and found an increase in AGIS' sourcing of Chinese-origin substrates and an increase in AGIS' exports of CORE to the United States. *Id.* at 12 (citing PAM at 8). Specifically, Commerce found that AGIS' purchase of CRS and HRS substrates from China increased by [[ ]]% in the 49-month period after the initiation of the CORE investigation. PAM at 7. Additionally, AGIS' export of CORE using Chinese-origin substrate to the United States increased from [[ ]] metric tons to [[ ]] metric tons after the initiation of the 2016 CORE investigations. *Id.* at 8. In addition to country-wide patterns of trade, Commerce found that these AGIS-specific patterns of trade supported a finding of circumvention. IDM at 12.

### STANDARD OF REVIEW

This court has jurisdiction pursuant to 19 U.S.C. § 1516a(a)(2)(B)(vi) and 28 U.S.C. § 1581(c). Under 19 U.S.C. § 1516a(b)(1)(B)(i), the court is required to hold unlawful Commerce's determination if it is found "to be unsupported by substantial evidence on the record, or otherwise not in accordance with law." Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Consol. Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938). This standard is deferential, with a high barrier to reversal. *Nippon Steel Corp. v. United States*, 458 F.3d 1345, 1351–52 (Fed. Cir. 2006) (citation omitted). The question for the court is "not whether we agree with [Commerce's] decision, nor whether we would have reached the same result as [Commerce] had the matter come before us for decision in the first instance," but whether Commerce's determination was "reasonable and supported by the record as a whole . . ." *Id.* at 1352 (first quoting *U.S. Steel Grp. v. United States*, 96 F.3d 1352, 1357 (Fed. Cir. 1996); then quoting *Atlx, Inc. v. United States*, 370 F.3d 1108, 1121 (Fed. Cir. 2004) (internal quotation marks omitted)).

The court must review the record in its entirety, "including whatever fairly detracts from the substantiality of the evidence." *Atl. Sugar, Ltd. v. United States*, 744 F.2d 1556, 1562 (Fed. Cir. 1984). Still, the possibility of drawing two inconsistent conclusions from the record "does not prevent an administrative agency's finding from

being supported by substantial evidence.” *Consolo v. Fed. Mar. Comm’n*, 383 U.S. 607, 620 (1966) (citation omitted). Under the substantial evidence standard, the court should uphold the agency determination as long as “its factual findings are reasonable and supported by the record as a whole, even if there is some evidence that detracts from the agency’s conclusion.” *Shandong Huarong Gen. Corp. v. United States*, 25 CIT 834, 159 F. Supp. 2d 714, 718 (2001), *aff’d sub nom. Shandong Huarong Gen. Grp. Corp. v. United States*, 60 F. App’x 797 (Fed. Cir. 2003).

### LEGAL FRAMEWORK

Circumvention inquiries are governed by 19 U.S.C. § 1677j. When the process of assembly or completion of merchandise occurs in a third country other than the country named in the AD or CVD order, the relevant provision is 19 U.S.C. § 1677j(b). To find that imported merchandise completed in a third country falls within the scope of the AD/CVD order, Commerce must show that the merchandise meets all the criteria under section 1677j(b)(1). Germane to this case are sections 1677j(b)(1)(C) (“the process of assembly or completion in the foreign country referred to in subparagraph (B) is minor or insignificant”) and 1677j(b)(1)(D) (“the value of the merchandise produced in the foreign country to which the antidumping duty order applies is a significant portion of the total value of the merchandise exported to the United States”).

To include imported merchandise completed or assembled in a third country other than the country named in the AD/CVD order, Commerce must determine that the process of assembly or completion in the foreign country is “minor or insignificant.” 19 U.S.C. § 1677j(b)(1)(C). In determining whether the process of assembly or completion is minor or insignificant, the statute directs Commerce to take into account five factors: (1) the level of investment in the foreign country; (2) the level of research and development in the foreign country; (3) the nature of the production process in the foreign country; (4) the extent of production facilities in the foreign country; and, (5) whether the value of processing performed in the foreign country represents a small proportion of the value of the merchandise imported into the United States. 19 U.S.C. § 1677j(b)(2). No single factor under section 1677j(b)(2) controls. 19 C.F.R. § 351.225(h).

Under section 1677j(b)(3), Commerce is required to take into account the following additional factors when making its determination: (1) the pattern of trade, including sourcing patterns; (2) whether the manufacturer or exporter of the merchandise is affiliated with the person who uses the merchandise to assemble or complete in the

foreign country the merchandise that is subsequently imported into the United States; and, (3) whether imports into the foreign country of the merchandise have increased after the initiation of the investigation which resulted in the issuance of such order or finding.

## DISCUSSION

### ***I. Whether substantial evidence supports that AGIS' level of investment in the United Arab Emirates (UAE) and the nature of the production process and the extent of production facilities there are minor or insignificant***

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

##### **1. Commerce's comparison of the levels of investment in the UAE as compared to levels in China**

Plaintiff argues that its level of investment in the UAE is significant under the statute. For example, plaintiff lists AGIS' initial monetary investment as United Arab Emirates Dirham (AED) [[ ]] in 2008, plus a shareholders' loan of AED [[ ]] and project term loan of AED [[ ]] from HSBC Bank. Additional investments amounted to AED [[ ]]. Pl. Br. at 9. Plaintiff claims that by the end of 2018, AGIS' total assets were valued at the substantial sum of AED [[ ]] (approximately \$[[ ]]). *Id.* at 10.

Plaintiff contends that the establishment of its CORE operations prior to the initiation of the investigations that resulted in the *2016 CORE Orders* indicates that AGIS did not circumvent the orders. *Id.* at 22–23. Plaintiff adds that the sequencing of AGIS' initial investment — specifically, its occurrence prior to the issuance of the *2016 CORE Orders* — disproves that AGIS intended to circumvent the order. *Id.* at 23. Plaintiff argues that the sequencing of AGIS' investment shows that AGIS' investment here did not arise as a response or in reaction to the *2016 CORE Orders*. *Id.* Plaintiff points to the *Statement of Administrative Action Accompanying the Uruguay Round Agreements Act*, H.R. Doc. No. 103–316, vol. 1 (1994) (“SAA”), to show that circumvention inquiries are meant to cover intentional evasion as evidenced by minor or insignificant assembly or completion in a third country — unlike, plaintiff maintains, AGIS' operation in the UAE. Pl. Br. at 19. Plaintiff notes that according to the SAA, the purpose of third-country assembly circumvention inquiries is not to deter legitimate investment in third countries. SAA at 224. Rather, plaintiff argues, the purpose is to determine whether a producer was

incentivized to “move its further processing across borders *to avoid the discipline of the order.*” Pl. Reply Br. at 9.

Defendant, on the other hand, asserts that plaintiff’s level of investment in the UAE is not significant — the level of investment in the UAE is minor compared to that in China. Def. Br. at 18. Defendant counters also that the congressional record does not indicate that Congress intended to limit the scope of circumvention inquiries to third-country operations established after the initiation of the investigation leading to the issuance of an AD/CVD order. *Id.* at 24. Defendant notes similarly that the statute does not require intent. *Id.* at 23; 19 U.S.C. § 1677j(b)(1)(E). Defendant argues that there is no indication either in the statute or in its legislative history that evasion must be intentional. Def. Br. at 23; 19 U.S.C. § 1677j(b)(1)(E); *see also* SAA at 224. Rather, defendant maintains that Commerce must only determine that action is appropriate to prevent evasion. Def. Br. at 23.

Defendant-intervenor Steel Dynamics, Inc. adds that the creation of such a restriction would create a “get out of jail free” card by encouraging companies in third countries to rush to build facilities in anticipation of an AD or CVD investigation. Def.-Intervenor Br. at 4. This argument amounts to the contention that an exporter could avoid an affirmative determination of circumvention solely through possession or use of a pre-existing facility.

## **2. Commerce’s comparative analysis of the production process and facilities**

Plaintiff argues that both the production process and production facilities in the UAE are extensive and, therefore, not minor. Pl. Br. at 21. In particular, plaintiff highlights that AGIS’ production process in the UAE to convert steel substrates imported from China into CORE entails at least seven stages. *Id.* at 2. Plaintiff details each stage of the production process in the UAE, including trimming, pickling, cold rolling, hot-dip galvanizing, coating, slitting and cutting. *Id.* Plaintiff notes that Commerce has also issued separate AD and CVD orders for HRS, CRS and CORE, considering each discrete merchandise as individually eligible for its own investigation of unfair trade practices. *Id.* at 6. CORE was also deemed sufficiently distinct as to warrant its own investigation. *See Certain Corrosion-Resistant Steel Products from Italy, India, the People’s Republic of China, the Republic of Korea, and Taiwan: Initiation of Less-Than-Fair Value Investigations*, 80 Fed. Reg. 37,228 (Dep’t of Commerce June 30, 2015); *see also Certain Corrosion-Resistant Steel Products from the People’s Republic of China: Final Determination of Sales at Less Than Fair Value, and Final Affirmative Critical Circumstances Determination*,

*in Part*, 81 Fed. Reg. 35,316 (Dep't of Commerce June 2, 2016). From plaintiff's perspective, it follows logically that manufacturing CORE from hot-rolled or cold-rolled inputs should be considered significant under the statute. Pl. Br. at 6.

With respect to production facilities, plaintiff notes that Commerce's on-site investigation of facilities confirmed that plaintiff employs hundreds of employees. *Id.* at 12. Commerce confirmed that plaintiff's facilities include slitting and pickling lines, a CRS cold-rolling line and two continuous galvanizing lines capable of producing 500,000 metric tons per year of CORE. *Id.* (citing AGIS Initial Questionnaire Response, at Ex. 3, CR 8–28; AGIS Verification Report, at 2, CR 81). Plaintiff references Commerce's description of these operations as sophisticated and reliant on skilled labor and expensive, customized equipment — including conveyor systems, stocking ramps, vertical assemblies, engines and exhaust systems. *Id.* at 13 (citing AGIS Initial Questionnaire Response, at Exs. 3 and 28, CR 8–28; AGIS Verification Report, at 8 and Ex. 8, CR 70 and 81).

Plaintiff contrasts its own production in the UAE to the minor production at issue in *Tissue Paper from the People's Republic of China*. Pl. Br. at 21–22; see also *Certain Tissue Paper Products from the People's Republic of China: Affirmative Preliminary Determination of Circumvention of the Antidumping Duty Order*, 78 Fed. Reg. 14,514 (Dep't of Commerce Mar. 6, 2013); *Certain Tissue Paper Products from the People's Republic of China: Affirmative Final Determination of Circumvention of the Antidumping Duty Order*, 78 Fed. Reg. 40,101 (Dep't of Commerce July 3, 2013) (“*Tissue Paper Final Determination*”) and accompanying Issues and Decision Mem. (“*Tissue Paper IDM*”). In that case, the production process in a third country, India, consisted of cutting and folding tissue paper. *Tissue Paper IDM* at 2. The process in India consisted of converting jumbo rolls into cut-to-length tissue paper, and Commerce considered this conversion minor compared to the previous production process that took place in China. *Id.* at 6. Plaintiff here argues that its own production is more significant in this context than cutting and folding was in the earlier case. Pl. Br. at 21–22.

Defendant's determination of whether the production process and production facilities are significant depends ultimately on the same comparative analysis discussed above. Defendant considers the UAE's production process and facilities minor compared to those in China. Def. Br. at 27. For example, defendant argues that the production facilities — specifically the materials, energy, labor and capital equipment — located in the UAE are not substantial relative to

those in China required to hot roll and produce the inputs. *Id.* at 29. Defendant maintains that “the vast majority of production activities necessary to produce CORE occur at earlier stages in the CORE production process, including at the molten steel, semi-finished steel, and hot-rolling stages.” *Id.* at 28.

## B. Analysis

### 1. Commerce’s comparison of the levels of investment in the UAE as compared to China

Commerce’s conclusion that the investment in the UAE was minor or insignificant based on a comparative analysis is reasonable for four reasons. First, the statute does not outline a specific methodology for Commerce to follow to determine the level of investment. 19 U.S.C. § 1677j(b)(2)(A). Second, Commerce’s approach aligns with its past practice. Third, Commerce has found circumvention regardless of the point in time at which third-country operations were established. Fourth, the statute does not provide for consideration of whether circumvention occurred as a response to the imposition of AD/CVD duties or the initiation of an investigation. *See* 19 U.S.C. § 1677j(b)(3)(C).

Based on the absence of a designated methodology, Commerce has the discretion to decide on its own method of analysis. *See Timken Co. v. United States*, 38 CIT \_\_\_, \_\_\_ n.7, 968 F. Supp. 2d 1279, 1286 n.7 (2014), *aff’d*, 589 F. App’x 995 (Fed. Cir. 2015) (when a statute “places no other limits on the methodologies that Commerce may employ . . . , [it] leav[es] Commerce discretion as to the choice of methodologies”). The statute does not provide for a specific minimum or maximum level of investment to qualify as minor or insignificant, so Commerce has the discretion to adapt to different factual circumstances to address circumvention. 19 U.S.C. § 1677j(b)(2)(A).

Here, Commerce employed an analysis that compared the levels of investment by UAE producers in the CRS mill and CORE factory in the UAE, on the one hand, and a Chinese company’s investment in integrated mills in China, on the other. IDM at 17–20. A determination of the third country’s portion of the total sum of investment is useful to gauge the level of investment in a third country. Comparative analysis helps also to ensure that larger companies with much smaller operations in a third country — operations that may appear significant in absolute terms given the size of the firm, but that comprise a small share of total operations — will not be able to elude an AD/CVD order simply on account of the firm’s large overall size. Accordingly, a comparative analysis was reasonable.

The *China/Vietnam CORE Final Determination* noted an average investment of between \$295 million and \$10.12 billion to construct an integrated steel mill in China, with an average investment of \$3.6 billion per steel mill. IDM at 17; see also *Certain Corrosion-Resistant Steel Products from the People's Republic of China: Affirmative Final Determination of the Antidumping Duty and Countervailing Duty Orders*, 83 Fed. Reg. 23,895 (Dep't of Commerce May 23, 2018) ("*China/Vietnam CORE Final Determination*") and accompanying Issues and Decision Mem. ("*China/Vietnam CORE IDM*") at 39. AGIS' total assets were approximately \$[[ ]], a far smaller amount. PAM at 2. Plaintiff contends that the determination was unreasonable because Commerce's comparison of AGIS' investments to the investments in integrated steel mills in China was inapposite. Pl. Br. at 23. Plaintiff claims also that the record did not support that any of the "integrated steel mills in China" referenced by Commerce actually produced CORE. *Id.* at 24 (citing PAM at 2–3). However, plaintiff does not propose an alternative comparison. Instead, plaintiff states that Commerce should compare investment at each stage of production rather than the overall level of investment. *Id.* Since the statute does not outline a specific methodology for Commerce to determine whether the level of investment is minor or insignificant, 19 U.S.C. § 1677j(b)(2)(A), the court finds that Commerce's methodology here was reasonable.

Second, Commerce's approach was reasonable because it aligns with its past practice. "[I]f Commerce has a routine practice for addressing like situations, it must either apply that practice or provide a reasonable explanation as to why it departs therefrom." *Save Domestic Oil, Inc. v. United States*, 357 F.3d 1278, 1283–84 (Fed. Cir. 2004). In previous cases involving investment in a third country, Commerce used a similar type of comparative analysis and arrived at similar conclusions. See *Certain Corrosion-Resistant Steel Products from Taiwan: Affirmative Final Determination of Circumvention Inquiry on the Antidumping Duty Order*, 84 Fed. Reg. 70,937 (Dep't of Commerce Dec. 26, 2019) ("*Taiwan/Vietnam CORE Final Determination*") and accompanying Issues and Decision Mem. ("*Taiwan/Vietnam CORE IDM*"). In the *Taiwan/Vietnam CORE Final Determination*, Commerce determined that the level of investment in steel mills by Taiwanese producers of CORE rendered the level of investment by Vietnamese CORE producers comparatively insignificant. See *Taiwan/Vietnam CORE IDM* at 8, 60–62. In another case, Commerce compared the investment required for a Chinese manufacturer to produce an unfinished graphitized electrode to the investment required by the third country to complete production of that product.

*See Small Diameter Graphite Electrodes from the People's Republic of China: Affirmative Preliminary Determination of Circumvention of the Antidumping Duty Order and Extension of Final Determination*, 77 Fed. Reg. 33,405, 33,412 (Dep't of Commerce June 6, 2012) (“*SDEGs Preliminary Determination*”) (unchanged in *Small Diameter Graphite Electrodes from the People's Republic of China: Affirmative Final Determination of Circumvention of the Antidumping Duty Orders*, 77 Fed. Reg. 47,596 (Dep't of Commerce Aug. 9, 2012) ) (cited in IDM at 18 n.82). Further, Commerce compared the investment for a Taiwanese manufacturer to produce polyethylene film tubes to the investment required to complete production of those products in the third country. *See Polyethylene Retail Carrier Bags from Taiwan: Affirmative Preliminary Determination of Circumvention of the Antidumping Duty Order*, 79 Fed. Reg. 31,302 (Dep't of Commerce June 2, 2014) (“*PRCBs Preliminary Determination*”) and accompanying Preliminary Decision Mem. (“*PRCBs PDM*”) at 9–10 (unchanged in *Polyethylene Retail Carrier Bags from Taiwan: Affirmative Final Determination of Circumvention of the Antidumping Duty Order*, 79 Fed. Reg. 61,056 (Dep't of Commerce Oct. 9, 2014)) (cited in *China/Vietnam CORE IDM* at 36 n.115).

In these cases, a comparative analysis — similar to that employed by Commerce here — led Commerce to determine that the level of investment in the third country was comparatively minor. *See SDEGs Preliminary Determination*, 77 Fed. Reg. at 33,412–13 (using a comparative analysis to find that the level of investment in a third country was minor compared to the level in China); *see also PRCBs Preliminary Determination*, 79 Fed. Reg. at 31,302 and accompanying *PRCBs PDM* at 9–10 (using a comparative analysis to find that the level of investment in a third country was minor compared to the level in Taiwan).

Moreover, Commerce has found circumvention regardless of the point in time at which third-country operations were established, including instances in which the establishment of such operations preceded the issuance of the underlying AD or CVD order. *See Certain Cold-Rolled Steel Flat Products from the Republic of Korea: Affirmative Final Determinations of Circumvention of the Antidumping Duty and Countervailing Duty Orders* (“*Korea CRS Final Determination*”), 84 Fed. Reg. 70,934 (Dep't of Commerce Dec. 26, 2019) and accompanying *Issues and Decision Mem.* (“*Korea CRS IDM*”) at 57–60. For example, in the *Korea CRS IDM*, Commerce made clear that “a new facility is not required in order for circumvention to occur” in a case involving HRS produced in Korea and converted to CRS in Vietnam. *Korea CRS IDM* at 59. For the statute to be read to exclude affirma-

tive findings of circumvention in any circumstance in which there was a pre-existing facility in a third country would create a de facto exception to the statute. The plain text of the statute does not support the creation of such an exception by this court. *See* 19 U.S.C. § 1677j(b)(2)(A).

This conclusion is buttressed by the fact that when Congress intended to incorporate temporal elements in a circumvention inquiry, Congress did so expressly. *See* 19 U.S.C. § 1677j(b)(3)(C). Section 1677j(b)(3)(C) provides that Commerce consider in a circumvention inquiry whether imports from a third country have increased after the initiation of the investigation that resulted in the issuance of the order. 19 U.S.C. § 1677j(b)(3)(C). Notably, the statute does not provide for consideration of the sequencing of establishment of operations relative to an AD/CVD order; the statute addresses only the timing of actual imports. 19 U.S.C. § 1677j(b)(3)(C).

Finally, the statute similarly does not provide for consideration of whether circumvention occurred as a response to the imposition of AD/CVD duties or the initiation of an investigation. *See* 19 U.S.C. § 1677j(b)(3)(C). Commerce addressed this point directly in its IDM, including by reference to earlier Commerce decisions, including the *Korea CRS Final Determination*. *See Korea CRS Final Determination*; *Korea CRS IDM* at 57–60. In that case, Commerce noted that plaintiff cited neither to legal precedent nor to any other persuasive authority that lays out a requirement for showing *intent* to circumvent. *See Korea CRS IDM* at 59. Similarly, in *Tissue Paper from the People's Republic of China*, Commerce reiterated that “[Commerce] is not required to determine intent during a circumvention inquiry.” *Tissue Paper IDM* at 7. Further, Commerce in the instant case noted that an intent analysis would be “inherently impractical in the context of trade remedies” due to factors like the difficulty of proving intent. *IDM* at 14.<sup>2</sup>

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<sup>2</sup> Commerce explained in its IDM that intent to circumvent is not required by the statute: “AGIS’ argument that Commerce must find intent of evasion in order to reach a finding of circumvention is clearly unsupported by the Act. The section of the Act identifying the factors for evaluating whether merchandise completed or assembled in a foreign country is circumventing an order does not specify that Commerce should consider the intent of a respondent as part of its analysis. Rather, section 781(b)(1)(E) of the Act provides that before issuing an affirmative circumvention determination Commerce should ‘determine[] that action is appropriate . . . to prevent evasion’ of the relevant AD/CVD orders at issue. Nowhere does the statute indicate that ‘evasion’ must be intentional, or that a respondent in the third country must have the ‘intent’ to evade duties. According to AGIS’s interpretation of the Act, even if circumvention of an AD or CVD order exists, Commerce must also — through some undefined means — ascertain a respondent’s intent to evade duties before it may determine that circumvention has occurred. Not only is an intent analysis inherently impractical in the context of trade remedies, there is no support for AGIS’s argument in the statute. Indeed, we have previously explained that intent is not a necessary element of a finding of circumvention.” *IDM* at 13–14 (citations omitted).

Accordingly, for the reasons discussed above, Commerce's conclusion that the investment in the UAE was minor or insignificant based on a comparative analysis was reasonable.

## **2. Commerce's comparative analysis of the production process and facilities**

Commerce in its IDM described and discussed in detail the production process at plaintiff's facilities in China and the production process at its facilities in the UAE and concluded that the latter was minor and not significant. *Id.* at 17–20. Commerce's comparative approach to the production process and facilities was reasonable and supported by substantial evidence.

Commerce noted that the production stages in China, such as steel making, slab casting and hot rolling, are more numerous, more technologically complex and require substantially more investment than the production stages in the UAE, which were comprised substantially of cutting the steel input, dipping it in hydrochloric acid, rinsing it with water, drying, cold-rolling and galvanizing. *Id.* at 18; PAM at 3. Commerce determined that the stages in the UAE were minor compared to those required to make the inputs in China. IDM at 18.

As with Commerce's comparative approach to investment, Commerce's comparative approach to determining whether the production process and facilities were significant or minor was consistent with prior Commerce practice and was reasonable. For example, in the *China/Vietnam CORE Final Determination*, Commerce compared the Vietnam facilities' production process — cold-rolling and galvanizing steel substrates — to the Chinese facilities' production process — creating the HRS and CRS steel substrates. *See China/Vietnam CORE Final Determination* and accompanying China/Vietnam CORE IDM. Commerce determined that the Vietnam facilities' production process was minor compared to that of the Chinese facilities. *See China/Vietnam CORE IDM* at 40–42. Commerce's determination in that case that the substrates produced in China constituted the majority of the production process and that the third country's production process was comparatively minor is comparable to Commerce's determination in this case because the production process analysis in that case is analogous to the production process analysis here.

Plaintiff describes the number of production stages in the UAE and asserts that they are numerous and complex. Pl. Br. at 2, 13, 21. Plaintiff then contrasts those stages with those addressed by Commerce in its determination in *Tissue Paper from the People's Republic of China*. *See Tissue Paper Final Determination*. In that case, Commerce found that the allegedly circumventing respondent merely cut

jumbo rolls to ordered lengths in the third country. *See* Tissue Paper IDM at 6–9.

The statute does not direct the court to evaluate the number of stages involved in a production process. The statute directs the court to consider whether “the nature of the production process” is minor or insignificant. 19 U.S.C. § 1677j(b)(2)(C). As defendant pointed out, a seemingly “extensive operation” may nonetheless be “minor” in the context of the overall process of manufacturing a product — depending on the nature of that product. Def. Br. at 30–31. In that regard, in *Tissue Paper from the People’s Republic of China*, the case offered by plaintiff, the respondent broke the production process down into multiple, discrete stages — including, cutting, dying, printing, packaging and packing cut-to-length tissue paper — what plaintiff here characterizes as “cutting jumbo rolls [of toilet paper] into cut-to-length sheets of paper . . . .” Pl. Br. at 22. Notwithstanding that the operations in the third country entailed various stages, Commerce, applying the statute, found this process to be minor in the context of the overall production process. *See* Tissue Paper IDM at 6.

Finally, plaintiff overlooks also that one stage in its UAE production process — cutting completed CORE to particular sheet sizes — is strikingly similar to cutting tissue paper into ordered lengths. Notably, Congress explicitly referenced cutting steel sheet to customers’ ordered lengths in a third country as a situation that qualifies as circumvention. *See* H.R. Doc. No. 100–33, at 460–61 (1987). Plaintiff’s argument here ignores the comparative aspect of a determination of whether the level of investment is minor or insignificant, or, more specifically, that even if AGIS’ production process and facilities in the UAE appear significant, they are minor as compared to the production process and facilities in China.

Accordingly, Commerce’s comparative approach to determining whether the production process and facilities were not significant or minor was reasonable.

## **II. Commerce’s determination that the value of the *processing* performed in the UAE is a small proportion of the value of the *merchandise* imported into the United States**

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

Plaintiff argues that Commerce’s determination is not supported by substantial evidence because the determination was based on an incorrect calculation of the value-added percentages and Commerce inadequately explained its conclusion that the value of processing performed in the UAE was minor and not significant. Pl. Br. at 26–31.

Plaintiff argues first that Commerce erred in its calculation of the percentages of value added by processing in plaintiff's facilities in the UAE.<sup>3</sup> In particular, plaintiff argues that Commerce added *company-wide* profit, financial expenses and SG&A to the processing costs instead of adding only *U.S. sale-specific* profit, financial expense and SG&A information. *Id.* at 28–29. Plaintiff maintains that this approach resulted in an incorrect calculation because Commerce used profit percentages based on sales of merchandise to countries other than the United States when calculating the proportion of the value of merchandise imported into the United States. *Id.* at 30–31. AGIS presented calculations to Commerce that showed that, had Commerce included profit information for U.S. sales only, the value of processing Chinese HRS and CRS into CORE in the UAE would have been [ ]% and [ ]%, respectively, rather than [ ]% and [ ]%, respectively. *Id.* at 30. Not only did Commerce ignore AGIS' calculations, according to plaintiff, but Commerce also did not provide an explanation for its use of company-wide profit information rather than U.S. sale-specific profit information. Therefore, plaintiff argues, Commerce's determination that the value of processing performed in the UAE was small was based on an incorrect calculation. *Id.* at 30–31.

Second, plaintiff argues that Commerce did not provide a rationale for its conclusion that the value-added percentages were not significant. *Id.* at 27–28. Plaintiff's argument amounts to the contention that Commerce erred in its analysis because of its failure to use a benchmark. *See id.* Plaintiff maintains that Commerce did not explain what level of processing would qualify as significant, "nor did Commerce make any type of comparative analysis as to why these percentages in this particular proceeding should be considered insignificant." *Id.* at 28. Plaintiff claims that Commerce did not clarify the reason that it considered the values still to be small, even once Commerce's calculations were revised at the request of plaintiff. *Id.* at 29.

Plaintiff next points to *Peer Bearing Co.—Changshan v. United States*, 39 CIT \_\_\_, 128 F. Supp. 3d 1286 (2015). In that case, Com-

<sup>3</sup> As discussed above, Commerce found preliminarily that the value-added percentage of processing HRS and CRS substrates into CORE was [ ]% and [ ]%, respectively. PAM at 4–5. In consideration of AGIS' argument, Commerce, in its Final Determination added profit, financial expenses and SG&A costs in its revised calculation of AGIS' further processing costs and found that the value-added percentage of processing HRS and CRS substrates into CORE was [ ]% and [ ]%, respectively. FAM at 2–4. Commerce did not recognize plaintiff's value-added formula that resulted in different figures, [ ]% and [ ]%. IDM at 20; Pl. Br. at 30. Defendant addresses plaintiff's figure by stating only that "the statute, as Commerce observed, does not require the use of AGIS's preferred formula and Commerce was not otherwise somehow obliged to use it." Def. Br. at 35.

merce found that when the cost of manufacturing incurred in the third country accounted for 38% of the total cost of manufacturing of the product, it was sufficient to support a finding of substantial transformation. *Id.* at \_\_\_, 128 F. Supp. 3d at 1296. Plaintiff argues that the discrepancy between *Peer Bearing* and the present case — in which, according to plaintiff, the value of processing Chinese HRS and CRS into CORE should have been [[ ]]% and [[ ]]%, respectively — supports plaintiff’s view that Commerce’s determinations as to the significance of percentages lack both transparency and consistency. *See* Pl. Br. at 29–30.

Defendant counters that Commerce’s determination that the value of processing in the UAE represented a small proportion of the value of the merchandise imported into the United States was reasonable and based on substantial evidence. Def. Br. at 31–37. First, defendant argues that Commerce provided a reasonable and record-based explanation for the formula that Commerce used to calculate the value-added percentages. *Id.* at 35. Defendant emphasizes that section 1677j(b) does not require the use of a specific formula and that Commerce was under no obligation to adopt AGIS’ preferred method of calculation. *Id.*

Second, defendant argues that Commerce provided a reasonable analysis for its conclusion that the value of processing performed in the UAE represented a “small proportion” of the value of the CORE imported into the United States. *Id.* at 35–37. In its Preliminary Analysis, Commerce evaluated the value added by AGIS by comparing AGIS’ \$/MT further processing costs to AGIS’ \$/MT U.S. sales price. PAM at 4–5. Defendant argues that in Commerce’s Final Determination, Commerce engaged AGIS’ argument of adding profit, financial expenses and SG&A into the calculation and explained that “the percentage of value added does not materially change, and thus the cost of processing CRS and HRS would still be much greater than the cost of processing CORE in the UAE.” Def. Br. at 33 (citing IDM at 20).

Defendant maintains further that to buttress Commerce’s analysis, Commerce compared prior circumvention determinations in which the value added by processing in Vietnam comprised a small proportion of the value of CORE imported into the United States. Def. Br. at 34 (citing PDM at 21). These comparisons supported further the determination that the relative level of processing in the UAE was small. Additionally, defendant argues that Commerce considered pricing information that showed that the value added to the price of CORE by production in third countries like the UAE was approxi-

mately 10% to 31% and that the value of processing to produce CORE from CRS and HRS substrates was approximately 13% and 22%, respectively. *Id.* at 34–35. These data strengthened further Commerce’s determination that in this instance, [[ ]]% and [[ ]]%, respectively, did not qualify as significant. FAM at 2–4.

Last, defendant argues that Commerce’s approach to evaluating the value of processing was consistent with congressional intent. Defendant points to congressional language pertaining to the amendment of 19 U.S.C. § 1677j(b), which provides that “the bill does not establish a rigid numerical standard for determining ‘significance’ nor does the Committee expect Commerce to establish a specific numerical test.” Def. Br. at 3132 (citing Uruguay Round Agreements Act, S. Rep. No. 103–412, at 81–82 (1994)). Defendant maintains that Congress instead intended for Commerce to determine significance on a case-by-case basis and by considering the totality of the circumstances, a standard which defendant argues that Commerce upheld in this instance. Def. Br. at 36.

## B. Analysis

In considering whether the value of the processing performed in the UAE comprises a significant proportion of the value of the merchandise exported to the United States, the court considers: (1) Commerce’s selection and application of its formula and, (2) Commerce’s conclusion that the value was not significant. The court concludes that Commerce’s determination that the value of the processing performed in the UAE comprises a small proportion of the value of the merchandise imported into the United States was supported by substantial evidence.

Commerce provided a reasonable explanation for the formula that it used to calculate the value-added percentages. In its Preliminary Analysis, Commerce outlined its method for the calculation of further processing costs and the value-added percentages.<sup>4</sup> PAM at 4–5. In consideration of plaintiff’s argument, Commerce recalculated the percentages to include profit, financial expenses and SG&A, using company-wide profit information. IDM at 20. This Court has previously held — in a case challenging the final results of an administra-

<sup>4</sup> “Average further processing expenses are the expenses incurred by the UAE respondent, not including HRS and/or CRS input costs. . . . The further processing costs were calculated as follows: Further Processing Cost = Total Cost (including Direct Material Cost, Labor, Manufacturing, Overhead, and Packing Costs) – Direct Material Cost of HRS or CRS Substrate.” PAM at 4. “To determine the average further processing cost as a percentage of AGIS’s U.S. sales price, Commerce compared AGIS’s further processing value added to the actual value of its merchandise exported to the United States. The value-added percentage was calculated as follows: Value-Added Percentage = Average Further Processing Cost / Average U.S. Sales Price.” *Id.*

tive antidumping review issued by Commerce — that where the relevant statute provides little direction, “Commerce enjoys discretion in choosing its methodology.” *NSK Ltd. v. United States*, 29 CIT 1, 17, 358 F. Supp. 2d 1276, 1291 (2005), *aff’d*, 162 F. App’x 982 (Fed. Cir. 2006). Because section 1677j(b) does not mandate the use of a particular formula, Commerce has the ability to choose how to calculate the value-added percentages as long as its chosen methodology is reasonable and Commerce explains its choice. Commerce is required neither to use a party’s proffered and preferred methodology, nor to provide an explanation for a decision not to use an alternative methodology offered by a party.

The statute directs this court to review whether Commerce’s determination is reasonable and is supported by the record as a whole, not whether the court agrees with Commerce’s chosen methodology. *Nippon Steel Corp.*, 458 F.3d at 1351–52. The court’s review of Commerce’s findings “does not demand expansive discussion or rigid adherence to a specific formula, as long as the court can determine that the statutory requirements have been satisfied.” *Nucor Corp. v. United States*, 414 F.3d 1331, 1341 (Fed. Cir. 2005). Accordingly, the court will affirm Commerce’s determination as long as Commerce used a reasonable formula that satisfies the statutory requirements under 1677j(b). *Id.* Here, Commerce used a formula that captured the value added by AGIS’ processing in the UAE, as section 1677j(b)(1)(C) requires. Additionally, Commerce explained its chosen methodology. *See* PAM at 4. Therefore, plaintiff’s argument that Commerce erred in calculating the value-added percentages lacks merit.

With regard to the question of whether the value of processing in the UAE was significant, Commerce based its determination on its calculation of value-added percentages, a comparison with previous circumvention determination findings and evaluation of price data. IDM at 11–12, 17–21; PDM at 17–23. Based on these substantial data, Commerce reached a reasonable conclusion.

Further, Congress did not intend to create a “rigid numerical standard” for Commerce’s determination of whether the value of the processing performed in the foreign country was significant under 19 U.S.C. § 1677j(b). Uruguay Round Agreements Act, S. Rep. No. 103–412, at 81–82 (1994).<sup>5</sup> Instead, Congress intended for Commerce to have “flexibility in administering this standard” to be implemented

<sup>5</sup> “The Committee expects and intends that the new standard will be less difficult to meet, thereby improving our ability to prevent circumvention. It also recognizes the need for *flexibility* in administering this standard. Thus, the bill does not [] establish a rigid numerical standard for determining ‘significance’ nor does the Committee expect Commerce to establish a specific numerical test. The determination of whether the value of the parts or components is a significant portion of the total value of the merchandise should be made on a case-by-case basis, looking at the totality of the circumstances. However, where the

on a “case-by-case basis” and for “the new standard [to be] less difficult to meet, thereby improving [Commerce’s] ability to prevent circumvention.” *Id.* at 82. Therefore, contrary to plaintiff’s argument, the statute does not require Commerce to provide a specific benchmark value to delineate a finding as to whether the value of processing performed in a foreign country is significant, nor does the statute require Commerce to conduct a comparative analysis.

Additionally, the case cited by plaintiff, *Peer Bearing*, is not apposite. In that case, Commerce calculated the average unit cost of manufacturing in the third country as 38% of the total cost of manufacturing and concluded that the 38% figure represented *one consideration* that weighed in favor of finding that the product had been “substantially transformed” in the third country. *Peer Bearing*, 39 CIT at \_\_\_, 128 F. Supp. 3d at 1291; *see also Tapered Roller Bearings and Parts Thereof, Finished and Unfinished, from the People’s Republic of China: Final Results of the 2007–2008 Administrative Review of the Antidumping Duty Order*, 75 Fed. Reg. 844 (Dep’t of Commerce Jan. 6, 2010) and accompanying Issues and Decision Mem. at 10–11. Substantial transformation and circumvention represent two distinct legal standards and two distinct inquiries. *Peer Bearing* involved neither a circumvention inquiry nor Commerce’s analysis of whether “the value of the processing performed in the foreign country represents a small proportion of the value of the merchandise imported into the United States” — the relevant factor under 19 U.S.C. § 1677j(b)(2)(E).

Finally, even if the holding in the case was apposite and even if the proffered numbers in this case were equivalent, the *Peer Bearing* court noted that the value-added percentage would not be “so significant as to outweigh the other factors” and that “no single factor is dispositive.” *Peer Bearing*, 39 CIT at \_\_\_, 128 F. Supp. 3d at 1291 (citing Final Results of Redetermination Pursuant to Court Remand (Apr. 11, 2012) at 16). In the present case, the value-added percentages calculated by Commerce — [[ ]]% for CRS and [[ ]]% for HRS — are even lower than the 38% value-added percentage in *Peer Bearing*.

In sum, even if the substantial transformation and circumvention inquiries were comparable, it is not clear that *Peer Bearing* would weigh in favor of this court finding that Commerce’s conclusion that the relevant figures in this case were not significant was unreasonable. Therefore, plaintiff’s second argument — that Commerce failed to provide a rationale for its significance finding such that its determination lacked substantial evidence — lacks merit.

proportion of the value is relatively high (e.g., the value of a television tube in relation to a finished television set), the conclusion should be clear.” Uruguay Round Agreements Act, S. Rep. No. 103–412, at 82 (1994) (emphasis supplied).

### ***III. Commerce's decision to use surrogate values for a non-market economy (NME) proceeding***

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

Plaintiff argues that the exports in this case are from the UAE, which is a market economy (“ME”) country. Pl. Br. at 31–34. Accordingly, plaintiff urges an ME methodology in which Commerce uses the actual prices of inputs that plaintiff imported from China. *Id.* at 16. Plaintiff asserts that Commerce is not entitled to use surrogate values when purchases were made in ME countries, because those purchase prices are ME prices. *Id.*

Plaintiff maintains that the statute requires that this proceeding be conducted as an ME proceeding, not an NME proceeding. *Id.* at 32–34. Plaintiff points out that section 1677j(b) pertains to “[m]erchandise completed or assembled in other foreign countries.” As a result, according to plaintiff, “merchandise” completed “in other foreign countries” in this case means the UAE, which is an ME country. 19 U.S.C. § 1677j(b)(1)(D). Therefore, plaintiff concludes, Commerce should rely on an ME methodology and ME values from the UAE rather than an NME methodology and surrogate values from China. Pl. Br. at 32–34.

Plaintiff asserts that Commerce’s use of surrogate values here is inconsistent not only with the statute, but also with Commerce’s chosen methodology and, therefore, is arbitrary. Pl. Reply Br. at 14–15. Plaintiff references Commerce’s use of Chinese purchase prices to calculate costs under section 1677j(b)(1)(C). *Id.* at 14. Plaintiff then argues that for Commerce to use these values from China under section (C), only to resist their use in another context, section (D), based on alleged unreliability, demonstrates inconsistency. *Id.* Plaintiff maintains that Commerce relied on internal Chinese prices in accordance with section 1677j(b)(1)(C) — for example, valuing the average construction price of an integrated steel mill in China at \$3.6 billion — when analyzing the level of investment in the UAE as compared to that in China. *Id.* at 14–15; IDM at 17.

Plaintiff argues further that defendant’s reliance upon *U.K. Carbon and Graphite Co., Ltd. v. United States*, 37 CIT 1295, 931 F. Supp. 2d 1322 (2013) — a circumvention case in which Commerce used its NME surrogate-value methodology to value exports from an ME in which the underlying AD order pertained to exports from an NME, China — is misplaced. Pl. Reply Br. at 15 (citing *U.K. Carbon and Graphite*, 37 CIT at 1311–12, 931 F. Supp. 2d at 1336). In that case, Commerce made a determination that the actual, specific purchase

prices paid by the entity in the third country — the United Kingdom — were inherently unreliable because those purchase prices pertained to products from China and China itself is an NME. *U.K. Carbon and Graphite*, 37 CIT at 1311, 931 F. Supp. 2d at 1336. Here, Commerce determined that NME prices are inherently unreliable as a general matter — Commerce did not render a determination that the specific purchase prices that plaintiff paid to Chinese suppliers in this case were unreliable. IDM at 21. Accordingly, plaintiff seeks to distinguish the approach taken by Commerce in the instant case from the one affirmed in *U.K. Carbon and Graphite*.

Defendant admits that Commerce typically uses actual prices paid for China-produced inputs in ME proceedings, but seeks to distinguish this circumvention case as an NME proceeding. Def. Br. at 40. Defendant notes first that Commerce initiated this circumvention proceeding under the China CORE investigation, and the proceeding concerns China-produced merchandise. *Id.* Commerce seeks to determine whether Chinese-produced merchandise is being sold to the United States in circumvention of the *2016 CORE Orders*. *Id.* As a result, defendant claims that, on its face, this is an NME proceeding. *Id.*

Defendant claims that the use of surrogate NME values in anti-dumping duty proceedings involving imports from ME countries is a well-established practice of Commerce. *Id.* at 38–40. In its Final Determination, Commerce stated that the analysis of the input costs at issue here “appropriately falls under the purview of Commerce’s NME methodology, which by statute presumes that NME costs and prices are inherently unreliable.” IDM at 21. Defendant notes that Commerce used surrogate value methodology in *U.K. Carbon and Graphite*. Def. Br. at 39–40 (citing *U.K. Carbon and Graphite*, 37 CIT 1295, 931 F. Supp. 2d 1322). In that case, product inputs from China were completed in an ME country — the United Kingdom, like the UAE in this case — and Commerce used surrogate values for an NME country. Def. Br. at 39–40.

## B. Analysis

Commerce’s decision to use surrogate values and the manner in which it computed those values in the circumvention analysis was reasonable and supported by substantial evidence for two reasons. First, Commerce’s decision to treat this proceeding as an NME proceeding rather than an ME proceeding was reasonable. Second, Commerce’s interpretation of the “value” determination was reasonable.

Turning first to Commerce’s decision to treat this proceeding as an NME proceeding, Commerce decision was reasonable because the

orders that Commerce was seeking to enforce are from China. The subject merchandise in this case was CORE produced in China. IDM at 1. China, as noted, is an NME country. *Id.* at 21.

Plaintiff argues that the goods were being manufactured or assembled in an ME country and, accordingly, Commerce should have used an ME methodology. Pl. Br. at 31–34. Commerce noted that this proceeding involved circumvention proceedings initiated under the 2016 CORE Orders, which are NME proceedings. PDM at 8. In its IDM, Commerce asserted that “analysis of [AGIS’] Chinese-origin input costs appropriately falls under the purview of Commerce’s NME methodology, which by statute presumes that NME costs and prices are inherently unreliable.” IDM at 21. In light of China’s status as an NME and in light of the fact that these circumvention proceedings were initiated under the 2016 CORE Orders (NME proceedings), Commerce’s decision to treat this proceeding as an NME proceeding was reasonable.

Moreover, this Court has sustained Commerce’s use of surrogate values in previous circumvention inquiries involving merchandise assembled in an ME country, because the decision to do so reflects Commerce’s reasonable construction of the statute. *See U.K. Carbon and Graphite*, 37 CIT at 1312, 931 F. Supp. 2d at 1336. Defendant notes accurately that in *U.K. Carbon and Graphite*, Commerce used surrogate values for NME Chinese inputs when production was completed in an ME country, the United Kingdom — circumstances that are comparable to the facts in this case. Def. Br. at 39–40; *U.K. Carbon and Graphite*, 37 CIT at 1311–12, 931 F. Supp. 2d at 1336. In that case, Commerce used surrogate values from Ukraine to value Chinese inputs and the court held that Commerce’s decision to use a surrogate value methodology in determining the value of inputs from an NME country represented a reasonable construction of the statute. *U.K. Carbon and Graphite*, 37 CIT at 1312, 931 F. Supp. 2d at 1336.

Plaintiff seeks to distinguish *U.K. Carbon and Graphite* on the grounds that there, Commerce found that the *actual prices paid* in the third country for Chinese products were unreliable, whereas here, Commerce noted that NME prices *in general* were unreliable. *Id.* at 1311, 931 F. Supp. 2d at 1336; Pl. Reply. Br. at 15; IDM at 21. *U.K. Carbon and Graphite* does not support plaintiff’s argument. In that case, the court found that surrogate values from Ukraine were reasonably used to value Chinese inputs. *U.K. Carbon and Graphite*, 37 CIT at 1312, 931 F. Supp. 2d at 1336. Commerce found it reasonable to use surrogate values from Ukraine there because Commerce said

that costs and prices from an NME are “inherently unreliable.” *Id.* at 1299, 931 F. Supp. 2d at 1327. In that case, Commerce looked at the specific prices involved and declared them unreliable. Plaintiff argues that, in contrast, here, Commerce declared that NME prices *in general* are unreliable because they came from China. Pl.’s Reply Br. at 15. Plaintiff’s argument is based on highlighting a distinction without a difference and is, therefore, unpersuasive. Commerce’s decision to use surrogate values in an NME proceeding was reasonable, within its discretion and aligned with precedent.

In addition, Commerce’s interpretation of the “value” determination was reasonable. Section 1677j(b)(1)(D) instructs that one basis for Commerce to find that an order was being circumvented is that “the *value* of the merchandise produced in the foreign country to which the antidumping duty order applies is *a significant portion* of the value of the merchandise that was exported to the United States . . . .” 19 U.S.C. § 1677j(b)(1)(D) (emphasis supplied).

Section 1677j(b)(1)(D) does not define how Commerce is to determine “value.” *Id.*; see also Def. Br. at 37–38. This statutory ambiguity shows that Congress left a gap for the agency to fill. The delegation of interpretive power to Commerce is bolstered by its greater expertise than courts in determining valuation methodologies. See *Consumer Prods. Div., SCM Corp. v. Silver Reed Am., Inc.*, 753 F.2d 1033, 1039 (Fed. Cir. 1985); *Thai Pineapple Pub. Co. v. United States*, 187 F.3d 1362, 1365 (Fed. Cir. 1999). Given the lack of definition of “value” and silence as to the method to use to assess “value,” Commerce acted reasonably.

#### ***IV. Commerce’s consideration of the pattern of trade***

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

Plaintiff argues that Commerce did not consider adequately the pattern of trade in its determination. Pl. Br. at 34–37. Specifically, plaintiff alleges that Commerce acted arbitrarily and contrary to law in limiting its analysis to only the two 49-month periods before and after the initiation of the investigations that led to the 2016 CORE-Orders. *Id.* at 34. Plaintiff argues that section 1677j(b)(3)(A) does not identify specific parameters on which Commerce must rely in its selection of time periods. *Id.* Because Commerce limited its analysis to only a single set of time periods and not the other time periods proposed by plaintiff, plaintiff alleges that Commerce “cherry picked” time periods that were likely to support an affirmative determination of circumvention. *Id.* The time periods proposed by plaintiff reveal data that support the finding that AGIS did not shift shipping and sourcing patterns in response to the 2016 CORE Orders. *Id.* at 34–35.

Plaintiff argues that AGIS' annual increase in shipment volume began prior to the issuance of the *2016 CORE Orders*, reflecting "natural upward progression of . . . a growing and expanding company." *Id.* at 35. Moreover, plaintiff points out that its shipments to the United States of CORE produced with Chinese HRS or CRS substrates have decreased since the issuance of the *2016 CORE Orders*. *Id.* Further, since December 2017, AGIS has not shipped any CORE products with Chinese HRS or CRS substrates to the United States. *Id.* Additionally, plaintiff points to AGIS' patterns of sourcing Chinese HRS and CRS. *Id.* at 37. According to plaintiff, these patterns of sourcing show that, since June 2011, Chinese-origin HRS and CRS substrates purchases comprised only [ ]% of the total steel substrate purchased by AGIS and that AGIS' semi-annual steel purchases from China have declined since the issuance of the *2016 CORE Orders*. *Id.* In sum, plaintiff argues that it was unreasonable for Commerce to rely upon only a single pattern of trade that was "contradicted and overshadowed" by other patterns of trade. Pl. Reply Br. at 19.<sup>6</sup>

Defendant argues that Commerce's consideration of the pattern of trade was reasonable and that prior decisions of this Court and prior Commerce determinations support its approach. Def. Br. at 41–44. Defendant submits that Commerce selected the symmetrical 49-month periods for the purpose of comparing data from before and after Commerce initiated the underlying antidumping and countervailing duty investigations on CORE from China. *Id.* at 41. Defendant asserts that this selection is consistent with Commerce's examination of time periods in other cases. *Id.* at 43 (citing *China/Vietnam CORE IDM* at 47–48); see also *Taiwan/Vietnam CORE Final Determination* and accompanying *Taiwan/Vietnam CORE IDM*. For example, in a circumvention inquiry with regard to CORE produced in Vietnam using HRS and CRS from China, Commerce compared pattern of trade data using periods of time identical in length and bifurcated by the initiation of the CORE investigations. See *China/Vietnam CORE IDM* at 47. Similarly, in a circumvention inquiry with regard to CORE produced in Vietnam using HRS and CRS from Taiwan, Commerce compared periods of time before and after Commerce initiated circumvention inquiries on the AD and CVD orders of CORE from

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<sup>6</sup> At oral argument, plaintiff expanded on its argument and claimed that Commerce's analysis of pattern of trade was arbitrary for two reasons. First, Commerce looked at only a single pattern of trade and did not consider any of AGIS' suggested patterns of trade. Oral Argument Tr. at 42, ECF Nos. 57, 58. Second, and relatedly, Commerce used identical time periods for its analyses under both section 1677j(b)(3)(A) and section 1677j(b)(3)(C), resulting in the consideration of the same information under both sections of the statute. *Id.*

China. See Taiwan/Vietnam CORE IDM at 9–10. In addition, defendant argues that Commerce’s choice is entitled to deference because it represented a reasonable interpretation of the statute, which is silent as to the particular method to be used. Def. Br. at 42–43 (citing *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 843–44 (1984)).

Defendant argues also that Commerce’s decision was reasonable, even after considering AGIS’ decrease in exports. Commerce found that AGIS shipped CORE containing Chinese HRS and CRS substrates to the United States until December 2017, more than a year after the orders were published and nearly two years after the investigations began. *Id.* at 43–44. Defendant maintains that Commerce therefore considered the decrease in AGIS’ exports to the United States after December 2017 but discounted this decrease in light of the shipments that increased after the investigations were commenced and the orders entered. *Id.*

## B. Analysis

The court concludes that Commerce’s consideration of the pattern of trade was reasonable. Section 1677j(b)(3)(A) does not mandate the use of a specific time period to analyze the pattern of trade. As defendant correctly points out, when the statute is silent as to the use of a particular method, “Congress has explicitly left a gap for the agency to fill.” Def. Br. at 42–43 (citing *Chevron*, 467 U.S. at 843–44). Because the statute is silent with regard to selection of time period here, Commerce’s selection is entitled to deference.

Commerce’s selection of time periods to analyze was reasonable and in accordance with law because the time periods were based on critical dates in the investigation, IDM at 13, and these periods comported with prior practice, as demonstrated through comparison to previous Commerce decisions. In previous circumvention inquiries of CORE products with Chinese-origin substrate, Commerce similarly selected time periods centered symmetrically around the initiation date of the underlying investigations. See, e.g., Taiwan/Vietnam CORE IDM; China/Vietnam CORE IDM.

Commerce is required to “explain the basis for its decisions; while its explanations do not have to be perfect, the path of Commerce’s decision must be reasonably discernable to a reviewing court.” *NMB Singapore Ltd. v. United States*, 557 F.3d 1316, 1319 (Fed. Cir. 2009) (quoting *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)). In this case, Commerce provided a reasonable explanation for its selection of the two 49-month time periods upon

which it based its decision on the pattern of trade. Commerce provided the following explanation for its decision:

Contrary to AGIS’s claim that the period was arbitrarily set, the period keys off the initiation of the underlying investigations and also takes into account the date of the preliminary determination in the AD investigation. These periods allowed Commerce to compare the trade patterns prior to the discipline of any AD and CV duties with the trade patterns present when parties were aware that they could potentially have to pay AD and CV duties.

IDM at 13.

Additionally, section 1677j(b)(3)(A) does not mandate the consideration of any specific data in Commerce’s evaluation of the pattern of trade. Rather, the statute sets out “the pattern of trade, including sourcing patterns,” as one of multiple “[f]actors to consider.” 19 U.S.C § 1677j(b)(3)(A).

In this instance, Commerce considered country-wide sourcing patterns by comparing the average monthly volume of imports of CRS and HRS substrates from China into the UAE before and after the initiation of the CORE investigations. IDM at 12. Commerce considered also AGIS-specific sourcing patterns by comparing the quantity of purchases of Chinese origin CRS and HRS substrates before and after initiation. PAM at 7. Once Commerce analyzed sourcing patterns, Commerce completed its duty under the statute and was not mandated to factor in AGIS’ proposed data in its analysis of the pattern of trade. *See* 19 U.S.C § 1677j(b)(3)(A).

The data submitted by plaintiff show a decrease in the use of Chinese substrate following the issuance of the *2016 CORE Orders* and an eventual end to the importation of CORE products using Chinese-origin substrate into the United States. Pl. Br. at 34–35. However, as discussed, Commerce’s analysis of pattern of trade was reasonable and in accordance with the law. Therefore, Commerce’s determination that the pattern of trade weighed in favor of an affirmative determination of circumvention was supported by substantial evidence on the record.

## CONCLUSION

*The Deer Hunter*,<sup>7</sup> the masterful 1978 motion picture about the impact of the Vietnam War on the lives of a group of people — in

<sup>7</sup> THE DEER HUNTER (EMI Films/Universal Pictures 1978). The film was nominated for nine Academy Awards, winning five: Best Picture, Best Director, Best Supporting Actor, Best Film Editing and Best Sound. *See The Deer Hunter*, WIKIPEDIA, [https://en.wikipedia.org/wiki/The\\_Deer\\_Hunter](https://en.wikipedia.org/wiki/The_Deer_Hunter) (last visited Sept. 17, 2021).

particular, the lives of a handful of steel workers — is set in Clairton, Pennsylvania, approximately 15 miles southeast of Pittsburgh, situated on the Monongahela River in the southeast corner of Allegheny County.<sup>8</sup> The film’s sequences in the United States are set against the backdrop of a Russian Orthodox Cathedral<sup>9</sup> and giant steelworks.<sup>10</sup>

The opening scene features an oiler, belching smoke, barreling downhill under a highway overpass, around a bend and past a small gas station. The streets are wet and littered with leaves. It is dawn, streetlamps lit against an overcast sky, smoke from the steelworks wafting up into steely gray clouds, heavy with rain.

The film cuts to inside the mill. The workers, in metal coats, are surrounded by fire and molten material, heavy equipment. Sparks fly everywhere. The men’s faces, when unmasked, are drenched in sweat.

The night shift ends and they go to the locker rooms. Three of the leads — Mike Vronsky (Robert De Niro), Nick Chevotarevich (Christopher Walken, who won an Academy Award for Best Supporting Actor for the role) and Steven (“Stevie”) Pushkov (John Savage) — are getting man hugs, slaps on the back, well wishes from the other shift workers.

As Mike, Nick and Stevie make their way through the locker room and out, they are joined by Stan (John Cazale, who died three months after filming completed from terminal bone cancer, friend and co-star Meryl Streep at his side throughout and at his death) and Axel (Chuck Aspegren). We learn that it is Stevie’s wedding night, that his bride, Angela (Rutanya Alda), is pregnant, and that Mike and the other guys are going deer hunting that night.

They go to the bar run by John Welsh (George Dzundza), who bolts out of the kitchen, apron on, to greet them, bear hugs Stevie from behind and, in nearly Tigger-like fashion, bounces him around the bar in celebration: “Drinks are on the house!” Football is on the TV, there is Steelers - Eagles banter, mugs of beer and Rolling Rocks everywhere, they shoot pool. Frankie Valli’s *Can’t Take My Eyes off You* booms out from the speakers.<sup>11</sup>

<sup>8</sup> See *The Deer Hunter*, WIKIPEDIA, *supra* note 7; *Clairton, Pennsylvania*, WIKIPEDIA, [https://en.wikipedia.org/wiki/Clairton,\\_Pennsylvania](https://en.wikipedia.org/wiki/Clairton,_Pennsylvania) (last visited Sept. 17, 2021). The scenes were actually filmed on location in Weirton, West Virginia, Steubenville, Ohio, and Struthers, Ohio, and at the U.S. Steel Central Furnaces in Cleveland, Ohio. See *The Deer Hunter*, WIKIPEDIA, *supra* note 7.

<sup>9</sup> St. Theodosius Russian Orthodox Cathedral in Cleveland, Ohio. See *The Deer Hunter*, WIKIPEDIA, *supra* note 7.

<sup>10</sup> See *id.*

<sup>11</sup> FRANKIE VALLI, *Can’t Take My Eyes off You*, on FRANKIE VALLI: SOLO (A & R Recording Inc. 1967).

\* \* \*

For the reasons stated above — which, the court hopes, have been elucidated with sufficient amplification — Commerce’s Final Determination was reasonable and in accordance with law. As such, the court sustains Commerce’s Final Determination and denies plaintiff’s motion for judgment upon the agency record pursuant to USCIT Rule 56.2. Judgment will enter accordingly.

Dated: September 24, 2021  
New York, New York

*/s/ Timothy M. Reif*  
TIMOTHY M. REIF, JUDGE

## Slip Op. 21–134

THE MOSAIC COMPANY, et al., Plaintiffs, v. UNITED STATES, Defendant,  
and OCP, S.A., et al., Defendant-Intervenors.

Before: Timothy C. Stanceu, Judge  
Consol. Court No. 21–00116

[Granting motion of plaintiff OCP, S.A. and enjoining the liquidation of certain entries of merchandise subject to a countervailing duty order]

Dated: October 4, 2021

*Stephanie E. Hartmann*, Wilmer, Cutler, Pickering, Hale & Dorr, LLP, of Washington, D.C., for plaintiff and defendant-intervenor The Mosaic Company. With her on the motions were *David J. Ross*, *Patrick J. McLain*, and *Eliot Kim*.

*L. Misha Preheim*, Assistant Director, U.S. Department of Justice, of Washington, D.C., for defendant. With him on the motions were *Brian M. Boynton*, Acting Assistant Attorney General, *Jeanne E. Davidson*, Director, and *Ebonie I. Branch*, Trial Attorney. Of counsel on the motions was *Mykhaylo Alexander Gryzlov*, U.S. Department of Commerce, Office of Chief Counsel for Trade Enforcement and Compliance, of Washington, D.C.

*William R. Isasi*, Covington & Burling LLP, of Washington D.C., for plaintiff and defendant-intervenor OCP, S.A. With him on the motions were *Alexander D. Chinoy* and *Rishi R. Gupta*.

## OPINION AND ORDER

### Stanceu, Judge.

Plaintiff OCP S.A. (“OCP”), a Moroccan producer and exporter of phosphate fertilizers, brought an action, now consolidated, to contest a final affirmative determination of the U.S. International Trade Administration, U.S. Department of Commerce (“Commerce” or the “Department”) in a countervailing duty (“CVD”) investigation of phosphate fertilizers from Morocco. Before the court is OCP’s motion for a court order enjoining the liquidation of certain entries of phosphate fertilizers produced or exported by OCP that are subject to the countervailing duty order resulting from the Department’s investigation (the “CVD Order”). Mot. for a Statutory Inj. of OCP S.A. (Ct. No. 21–00218) (July 2, 2021), ECF No. 20 (“OCP’s Mot.”). OCP seeks an injunction that would prohibit the liquidation of all such entries throughout the pendency of this litigation, including appeals.

Defendant United States, while indicating it would consent to relief more limited in scope than that sought by OCP, opposes OCP’s motion, characterizing it as seeking an “overbroad and open-ended injunction.”<sup>1</sup> Gov’t’s Partial Opp’n to OCP S.A.’s Mot. for Statutory Inj.

<sup>1</sup> Plaintiff and defendant-intervenor The Mosaic Company takes no position on OCP’s motion and does not opine on the issue of the scope of any injunction against liquidation of OCP’s entries. The Mosaic Company’s Resp. to OCP S.A.’s Mot. for Statutory Inj. in Ct. No. 21–00218 (July 23, 2021), ECF No. 27.

in Case No. 21–00218 2 (July 23, 2021), ECF No. 28 (“Def.’s Opp’n”). Defendant argues that any injunction the court orders should not apply to entries made after December 31, 2021. *Id.* at 2–3.

Also before the court is OCP’s motion to file a reply to defendant’s opposition to its motion. Mot. for Leave to File a Reply in Supp. of a Statutory Inj. of OCP S.A. (Aug. 4, 2021), ECF No. 29; Proposed Reply in Supp. of a Statutory Inj. of OCP S.A. (Aug. 4, 2021), ECF No. 29–1 (“OCP’s Reply”).

The court grants OCP’s motion to file a reply and enters an injunction according to the terms sought by OCP. The court rejects defendant’s position that any injunction entered in this litigation should be of a more limited scope.

## I. BACKGROUND

The contested agency determination is *Phosphate Fertilizers From the Kingdom of Morocco: Final Affirmative Countervailing Duty Determination*, 86 Fed. Reg. 9,482 (Int’l Trade Admin. Feb. 16, 2021) (the “*Final Determination*”). This determination culminated in the Department’s issuance of the CVD Order published as *Phosphate Fertilizers From the Kingdom of Morocco and the Russian Federation: Countervailing Duty Orders*, 86 Fed. Reg. 18,037 (Int’l Trade Admin. Apr. 7, 2021).

OCP brought an action to contest various aspects of the contested determination, alleging, *inter alia*, that the investigation was unlawfully initiated and that the CVD Order is invalid as a result. Compl. (Ct. No. 21–00218) (June 4, 2021), ECF No. 8. The court consolidated this action with another action contesting the same determination, brought by The Mosaic Company, a domestic producer of phosphate fertilizers. Order (July 8, 2021), ECF No. 26. The Mosaic Company was the petitioner in the Department’s countervailing duty investigation. *See Phosphate Fertilizers From the Kingdom of Morocco and the Russian Federation: Initiation of Countervailing Duty Investigations*, 85 Fed. Reg. 44,505, 44,505 (Int’l Trade Admin. July 23, 2020). As each plaintiff intervened as of right in the action brought by the other plaintiff, both are defendant-intervenors in this consolidated action.

## II. DISCUSSION

Section 516A(c)(2) of the Tariff Act of 1930 provides, in pertinent part, that this Court “may enjoin the liquidation of some or all entries of merchandise covered by a determination of . . . the administering authority [i.e., Commerce], upon a request by an interested party for such relief and a proper showing that the requested relief should be

granted under the circumstances.” 19 U.S.C. § 1516a(c)(2).<sup>2</sup> The purpose of an injunction entered under § 1516a(c)(2) (sometimes described as a “statutory” injunction) is to preserve the court’s ability to provide relief, should the movant prevail on the merits. *See Uginé & Alz Belg. v. United States*, 452 F.3d 1289, 1297 (Fed. Cir. 2006). Absent an injunction in some form, the attachment of finality to the liquidation of the “entries of merchandise covered by” the contested determination, 19 U.S.C. § 1516a(c)(2), potentially places those entries beyond the reach of a court-ordered remedy imposed at the conclusion of the litigation and may deny the plaintiff the opportunity to obtain meaningful judicial review of the contested agency action. *See Zenith Radio Corp. v. United States*, 710 F.2d 806, 810 (Fed. Cir. 1983).

In ruling on motions for statutory injunctions under § 1516a(c)(2), this Court and the Court of Appeals for the Federal Circuit have applied the four factors governing decisions on motions seeking preliminary injunctions: whether the movant will be irreparably harmed in the absence of relief, whether the movant is likely to succeed on the merits, whether the balance of hardships tips in the movant’s favor, and where the public interest lies. *See, e.g., Sumecht NA, Inc. v. United States*, 923 F.3d 1340, 1345 (Fed. Cir. 2019), *Uginé*, 452 F.3d at 1292–93.

OCP seeks an order that would enjoin liquidation of all consumption entries of merchandise produced or exported by OCP and subject to the CVD Order (the “subject merchandise”) and that would remain in effect so as to apply to all entries made throughout the pendency of this litigation, including appeals. OCP’s Mot. 2. While not conceding that OCP has shown a likelihood of success on the merits, defendant does not oppose in principle an injunction to prevent the liquidation of entries of OCP’s merchandise. Def.’s Opp’n 2–3. Defendant advocates that any such injunction should apply only to entries made prior to December 31, 2021, the date that would correspond to the end of the period of review for the first administrative review of the CVD Order, should such a review occur. *Id.*

### A. Irreparable Harm

OCP seeks an injunction “protecting *all* of its entries of merchandise subject to the CVD order from liquidation (*i.e.*, past, present, and future entries) until a final and conclusive court decision has been issued in this litigation.” OCP’s Mot. 4 (footnote omitted) (emphasis in original). Defendant informs the court that it would consent to an

<sup>2</sup> Unless otherwise indicated, all statutory citations are to the 2018 edition of the United States Code.

injunction “covering OCP’s unliquidated entries through the end of the first administrative review period” of the CVD Order that issued from the contested determination. Def.’s Opp’n 2. In opposing an injunction applying to entries made after the end of this calendar year, defendant argues, *inter alia*, that “OCP has not alleged sufficient facts demonstrating that it will suffer irreparable harm from a statutory injunction that has a specific end date of December 31, 2021, which is the date that corresponds to the end of the period of review for the first administrative review.” *Id.* at 3.

The end date applying to the scope of the injunction is the only issue on which the parties disagree. OCP and defendant concur in an injunction against liquidation that would apply to phosphate fertilizers from Morocco produced or exported by OCP that were entered, or withdrawn from warehouse, for consumption, beginning on November 30, 2020, the date of publication of the Department’s preliminary affirmative CVD determination. OCP’s Mot., Proposed Order 2; Def.’s Opp’n 2–3; see *Phosphate Fertilizers From the Kingdom of Morocco: Preliminary Affirmative Countervailing Duty Determination*, 85 Fed. Reg. 76,522 (Int’l Trade Admin. Nov. 30, 2020). Both also agree that an injunction against liquidation should exclude entries made during the “gap period” of March 30, 2021, the day after the final day of provisional measures, and April 4, 2021, the day prior to the publication of the final affirmative determination of the U.S. International Trade Commission, OCP’s Mot., Proposed Order 2; Def.’s Opp’n 3, as these entries are not subject to the CVD Order.

OCP argues that absent an injunction applying to entries made after the end of this year, and continuing for all such entries occurring during the pendency of this litigation, entries of its merchandise that are the subject of this litigation potentially will liquidate at the cash deposit rate of 19.97% rather than according to the final judicial decision in this case. OCP’s Mot. 8. While acknowledging that the first administrative review of the CVD order could alter this result, OCP argues that “[b]ecause no administrative review of the CVD Order has yet been conducted, such automatic liquidation will include not only all past entries, but also all future entries—under the CVD law, all entries of subject merchandise are automatically liquidated at the cash deposit rate unless an administrative review covering such entries is conducted.” OCP’s Reply 5 (citing *Mid Continent Steel & Wire, Inc. v. United States*, 44 CIT \_\_, \_\_, 427 F. Supp. 3d 1375, 1383 (2020) (“*Mid Continent*”). Pointing out that no party could request a review of the CVD Order until April of next year, OCP argues that at present, no review having been conducted, “by operation of law the status quo

would result in the automatic liquidation of all future subject entries, regardless of whether they are made within the first period of review or a subsequent review period.” *Id.* By OCP’s logic, “[t]here is, therefore, a presently existing, actual threat that *all* of OCP’s future entries made during the pendency of this litigation will be both subject to the CVD Order, and liquidated at the 19.97% rate, and this threat is in no way limited to entries made during the first period of review.” *Id.* (emphasis in original).

In its counterargument, the government contends that “an injunction is an ‘extraordinary remedy.’” Def.’s Opp’n 15 (quoting *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 22 (2008)). This is an incorrect statement of the law as it applies to this case. *Winter* involved a preliminary injunction, not a “statutory” injunction against liquidation issued under 19 U.S.C. § 1516a(c)(2). Injunctions under this statute are not “extraordinary” and are granted in the ordinary course in cases brought under 19 U.S.C. § 1516a. *See Husteel Co., Ltd. v. United States*, 38 CIT \_\_, \_\_, 34 F. Supp. 3d 1355, 1359 (2014) (“Because of the unique nature of antidumping and countervailing duty challenges, the court routinely enjoins liquidation to prevent irreparable harm to a party challenging the antidumping or countervailing duty rate.” (citing *Wind Tower Trade Coal. v. United States*, 741 F.3d 89, 95 (Fed. Cir. 2014))).

Under the government’s formulation, the injunction against liquidation of entries would not apply to entries made after the end of this calendar year—i.e., less than three months from now. Defendant’s position is that “the entries at issue are not subject to liquidation in the near future, and, consequently, OCP is unable to establish that it will suffer immediate harm if the Court declines to grant its request for injunctive relief.” Def.’s Opp’n 7. Defendant argues that the likelihood of future administrative reviews of the CVD Order are high “[b]ecause OCP is the only known Moroccan producer of the subject merchandise.” *Id.* at 8. It argues, further, that “[f]or companies for which no review is requested, the earliest time the automatic liquidation instructions for entries that are made after December 31, 2021 may be issued is in May 2023” and that “if this litigation is not resolved by the time some of these future entries could conceivably be subject to liquidation, when appropriate, the Government will consent to modifying the preliminary injunction to cover such entries that were made during the period of the second administrative review.” *Id.* at 8–9.

Defendant focuses its argument principally on the prospect of future administrative reviews and the resulting delay in liquidation of affected entries. The court considers it significant that the decision

contested here is the final agency determination in the CVD *investigation*, not an administrative review of the CVD Order. This Court previously has rejected arguments similar to those the government advances in its opposition to OCP's motion. "The danger of liquidation pending judicial review of an *investigation* constitutes irreparable harm." *Mid Continent*, 44 CIT at \_\_, 427 F. Supp. 3d at 1382 (emphasis added). In *Mid Continent*, this Court, noting that not all entities seek administrative reviews (citing *Husteel*, 38 CIT at \_\_, 34 F. Supp. 3d at 1360), reasoned that the danger of liquidation became sufficiently imminent when the antidumping duty order at issue in that litigation was published. *Id.* at \_\_, 427 F. Supp. 3d at 1383. "Securing the full benefits of judicial review of the *Final Results* should not require participation in each AR [administrative review]." *Id.* at \_\_, 427 F. Supp. 3d at 1384.

In opposing OCP's motion, defendant promises that "if appropriate" it will consent to modifying an injunction to cover future entries. Def.'s Reply 18. This Court has rejected a similar argument. *Mid Continent*, 44 CIT at \_\_, 427 F. Supp. 3d at 1384 ("True, a respondent could seek an injunction against liquidation after it decides not to seek judicial review of an AR, but the court fails to see why doing so should be required. The potential harm flows from the results of the investigation, not from the decision to forgo judicial review of an AR."). The *Mid Continent* opinion concluded that "an injunction against liquidation should apply to all entries from AR 1 going forward, until conclusion of the dispute." *Id.* at \_\_, 427 F. Supp. 3d at 1384.

The court agrees with the reasoning of *Mid Continent*, and the principles upon which it is based, as they apply to the issue of irreparable harm presented by OCP's motion for a statutory injunction. OCP has made a sufficient showing that it will suffer irreparable harm should the court enter an injunction that does not apply to entries affected by this litigation and occurring after the end of this calendar year. That harm already exists, having arisen upon the publication of the CVD Order.

### **B. Likelihood of Success on the Merits**

OCP has raised serious and substantial questions concerning the *Final Determination*. While not conceding that OCP is likely to succeed on the merits, the government has made no argument that any of the claims OCP raises are dubious. OCP's showing is sufficient for the purpose of obtaining a statutory injunction. *See Mid Continent*, 44

CIT at \_\_\_, 427 F. Supp. 3d at 1385; *Husteel*, 38 CIT at \_\_\_, 34 F. Supp. 3d at 1362. The “likelihood of success” requirement is, therefore, satisfied.

### C. Balance of the Hardships

Granting the injunction motion would prevent the hardship to OCP that potentially will be caused by the liquidation of entries of its merchandise during the pendency of the litigation. The court perceives no hardship to the government from the granting of this motion.

Defendant argues that “if the Court were to grant OCP’s broad request for injunctive relief, it could hamper Commerce’s ability to perform its statutory mandate and unnecessarily interfere with matters that are within the province of the Executive Branch.” Def.’s Opp’n 19 (citing *Advanced Tech. & Materials Co. v. United States*, 37 CIT 454 (2013)). Defendant has not demonstrated or even explained how the injunction sought by OCP would interfere with the government’s ability to perform its statutory mandate. The case it cites, which grants a statutory injunction in favor of a domestic interested party, concluded as to the balance of hardships that “[t]he defendant [United States] will suffer no significant hardship as a result of this court[s] granting the requested injunction against liquidation” which at most would be an inconvenience to the government. *Advanced Tech.*, 37 CIT at 459 (citations omitted).

Defendant also argues that the authority of the Executive Branch to “speak[] on behalf of the U.S. to the international community on matters of trade and commerce” would be “prematurely hampered in this case through the imposition of broad injunctive relief.” Def.’s Opp’n 19 (quoting *U.S. Steel Corp. v. United States*, 33 CIT 984, 995 (2009), *aff’d*, 621 F.3d 1351 (Fed. Cir. 2010)). Again, defendant makes an unsupported and unexplained argument. *U.S. Steel Corp.*, which sustained an administrative decision of Commerce on “zeroing,” contains a sentence explaining that the deference accorded to an interpretation by Commerce of an ambiguous antidumping statute “is at its highest when that agency acts . . . to harmonize U.S. practices with international obligations” and “allows the Executive Branch to speak on behalf of the U.S. to the international community on matters of trade and commerce.” *U.S. Steel Corp.*, 33 CIT at 995. The decision is irrelevant to the issues now before the court, and it lends no support to the notion that the government will suffer harm from the granting of the instant motion for an injunction under the authority Congress expressly provided in 19 U.S.C. § 1516a(c)(2).

In summary, OCP has shown that the balance of the hardships favors the granting of its motion. The arguments defendant makes to the contrary are unexplained, unsupported, and dependent on citations to inapposite court decisions. Considered on the whole, they are meritless.

#### **D. The Public Interest**

The public interest is served by preserving a plaintiff's right to meaningful judicial review of an agency action by means of a statutory injunction when the situation so warrants. Defendant argues that "OCP is engaged in meaningful judicial review, and that right is not threatened by the imposition of an injunction with a specific end date, as OCP is free to petition this Court for an extension of the injunction, if or when necessary." Def.'s Opp'n 19. The government fails to explain why OCP, having contested the administrative decision resulting in the CVD Order itself, should have to go to such lengths or why the temporal limitation it seeks is necessary to the resolution of the issues before the court. OCP has met its burden of showing that the injunction it seeks is in the public interest.

### **III. CONCLUSION AND ORDER**

For the reasons discussed in the foregoing, the court concludes that OCP's motion for a statutory injunction should be granted. Therefore, in consideration of the Motion for a Statutory Injunction filed by OCP S.A., and all other papers and proceedings herein, and upon due deliberation, it is hereby

**ORDERED** that OCP's Motion for Leave to File a Reply in Support of a Statutory Injunction (Aug. 4, 2021), ECF No. 29, be, and hereby is, granted, and OCP's Proposed Reply in Support of a Statutory Injunction (Aug. 4, 2021), ECF No. 29-1 is accepted for docketing as of the date of this Order; it is further

**ORDERED** that OCP's Motion for a Statutory Injunction (Ct. No. 21-00218) (July 2, 2021), ECF No. 20, be, and hereby is, granted; it is further

**ORDERED** that defendant, the United States, together with its delegates, officers, agents, and servants, including employees of U.S. Customs and Border Protection and the U.S. Department of Commerce, is enjoined during the pendency of this litigation, including any appeals, from issuing instructions to liquidate or making or permitting liquidation of any unliquidated entries of phosphate fertilizers from the Kingdom of Morocco:

- (1) that were produced and/or exported by OCP S.A.;
- (2) that were the subject of the U.S. Department of Commerce's

final determination in *Phosphate Fertilizers From the Kingdom of Morocco: Final Affirmative Countervailing Duty Determination*, 86 Fed. Reg. 9,482 (Int'l Trade Admin. Feb. 16, 2021), and *Phosphate Fertilizers From the Kingdom of Morocco and the Russian Federation; Countervailing Duty Orders*, 86 Fed. Reg. 18,037 (Int'l Trade Admin Apr. 7, 2021); and

- (3) that were entered, or withdrawn from warehouse, for consumption, on or after November 30, 2020, excluding any merchandise entered, or withdrawn from warehouse, for consumption, on March 30, 2021 through April 4, 2021;

it is further

**ORDERED** that the entries subject to this injunction shall be liquidated in accordance with the final and conclusive court decision in this action, including all appeals and remand proceedings, as provided in 19 U.S.C. § 1516a(e); and it is further

**ORDERED** that any entries inadvertently liquidated after this Order is signed but before this injunction is fully implemented by U.S. Customs and Border Protection shall be promptly returned to unliquidated status and suspended in accordance with this injunction.

Dated: October 4, 2021  
New York, New York

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

## Slip Op. 21–135

SAHA THAI STEEL PIPE PUBLIC COMPANY, LTD, Plaintiff, v. UNITED STATES,  
Defendant, and WHEATLAND TUBE COMPANY Defendant-Intervenor

Before: Stephen Alexander Vaden, Judge  
Court No. 1:20-cv-133

[Granting Plaintiff's Motion for Judgment on the Agency Record and remanding to Commerce with instructions.]

Dated: October 6, 2021

*Daniel L. Porter*, Curtis, Mallet-Prevost, Colt & Mosle LLP, of Washington D.C., for Plaintiff. With him on the brief was *James C. Beaty*.

*In K. Cho*, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, D.C. for Defendant United States. With him on the brief were *Brian M. Boynton*, Acting Assistant Attorney General, *Jeanne E. Davidson*, Director, Commercial Litigation Branch, *Franklin E. White, Jr.*, Assistant Director, Commercial Litigation Branch, and *Jonzachary Forbes*, Office of Chief Counsel for Trade Enforcement and Compliance, U.S. Department of Commerce.

*Luke A. Meisner*, Schagrin Associates, of Washington D.C., for Defendant-Intervenor. With him on the brief were *Roger B. Schagrin* and *Kelsey M. Rule*.

### OPINION

#### Vaden, Judge:

Saha Thai Steel Pipe Public Company, Ltd. (Saha), filed this case under Section 516A of the Tariff Act of 1930, as amended. Saha challenges the final scope ruling issued by the U.S. Department of Commerce (Commerce) after Commerce conducted a scope inquiry into its 1986 antidumping duty order (“Thailand Order”) on circular welded carbon steel pipes and tubes (CWP) imported from Thailand (Case No. A-549–502). Saha challenges Commerce’s decision to assess antidumping duties on the importation of dual-stenciled pipe imported as line pipe from Thailand. *See* Compl. ¶ 1, ECF No. 6. Before the Court is the Plaintiff’s Rule 56.2 Motion for Judgment on the Agency Record. Pl.’s Mot. for J. on the Agency R. (Pl.’s Mot.), ECF No. 26. For the reasons set forth below, the Court finds that Commerce’s determination that dual-stenciled pipe is covered by the Thailand Order is not supported by substantial evidence, holds that Commerce’s Final Scope Ruling constitutes an unlawful expansion of the scope of the underlying order, **GRANTS** the Plaintiff’s Motion, and remands the Final Scope Ruling back to Commerce to render a redetermination consistent with this Court’s opinion.

### BACKGROUND

The products at issue in this case are Saha manufactured standard pipes, dual-stenciled pipes imported as line pipe, and line pipe, all

produced in Thailand for importation into the United States. The International Trade Commission (ITC) has provided a concise and useful explanation of the differences between line pipe and standard pipe. The ITC's description, from its preliminary injury determination published before Commerce's antidumping order imposing duties on standard pipe imported from Thailand, is as follows:

We have addressed the like product question regarding standard pipes and tubes (standard pipe) and line pipes and tubes (line pipe) in prior investigations. In those investigations, the Commission recognized distinctions between standard pipe and line pipe. Standard pipe is manufactured to American Society of Testing and Materials (ASTM) specifications and line pipe is manufactured to American Petroleum Institute (API) specifications. Line pipe is made of higher grade steel and may have a higher carbon and manganese content than is permissible for standard pipe. Line pipe also requires additional testing. Wall thicknesses for standard and line pipes, although similar in the smaller diameters, differ in the larger diameters. Moreover, standard pipe (whether imported or domestic) is generally used for low-pressure conveyance of water, steam, air, or natural gas in plumbing, air-conditioning, automatic sprinkler and similar systems. Line pipe is generally used for the transportation of gas, oil, or water in utility pipeline distribution systems.

*Certain Welded Carbon Steel Pipes and Tubes from Thailand and Venezuela*, Inv. Nos. 701-TA-242 and 731-TA-252 and 253 (Preliminary), USITC Pub. 1680 (Apr. 1985), Joint Appendix (J.A.) at 1094–96, ECF No. 42. So-called dual-stenciled pipe has received both an American Society of Testing and Materials (ASTM) stencil and an American Petroleum Institute (API) stencil, indicating that it meets the minimum requirements for both standards. *See* J.A. at 1563 (providing a definition for dual-stenciled pipe).

### **I. The Original Antidumping Investigation**

Early in 1985, a subcommittee of the self-named Committee on Pipe and Tube Imports, with its constituent domestic manufacturers, asked Commerce to impose antidumping duties on circular welded carbon steel pipe imports from Thailand. *See id.* at 1090. Their original request sought the imposition of antidumping duties on standard, line, and dual-stenciled pipes. *Id.* Commerce responded to the petition with a memo on March 7, 1985, asking the petitioners to provide “[d]ocumentation which demonstrates that line pipe is manufactured

in Thailand” and “[d]ocumentation which supports the allegation that line pipe from Thailand [was] being sold at less than fair value.” J.A. at 1753.

After receiving Commerce’s March 7th letter, the initial petitioners, among which was Defendant-Intervenor Wheatland Tube Company (Wheatland), filed an amended petition on March 12, 1985. *Amended Petition Filed by Petitioner on March 12, 1985*, J.A. at 1755–79. In that amended petition, the initial petitioners rejected a meaningful distinction between standard and line pipe. *Id.* The initial petitioners instead argued that a precedent existed that collapsed line pipe and standard pipe into a single reviewable industry and that the better distinction was between small diameter and large diameter pipes. *Id.* at 1763. Despite these arguments in their amended petition, in a subsequent letter dated March 14, 1985, the initial petitioners expressly withdrew from their “petitions insofar as they concern line pipe, TSUS numbers 610.3208 and 3209.” *Letter Dated March 14, 1985, from Petitioner Regarding Partial Withdrawal of Petition*, J.A. at 1781–82. The Tariff Schedule of the United States (TSUS) numbers 610.3208 and 3209 are the numbers under which line pipe, dual-stenciled or otherwise, would have been imported in 1985. *See* TSUS 1985 Version; *see also* Tr. of Oral Arg. 7:8–12, ECF No. 51, July 26, 2021 (Government and Wheatland’s admission that line pipe and dual-stenciled pipe would have been imported under these numbers in 1985). At no point before or after submitting the March 14th letter did the initial petitioners provide any “[d]ocumentation” supporting “the allegation that line pipe from Thailand [was] being sold at less than fair value” or even “manufactured in Thailand.” J.A. at 1753. Indeed, the initial petitioners acknowledged that “no Thai company is presently licensed to produce pipe to API specifications, and imports of API line pipe from Thailand are therefore not likely.” J.A. at 1781.<sup>1</sup>

About a month after the back-and-forth between Commerce and the initial petitioners, the ITC released a preliminary report titled *Certain Welded Carbon Steel Pipes and Tubes from Thailand and Venezuela; Determination of the Commission in Investigation No. 701-TA-242: (Preliminary) Under the Tariff Act of 1930, Together with the Information Obtained in the Investigation*. The ITC determined “pursuant to section 733(a) of the Tariff Act of 1930 (19 U.S.C. § 1673b(a)), that there is a reasonable indication that an industry in the United States is threatened with material injury by reason of imports of welded carbon steel standard pipes and tubes from Thailand,” *i.e.*, the standard pipe industry. J.A. at 1089. In its analysis, the ITC directly

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<sup>1</sup> Meaning, Thailand produced neither line pipe, nor dual-stenciled line pipe, at the time of the initial petition, injury determination, and antidumping order.

addressed the initial petitioners' argument — that distinguishing between line and standard pipe was wrong and that the better distinction was between large and small diameter pipes — describing it as “somewhat arbitrary.” *See id.* at 1096. The ITC further stated that “domestic line pipe is like imported line pipe and not like imported standard pipe,” and “domestic standard pipe is like imported standard pipe and is not like imported line pipe.” *Id.* The ITC also described at length the differences between standard pipe and line pipe. *See id.* at 1095.

Almost a year later in January 1986, Commerce issued its final determination that standard pipe from Thailand was being, or was likely to be, sold in the United States at less than fair value. *Circular Welded Carbon Steel Pipes and Tubes from Thailand; Final Determination of Sales at Less Than Fair Value*, 51 Fed. Reg. 3384 (Jan. 27, 1986), J.A. at 1216. This Final Determination described its scope as encompassing “certain circular welded carbon steel pipes and tubes, also known as ‘standard pipe’ or ‘structural tubing,’ which includes pipe and tube with an outside diameter of 0.375 inch or more but not over 16 inches, or any wall thickness, as currently provided in items 610.3231, 610.3234, 610.3241, 610.3242, 610.3243, 610.3252, 610.3254, 610.3256, 610.3258 and 610.4925 of the Tariff Schedules of the United States Annotated.” *Id.* (emphasis added). The TSUS numbers under which dual-stenciled and single-stenciled line pipes would have been imported in 1986 were not listed in this scope. This determination relied on the preliminary ITC report released in April 1985 that addressed the material injury caused to the U.S. standard pipe industry by the importation of standard pipe from Thailand, not by line or dual-stenciled pipe. *Id.*

After Commerce issued its Final Determination on standard pipe imported from Thailand, the ITC issued its own final report in February 1986. This report addressed the material injury to domestic industry, actual and threatened, resulting from the importation of standard pipe from Thailand and the importation of line and standard pipe from Turkey. *See Certain Welded Carbon Steel Pipes and Tubes from Turkey and Thailand*, Inv. Nos. 701-TA-253 and 731-TA-252, USITC Pub. 1810 (Feb. 1986) (ITC Final Determination), J.A. at 1221. The ITC evaluated the effects of both imported line pipe and standard pipe from Turkey but only evaluated the effects of standard pipe from Thailand. *See id.* As a result of its analysis, the ITC made independent material injury determinations regarding line pipe imported from Turkey, standard pipe imported from Turkey, and standard pipe imported from Thailand. *Id.* At no point did the ITC con-

flate line and standard pipe of identical sizes. *See id.* at 1233–34. At no point did the ITC make a material injury determination regarding line pipe or dual-stenciled pipe imported from Thailand. *Id.* And the ITC consistently treated standard pipe and line pipe as different products throughout its injury analyses but did not mention dual or multi-stenciled pipe imported as line pipe. *See id.* at 1221–1376.

In March 1986, Commerce published its antidumping duty order (the Thailand Order) and the scope of that order included:

The products under investigation are certain circular welded carbon steel pipes and tubes (referred to in this notice as “pipes and tubes”), also known as “standard pipe” or “structural tubing,” which includes pipe and tube with an outside diameter of 0.375 inch or more but not over 16 inches, of any wall thickness, as currently provided in items 610.3231, 610.3234, 610.3241, 610.3242, 610.3243, 610.3252, 610.3254, 610.3256, 610.3258, and 610.4925 of the Tariff Schedules of the United States Annotated (TSUSA).

*Antidumping Duty Order: Circular Welded Carbon Steel Pipes and Tubes from Thailand*, 51 Fed. Reg. 8341, 8341 (Dep’t of Commerce Mar. 11, 1986).

Following the 1989 shift from the Tariff Schedule of the United States (TSUS) to the Harmonized Tariff Schedule of the United States (HTSUS), the language governing the scope of the Thailand Order was updated to align with the HTSUS and now states:

The products covered by the order are certain circular welded carbon steel pipes and tubes from Thailand. The subject merchandise has an outside diameter of 0.375 inch or more, but not exceeding 16 inches, of any wall thickness. These products, which are commonly referred to in the industry as “standard pipe” or “structural tubing” are hereinafter designated as “pipes and tubes.” The merchandise is classifiable under the Harmonized Tariff Schedule of the United States (HTSUS) item numbers 7306.30.1000, 7306.30.5025, 7306.30.5032, 7306.30.5040, 7306.30.5055, 7306.30.5085 and 7306.30.5090. Although the HTSUS subheadings are provided for convenience and purposes of U.S. Customs and Border Protection (CBP), the written description of the merchandise subject to the order is dispositive.

*Antidumping Duty Order on Circular Welded Carbon Steel Pipes and Tubes from Thailand: Final Scope Ruling on Line Pipe and Dual-Stenciled Standard and Line Pipe from Thailand*, dated June 30,

2020 (“Final Scope Ruling”), J.A. at 2042; *Circular Welded Carbon Steel Pipes and Tubes From Thailand: Final Results of Antidumping Duty Administrative Review and Final Determination of No Shipments*, 86 Fed. Reg. 7260 (Dep’t of Commerce Jan. 27, 2021); see also *Certain Circular Welded Carbon Steel Pipes and Tubes From Thailand: Preliminary Results of Antidumping Duty Administrative Review*, 55 Fed. Reg. 42596, 42596 (Dep’t Commerce Oct. 22, 1990) (noting transition from TSUS to HTSUS).

## II. Subsequent Reviews of the Thailand Order

Not quite a decade after Commerce published the Thailand Order, President William Jefferson Clinton signed the Uruguay Round Agreements Act (URAA). Pub. L. No. 103–465, 108 Stat. 4809 (1994). Along with resurrecting dead copyrights on largely forgotten movies, the Uruguay Round Agreements Act established a five-year sunset review process for antidumping and countervailing duty orders. Uruguay Round Agreements Act § 220. Under this process, every five years, the administering agency and the ITC conduct a review of all active antidumping and countervailing orders to determine whether they remain necessary. 19 U.S.C. § 1675.

Since the signing of the Uruguay Round Agreements Act, the ITC has initiated, conducted, and concluded four sunset reviews of the Thailand Order. The ITC conducted its first review in 1999 and published the results in 2000; it published the results of the second review in 2006, the third review in 2012, and the fourth in 2018. See *Certain Pipe and Tube from Argentina, Brazil, Canada, India, Korea, Mexico, Singapore, Taiwan, Thailand, Turkey, and Venezuela*, Inv. Nos. 701-TA-253, 731-TA132, 252, 271, 273, 276, 277, 296, 409, 410, 532–534, 536, and 537 (*First Sunset Review*), USITC Pub. 3316 at 6 (July 2000); *Certain Pipe and Tube from Argentina, Brazil, India, Korea, Mexico, Taiwan, Thailand, and Turkey*, Inv. Nos. 701-TA-253, 731-TA-132, 252, 271, 273, 409, 410, 532–534, and 536 (*Second Sunset Review*), USITC Pub. 3867 at 4–5 (July 2006); *Certain Circular Welded Pipe and Tube from Brazil, India, Korea, Mexico, Taiwan, Thailand, and Turkey*, Inv. Nos. 701-TA-253 and 731-TA-132, 252, 271, 273, 532–534 and 536 (*Third Sunset Review*), USITC Pub. 4333 (June 2012); *Certain Circular Welded Pipe and Tube from Brazil, India, Korea, Mexico, Taiwan, Thailand, and Turkey (Final)*, Inv. Nos. 701-TA-253 and 731-TA132, 252, 271, 273, 532–534, and 536 (*Fourth Sunset Review*), USITC Pub. 4754 (Jan. 2018).

In the ITC’s *First Sunset Review*, the express exclusion of line and dual-stenciled pipe from relevant antidumping orders of line pipe was

discussed. See *First Sunset Review* at 11–12, n.53. This discussion was within the context of streamlining the ITC’s different and like product analyses. See *id.* at 11–12. The ITC noted that “the orders on CWP from Thailand and Turkey (CVD) have no express exclusions for products excluded from the scopes in all later cases, including line pipe, OCTG, boiler tubing, cold-drawn or cold-rolled mechanical tubing, pipe and tube hollows for redraws, finished scaffolding, and finished rigid conduit.” *Id.* n.53. Notably, none of these products have ever been treated as within the scope of the Thailand Order, despite the lack of an express exclusion. Cf. *J.A. passim*.

Elsewhere in the same sunset review, the ITC discussed line pipe and dual-stenciled line pipe in the context of “safeguard duties” imposed by President Clinton on every country reviewed that produced line pipe and dual-stenciled pipe at the time, except Canada and Mexico. *First Sunset Review* at 28; see also *To Facilitate Positive Adjustment to Competition from Imports of Certain Circular Welded Carbon Quality Line Pipe*, Proclamation No. 7274, 65 Fed. Reg. 9191 (Feb. 23, 2000).<sup>2</sup> In that discussion, the ITC notes that dual-stenciled pipe imported as line pipe, and line pipe *simpliciter*, were excluded from antidumping orders but were nonetheless subject to President Clinton’s “safeguard duties” covering line pipe. *First Sunset Review* at 28.

When the ITC conducted its second review of the Thailand Order and other similar antidumping orders, the safeguard duties against line pipe had expired or otherwise ended. See *Second Sunset Review* at 11, n.55. Nonetheless, in the *Second Sunset Review* the ITC noted that dual-stenciled pipe imported as line pipe had only been subject to duties under President Clinton’s safeguard duties covering line pipes, not standard pipes: “Following an affirmative determination by the Commission, in March 2000, President Clinton issued Proclamation 7274, imposing additional duties of 19 percent on line pipe imports of more than 9,000 short tons annually (including “dual-stenciled” pipe but excluding “arctic grade” line pipe).” *Id.* at Overview-5 n.16. The *Second Sunset Review* also noted that “multiple-stenciled line pipe requires additional steel than CWP [*sic*] to meet American Petroleum Institute (API) specifications applicable to line pipe. At [then] current steel prices, this would require that a multiple-stenciled product be sold at a considerable price premium over a product that satisfies ASTM specifications but not API specifications.” See *id.* at 13 n.66.

In its third review of the Thailand Order, the ITC described the scope of all Orders under its review and in that description included

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<sup>2</sup> The Proclamation’s safeguard duties expired in March 2003. Proclamation No. 7274, 65 Fed. Reg. at 9194.

this caveat: “[D]ual-stenciled pipe, which for U.S. customs purposes enters as line pipe under a different tariff subheading, is not within the scope of the orders.” *Third Sunset Review* at 8. The Thailand Order did not receive a special carve out from the general language of the *Third Sunset Review’s* scope.<sup>3</sup> *See id.*

In the *Fourth Sunset Review* of the Thailand Order in January 2018, the ITC reiterated the position that it took in the *Third Sunset Review*, that it implied or stated in the first and second reviews, and that Commerce expressed in 1985, 1986, and 2012. *See Fourth Sunset Review* at 6–7. The *Fourth Sunset Review* stated that line pipe, which includes dual-stenciled pipe, was not within the scope of the anti-dumping orders concerning standard pipes:

Producers primarily make CWP to ASTM specifications A53, A135, and A795.26 Since these standards often require engineering characteristics that overlap with other specifications, a pipe may be dual stenciled, i.e., stamped to indicate compliance with two different specifications, such as ASTM A53 and API 5L. Dual-stenciled pipe, which enters as line pipe under a different subheading of the Harmonized Tariff Schedule of the United States (“HTS”) for U.S. customs purposes, is not within the scope of the orders.

*Id.*

### III. The Scope Determination in Question

In January 2019, Wheatland told Commerce “that certain imports of merchandise from Thailand that are entering the United States as ‘line pipe’ are circumventing” the Thailand Order and requested that Commerce make a circumvention ruling against Saha. *Circumvention Ruling Request*, J.A. at 1807. According to Wheatland and Southland Tube Company, the domestic interested parties who filed the request, Saha was circumventing the Thailand Order through minor alterations to Saha’s merchandise. *See id.* They alleged that Saha began exporting what Wheatland considered “minorly-altered standard pipe” after Saha’s dumping margin jumped from 1.36 percent to about 28 percent. *See id.* at 1811.

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<sup>3</sup> The argument that the lack of an express exclusion in the Thailand Order means the *Third Sunset Review’s* scope cannot possibly include the Thailand Order within its general exclusion of line pipe, single or dual-stenciled, is unavailing. That Thailand’s order does not expressly exclude line pipe or dual-stenciled pipe is a function of Thailand’s production capacity. It is not an expression of intent to include line pipe, single and dual-stenciled, within the scope of the Thailand Order. As mentioned above, Thailand’s order does not include an express exclusion because Thailand did not produce line pipe or dual-stenciled line pipe at the time the Thailand Order was issued.

On November 22, 2019, Commerce self-initiated a scope inquiry into the Thailand Order. *Memorandum from Leo Ayala, International Trade Compliance Analyst, Office VII, Antidumping and Countervailing Duty Operations, to James Maeder, Deputy Assistant Secretary for Antidumping and Countervailing Duty Operations, regarding Antidumping Duty Order on Circular Welded Carbon Steel Pipes and Tubes from Thailand: Self Initiation of Scope Inquiry on Line Pipe and Dual-Stenciled Standard Line Pipe* (Nov. 22, 2019), J.A. at 1800. Before the scope inquiry, during the inquiry, and since, Saha has consistently asserted that its dual-stenciled line pipes are not standard pipes with minor alterations and that these dual-stenciled line pipes are outside the antidumping duty order's scope. J.A. at 1171–1203, 1898–1953, and 1975–2022.

Commerce issued a preliminary scope ruling in February 2020, finding for the first time in thirty-four years that dual-stenciled line pipe is within the scope of the Thailand Order while single-stenciled line pipe is not. *See Antidumping Duty Order on Circular Welded Carbon Steel Pipes and Tubes from Thailand: Preliminary Scope Ruling on Line Pipe and Dual-Stenciled Standard and Line Pipe* (Feb. 24, 2020), J.A. at 1954. All the parties submitted comments and arguments on the preliminary ruling. J.A. at 1962–2040. Commerce remained unmoved; and in its Final Scope Ruling, Commerce again found that dual-stenciled pipe is within the scope of the Thailand Order. *See Final Scope Ruling*, J.A. at 2042.

#### IV. The Present Case

On July 17, 2020, Saha sued the Department of Commerce seeking to overturn its scope decision. ECF No. 6. Wheatland intervened in the case on August 12, 2020. ECF No. 15. In December 2020, Saha filed its Motion for Judgment on the Agency Record, for which the Court held an extensive hearing on July 15, 2021. ECF Nos. 26 and 47. Counsel for all parties attended. During the hearing, the Court asked several questions.

The first question was:

[Y]ou can just tell me with a simple yes or no if the statement as I have presented it is factually correct or not... . [I]n 1985 to 1986, the country of Thailand did not produce line pipe, including dual stenciled-line pipe.

Tr. of Oral Arg. 5:24–25, 6:1–4, ECF No. 51, July 26, 2021. The Government responded “Your Honor, our understanding is that the – the stated reason for the withdrawal – affirmative withdrawal of the original petition was that – was the notion that there was no manu-

facture of line pipe in Thailand at the time.” *Id.* at 6:12–16. Wheatland stated it understood “that there was neither production of regular single stenciled line pipe nor dual stenciled standard inline [*sic*] pipe in Thailand at the time the petitions were filed.” *Id.* at 7:1–3.

The second question the Court asked was:

Was all line pipe, including dual stenciled line pipe, in 1985/86 imported under TSUS Codes 610.3208 and/or 610.3209?

*Id.* at 7:8–10. Both the Government and Wheatland admitted that dual-stenciled pipe would have been imported under the TSUS codes for line pipe in 1985 and 1986. *Id.* at 7:11–22.

At the end of the hearing, the Court ordered the Government and Wheatland to review this case’s record thoroughly. After reviewing the record, the Court required them to write a letter identifying for the Court “in the record of this matter” where “there was an instance or more than one instance of...the Government” referring “explicitly to dual stenciled pipe as standard pipe.” *Id.* at 71:3–7. The Court also gave Saha’s counsel the right to respond. *Id.* at 72:1–7.

The Government and Wheatland timely submitted their letters. The Government identified for the Court quotes in the *Fourth Sunset Review* that came from Commerce’s antidumping order on standard pipe imported from Taiwan and from its antidumping order on standard pipe from Brazil, Mexico, and Korea. Government’s Letter Re: *Saha Thai Steel Pipe Public Company Limited v. United States*, No. 20–133 (Ct. Int’l Trade), at 1, ECF No. 49 (citing to *Fourth Sunset Review* at I-12 to I-13). The language that Commerce identifies is as follows:

**Brazil, Mexico, and Korea:** Standard pipe that is dual or triple certified/stenciled that enters the U.S. as line pipe of a kind used for oil or gas pipelines is also not included in the orders.

**Taiwan:** Standard pipe that is dual or triple certified/stenciled that enters the U.S. as line pipe of a kind or used for oil and gas pipelines is also not included in the scope of the order.

Wheatland, like the Government, also identifies the same language from other antidumping orders that is quoted in the *Fourth Sunset Review*. Wheatland’s Letter Re: *Saha Thai Steel Pipe Public Company Limited v. United States* (Ct. No. 20–00133): Response to Court’s July 15, 2021 Order, at 1–2, ECF No. 50. But Wheatland goes even further and cites additional quotes from the preliminary and final investigations into CWP imported from China. *Id.* at 3–4; *Circular Welded Carbon- Quality Steel Pipe from China*, Inv. Nos. 701-TA-447

and 731-TA-1116 (Preliminary), USITC Pub. 3938 (July 2007); *Circular Welded Carbon-Quality Steel Pipe from China*, Inv. Nos. 701-TA-447 and 731-TA-1116 (Final), USITC Pub. 4019 (July 2008).

Interestingly, the language that the Government and Wheatland have referenced in response to the Court's order is all language from antidumping orders that the Government and Wheatland have consistently argued "are not probative of the [Thailand] order's scope." Def.'s Resp. to Pl.'s Mot. for J. on the Agency R. (Def.'s Resp.) at 18, ECF No. 37. The Government in its response brief had argued that antidumping orders for other countries are not "enumerated under 19 CFR 351.225(k)(1)" and that the (k)(1) materials do not "include determinations [from] proceedings on similar products from different countries." *Id.* at 19. Wheatland likewise argued that the antidumping orders and investigations dealing with other countries "are not included within the 'scope determinations' that Commerce must consider under section (k)(1)." *See* Defendant-Intervenor's Resp. to Pl.'s Mot. for J. on the Agency R. (Def.-Int.'s Resp.) at 21, ECF No. 34. As Wheatland put it, "Saha Thai fails to appreciate that agency determinations arising from different orders with different scope language—even if similarly captioned" are not relevant. *Id.* And "[i]n- deed, there is no basis in law for Saha Thai's assertion that scope determinations arising from different proceedings involving different records and different scope language should have any bearing on Commerce's analysis of the (k)(1) sources." *Id.*

Saha timely responded to the Government and Wheatland's letters. ECF No. 52. In its response letter, Saha pointed out that the Government and Wheatland do not cite to any document or statement in the record underlying the Thailand Order. *Id.* at 1. Saha highlighted how the Government and Wheatland's letters quote language from other antidumping orders that do not involve pipe imports from Thailand. *Id.* at 1–2.

## JURISDICTION AND STANDARD OF REVIEW

The Court has jurisdiction over Plaintiff's challenge to the Scope Ruling under 19 U.S.C. § 1516a(a)(2)(B)(vi) and 28 U.S.C. § 1581(c), which grant the Court authority to review actions contesting scope determinations described in an antidumping order. The Court must sustain 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). If they are supported by neither substantial evidence nor the law, the Court must "hold unlawful any determination, finding, or conclusion

found.” *Id.* “[T]he question is not whether the Court would have reached the same decision on the same record[;] rather, it is whether the administrative record as a whole permits Commerce’s conclusion.” See *New American Keg v. United States*, No. 20–00008, 2021 WL 1206153, at \*6 (Ct. Int’l Trade Mar. 23, 2021).

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); see also *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951) (“The substantiality of evidence must take into account whatever in the record fairly detracts from its weight.”). The Federal Circuit has described “substantial evidence” 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)).

## DISCUSSION

### I. Legal Framework

The Federal Circuit has arguably provided the United States Court of International Trade with two distinct methods that the Court may use to begin its analysis of the lawfulness of Commerce’s scope inquiries into antidumping orders. The first method evaluates the content of the plain language of an antidumping order without reference to any other document, except typical references used when analyzing any law or regulation, such as a dictionary. See *OMG, Inc. v. United States*, 972 F.3d 1358, 1363 (Fed. Cir. 2020). The second method is the *Meridian* method, which requires an analysis of a scope’s language within the context of the (k)(1) materials, *i.e.*, the administrative documents produced during the agency process that led to the antidumping order. *Meridian Prod. v. United States*, 890 F.3d 1272, 1277 (Fed. Cir. 2018). Both methods seek to determine whether a scope’s language is sufficiently ambiguous that Commerce must resort to additional documents or considerations to interpret an order’s scope.

Under *OMG*, “the first step in a scope ruling proceeding is to determine whether the governing language is in fact ambiguous.” *ArcelorMittal Stainless Belgium N.V. v. United States*, 694 F.3d 82, 87 (Fed. Cir. 2012). “If it is not ambiguous, the plain meaning of the language governs.” *Id.* But “[i]f the language is ambiguous, Commerce must next consider the . . . (k)(1) materials.” *Mid Continent Nail Corp. v. United States*, 725 F.3d 1295, 1302 (Fed. Cir. 2013) (citations omitted).

Under *Meridian*, “the plain language of an antidumping order is paramount.” *Meridian Prod. v. United States*, 890 F.3d 1272, 1277 (Fed. Cir. 2018). But when “reviewing the plain language of a duty order, Commerce must consider” the (k)(1) materials. *Id.* at 1277; see also *Midwest Fastener Corp. v. United States*, 494 F.Supp. 3d 1335, 1340 (Ct. Int’l Trade 2021) (“When considering the scope language, Commerce will take into account descriptions of the merchandise contained in . . . [the (k)(1) sources]”). If the above method does “not dispositively answer the question, Commerce may consider the...so-called (k)(2) factors.” *Meridian Prod.*, 890 F.3d at 1278.

Regardless of the method, the question of whether a scope’s language is ambiguous is reviewed by the Court *de novo*. *OMG*, 972 F.3d at 1363; *Meridian Prod.*, 851 F.3d at 1382. After its *de novo* review of Commerce’s ambiguity determination in this case, the Court has determined that the distinction between the Federal Circuit’s two methods is of no moment given that the plain language of the Thailand Order’s scope is ambiguous without the context of the (k)(1) materials. Whether the Court uses the (k)(1) materials from the beginning or uses them only after reading the original scope does not matter. In this case, the (k)(1) materials must be read.

The (k)(1) materials consist of “[t]he descriptions of the merchandise contained in the petition, the initial investigation, and the determinations of the Secretary (including prior scope determinations) and the Commission.” 19 C.F.R. § 351.225(k)(1). So-called “Sunset Reviews” conducted pursuant to the Uruguay Round Agreements Act are (k)(1) materials. See *Quiedan Co. v. United States*, 294 F.Supp.3d 1345 (Ct. Int’l Trade 2018) (including sunset reviews among the (k)(1) materials), *aff’d*, 927 F.3d 1328 (Fed. Cir. 2019). Also included among the (k)(1) materials are “determinations of...the [ITC],” such as injury determinations. 19 C.F.R. § 351.225(k)(1).

“A fundamental requirement of both U.S. and international law is that an antidumping duty order must be supported by an ITC determination of material injury covering the merchandise in question.” *Wheatland Tube Co. v. United States*, 973 F.Supp. 149, 158 (Ct. Int’l Trade 1997), *aff’d*, 161 F.3d 1365 (Fed. Cir. 1998). The law permitting Commerce to issue antidumping orders, 19 U.S.C. § 1673, “is remedial, [and] . . . was designed to protect domestic industry from sales of imported merchandise at less than fair value which either caused or threatened to cause injury.” *Badger-Powhatan, Div. of Figgie Int’l, Inc. v. United States*, 608 F.Supp. 653, 656 (Ct. Int’l Trade 1985). Therefore, “[w]here the domestic industry is not injured, it cannot

avail itself of the relief accorded under the antidumping statute.” *Id.* at 657. And Commerce cannot “assess antidumping duties on products intentionally omitted from the ITC’s injury investigation.” *Wheatland Tube Co. v. United States*, 161 F.3d 1365, 1371 (Fed. Cir. 1998). Allowing the ITC to assess such duties without an injury determination “would itself frustrate the purpose of the antidumping laws.” *Id.*

If these (k)(1) materials are dispositive, whether they are evaluated while initially interpreting a scope or evaluated only after a scope is found ambiguous, Commerce may issue a final ruling based on those materials. *See Tak Fat Trading Co. v. United States*, 396 F.3d 1378, 1382 (Fed. Cir. 2005). If the (k)(1) materials are not dispositive, Commerce must consider “(k)(2) factors,” which include “(i) [t]he physical characteristics of the product; (ii) [t]he expectations of the ultimate purchasers; (iii) [t]he ultimate use of the product; (iv) [t]he channels of trade in which the product is sold; and (v) [t]he manner in which the product is advertised and displayed.” 19 C.F.R. § 351.225(k)(2); *see also* 19 C.F.R. § 351.225(e); *Meridian Prod.*, 890 F.3d at 1278.

Although this Court owes “significant deference” to Commerce’s interpretation of its orders, Commerce cannot issue an interpretation that changes the scope of the order nor “interpret an order in a manner contrary to its terms.” *See Duferco Steel Inc. v. United States*, 296 F.3d 1087, 1094–95 (Fed. Cir. 2002) (*quoting Eckstrom Indus., Inc. v. United States*, 254 F.3d 1068, 1072 (Fed. Cir. 2001)).

## II. Analysis

### A. Summary

Saha’s Motion for Judgment on the Agency Record presents three principal issues: First, whether Commerce’s decision to include dual-stenciled pipe within the scope of the Thailand Order is supported by substantial evidence; second, whether Commerce’s final scope decision unlawfully expands the scope to include merchandise that was not part of the final injury determination of the ITC; and third, whether Commerce’s final scope decision is otherwise not in accordance with law because it is contrary to the Federal Circuit’s decision in *Wheatland Tube Co. v. United States*, 161 F. 3d 1365 (Fed. Cir. 1998). Pl.’s Mot., ECF No. 26.

Saha’s argument is straightforward: Commerce unlawfully expanded the scope of the Thailand Order by ignoring overwhelming evidence that dual-stenciled line pipe was not treated as standard pipe by the ITC or by Commerce and was intentionally excluded from

the ITC's injury determination and Commerce's Thailand Order. Therefore, dual-stenciled line pipe is outside the Thailand Order's scope. *See* Pl.'s Mot. at 16–24, ECF No. 26. Saha supports its contention with documents that fall within the (k)(1) materials and with documents, orders, and determinations concerning the same products from other countries. *See* J.A., ECF No. 42; *see also* Pl.'s Mot. at 20, ECF No. 26.

Commerce responds that its determination that dual-stenciled pipe is within the scope of the Thailand Order is supported by substantial evidence because the order's plain language unambiguously encompasses dual-stenciled pipe. *See* Def.'s Resp. at 16–20, ECF No. 37. Commerce rejects Saha's contention that there is probative value in antidumping orders, ITC determinations, and Commerce's determinations that cover the same products but are from different countries. *See id.* at 18–20. Finally, Commerce asserts that its determination is consistent with the (k)(1) materials, but that those materials do not need to be consulted given the unambiguous language of the Thailand Order's scope. *See id.* at 15–18, ECF No. 37.<sup>4</sup>

The Court disagrees with Commerce's interpretation of the plain language of the scope and the short shrift it gives to the (k)(1) materials. Reviewing the Thailand Order's scope language *de novo*, the Court holds that the language is ambiguous without the context provided by the (k)(1) materials. *See OMG*, 972 F.3d at 1363 (scope ambiguity determinations by Commerce receive *de novo* review). Therefore, the Court, like Commerce, must rely on the (k)(1) materials to interpret the Thailand Order's scope language. *See Mid Continent Nail Corp.*, 725 F.3d at 1302.

After reviewing the (k)(1) materials in the administrative record with the appropriate deference, the Court finds that Commerce lacks substantial evidence for its position that dual-stenciled pipe imported as line pipe is included within the Scope of the Thailand Order; Commerce has instead unlawfully sought to expand the scope of its original order. First, Thailand did not produce dual-stenciled pipe at the time of the original investigation and order, and the request was effectively withdrawn from consideration by the petitioners themselves. Second, the (k)(1) materials show that the ITC made no injury determination as to dual-stenciled or mono-stenciled line pipe from Thailand; therefore, antidumping duties cannot be imposed on those types of pipes when imported from Thailand. Third, Commerce and the ITC throughout the (k)(1) materials consistently treat dual-stenciled pipe as line pipe when imported into the United States.

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<sup>4</sup> Wheatland's arguments are essentially aligned with the Government's.

The Court first will address Commerce’s plain language arguments; then it will turn to an analysis of the (k)(1) materials.<sup>5</sup>

### **B. The Plain Language of the Thailand Order’s Scope**

The original Thailand Order’s scope in its entirety reads:

The products under investigation are certain circular welded carbon steel pipes and tubes (referred to in this notice as “pipes and tubes”), also known as “standard pipe” or “structural tubing,” which includes pipe and tube with an outside diameter of 0.375 inch or more but not over 16 inches, of any wall thickness, as currently provided in items 610.3231, 610.3234, 610.3241, 610.3242, 610.3243, 610.3252, 610.3254, 610.3256, 610.3258, and 610.4925 of the Tariff Schedules of the United States Annotated (TSUSA).

*Antidumping Duty Order: Circular Welded Carbon Steel Pipes and Tubes from Thailand*, 51 Fed. Reg. 8341, 8341 (Dep’t of Commerce Mar. 11, 1986).

Commerce later rearranged the scope language, amended the TSUS numbers to reflect the change to the HTSUS, and added language asserting that the HTSUS numbers are simply examples and are not exhaustive of what might be covered by the Thailand Order:

The products covered by the order are certain circular welded carbon steel pipes and tubes from Thailand. The subject merchandise has an outside diameter of 0.375 inch or more, but not exceeding 16 inches, of any wall thickness. These products, which are commonly referred to in the industry as “standard pipe” or “structural tubing” are hereinafter designated as “pipes and tubes.” The merchandise is classifiable under the Harmonized Tariff Schedule of the United States (HTSUS) item numbers 7306.30.1000, 7306.30.5025, 7306.30.5032, 7306.30.5040, 7306.30.5055, 7306.30.5085 and 7306.30.5090. Although the HTSUS subheadings are provided for convenience and purposes

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<sup>5</sup> The Court will not discuss *Wheatland Tube Co. v. United States*, 161 F.3d 1365, 1371 (Fed. Cir. 1998) at length. *Wheatland Tube Co.* involved an analysis of the following question: If the language in an antidumping order’s scope expressly excludes a given product, but that product is then imported and used for the same purpose as the products otherwise covered by that same order, does the excluded product then fall under the scope of that antidumping order? See *Wheatland Tube Co.*, 161 F.3d at 1368–69. The answer *Wheatland Tube Co.* gave is no, it does not fall under the scope unless the scope is ambiguous and the (k)(1) materials are not dispositive. *Id.* at 1369–70.

The present case deals with an entirely different legal issue – the applicability of an antidumping order’s scope to products neither expressly included in nor expressly excluded from that scope, and whether the (k)(1) materials underlying that antidumping order support by substantial evidence the reading of that scope to nevertheless include those otherwise unmentioned products.

of U.S. Customs and Border Protection (CBP), the written description of the merchandise subject to the order is dispositive.

Final Scope Ruling, J.A. at 2042.

Commerce argues that the plain language of the amended Thailand Order's scope is "not ambiguous and supports Commerce's determination that dual stenciled pipe is within the scope of the order," and therefore the inquiry should stop there. Def.'s Resp. at 13, ECF No. 37. Because, according to Commerce, the Thailand Order is unambiguous, "the 'plain language of the order governs.'" *Id.* (quoting *OMG*, 972 F.3d at 1364). It is unclear, however, what language in the order Commerce believes governs given that Commerce fails to direct the Court to specific language in the scope that plainly subjects dual-stenciled pipe imported as line pipe to the Thailand Order. *Id.* at 13–16.

Wheatland attempts to bolster Commerce's textual argument by asserting that "[t]he scope covers all circular welded carbon steel pipes and tubes from Thailand with an outside diameter of 0.375 inch or more, but not exceeding 16 inches." *See* Def.-Int.'s Resp. at 12, ECF No. 34. Wheatland argues that, because dual-stenciled pipe imported as line pipe possesses the same shape characteristics of the merchandise described in the scope language, dual-stenciled pipe falls under the scope's plain language; and no further analysis is necessary. *See id.* at 14–15.

The problem with the Defendants' analysis of the text of the scope is that the Defendants look at the language of only one-third of the scope, isolating the language about size and diameter from the rest of the text. The scope includes more. The original scope also lists a set of TSUS item numbers that do not include, as all the parties agreed, the item numbers under which dual-stenciled pipe would have been imported in 1986. *See* Tr. of Oral Arg. 6:12–7:3; 7:11–22, ECF No. 51, July 26, 2021 (all parties agreeing that dual-stenciled pipe would have been imported in 1986 under TSUS item numbers that were expressly excluded from the scope of the original antidumping order). These item numbers, as the amended Thailand Order scope says, are not dispositive. *See also Novosteel SA v. U.S., Bethlehem Steel Corp.*, 284 F.3d 1261, 1270 (Fed. Cir. 2002) (reasoning that absence of particular HTSUS classification number does not show exclusion of any merchandise); *Smith Corona Corp. v. United States*, 915 F.2d 683, 687 (Fed. Cir. 1990) (reasoning that reference to TSUS classification number is not dispositive); *Wirth Ltd. v. United States*, 5 F.Supp. 968, 977–78 (Ct. Int'l Trade 1998), *aff'd*, 185 F.3d 882 (Fed. Cir. 1999) ("The inclusion of various HTSUS headings in a petition ordinarily should

not be interpreted to exclude merchandise determined to be within the scope of the antidumping or countervailing duty orders but classified under an HTSUS heading not listed in the petition”). Though not dispositive, their absence certainly does not provide evidence that dual-stenciled line pipe’s inclusion is supported by the scope’s plain language.<sup>6</sup>

Reading further past the language convenient for Wheatland’s argument, the scope also states that the pipes subject to the Thailand Order are “commonly referred to in the industry as ‘standard pipe.’” J.A. at 2042. Meaning, the scope applies not simply to circular welded pipes with a given size or shape, but rather circular welded pipes that meet the industry standards and specifications required for those pipes to qualify as “standard pipes” *and* are referred to by the industry as “standard pipes” in common usage. *Id.* But what exactly is “standard pipe,” and does it include dual-stenciled pipe? The language of the scope itself is silent. Given this, the Court, like Commerce, must turn to the (k)(1) materials to resolve the ambiguity. *Id.* at 2047 (expressly determining that it must examine the (k)(1) materials to resolve the question). The Court, therefore, considers next whether, viewed with the appropriate deference, the record as a whole supports Commerce’s decision with substantial evidence.

### C. The (k)(1) Materials

The (k)(1) materials consist of “[t]he descriptions of the merchandise contained in the petition, the initial investigation, and the determinations of the Secretary (including prior scope determinations) and the Commission.” 19 C.F.R. § 351.225(k)(1). Saha argues that these materials do not support Commerce’s decision to include dual-stenciled pipe imported as line pipe within the scope of the Thailand Order but rather lead to the opposite conclusion. *See* Pl.’s Mot. at 16–26, ECF No. 26. Saha supports its argument by noting that Thailand did not produce dual-stenciled pipe at the time of the order, that the original petitioners withdrew from consideration products im-

<sup>6</sup> Wheatland’s argument that size and shape are the only relevant characteristics for classifying different kinds of pipes has also been consistently rejected by Commerce and the ITC. For example, the ITC in 1985 called this approach “somewhat arbitrary” and did not apply it in its injury determinations, instead taking great care to distinguish between standard and line pipe. J.A. at 1096. During the scope inquiry that led to this case, Wheatland used this same argument again while attempting to convince Commerce to apply the Thailand Order not only to dual-stenciled line pipe but also to mono-stenciled line pipe. J.A. at 1004–06. Commerce rejected Wheatland’s argument in its Final Scope Ruling insofar as mono-stenciled line pipe is concerned, noting as the Court does that “[t]he historical documents establish that the investigations of both Commerce and the ITC were limited to standard pipe.” J.A. at 2053. And that “to impose AD duties, Commerce must determine that the class or kind of merchandise has been found to be sold at less than fair value, and the ITC must conclude that a domestic industry has been materially injured or threatened with material injury.” J.A. at 2053–54.

ported under TSUS item numbers 610.3208 and 3209, and that the ITC never made a legally required injury determination for imported Thai produced dual-stenciled pipe. *See id.* at 26. Saha also directs the Court's attention to the various sunset reviews and argues that these reviews consistently treat dual-stenciled pipe as line pipe. *See id.* at 32–34.

Commerce and Wheatland respond that the amended petition itself does not exclude dual-stenciled pipe in its language; therefore, dual-stenciled pipe is not excluded from the scope. *See* Def.'s Resp. at 20, ECF No. 37; Def.-Int.'s Resp. at 12, ECF No. 34. They also argue that the original ITC investigation only excluded line pipe and did not expressly exclude dual-stenciled pipe that receives both an ASTM standard pipe stencil and an API line pipe stencil so that any pipe with an ASTM stencil would fall within the ITC's injury determination. *See* Def.'s Resp. at 16, ECF No. 37. Finally, they assert that, when the sunset reviews emphasized that the antidumping orders under review excluded dual-stenciled pipe, "the Commission's statement was not addressing the language of each individual order but rather providing a generalized statement 'applicable to the majority of the orders, which contained explicit exclusions for dual-stenciled pipe.'" *See* Def.-Int.'s Resp. at 18, ECF No. 34 (quoting Final Scope Ruling at 15).

Without going deeply into the (k)(1) materials, one finds the following definition: "Standard pipe is [pipe that is] manufactured to American Society of Testing and Materials (ASTM) specifications." *Certain Welded Carbon Steel Pipes and Tubes from Thailand and Venezuela*, USITC Pub. 1680 at 7–8 (internal references omitted). With this aid, the meaning of the scope becomes clearer: The products subject to the Thailand Order as described by its scope consist of circular welded pipes with a specific range of diameters, any wall thickness, the production and metal quality of what are commonly called "standard pipes," and that obtain an American Society of Testing and Materials stencil. *See id.*

Even this explanation of the Thailand Order's scope raises one final question: Does "standard pipe" refer only to mono-stenciled standard pipe, or does it also include dual-stenciled pipe – pipe that meets both the minimum specifications demanded by the American Society of Testing and Materials for standard pipe and has the higher quality steel and has passed the more stringent tests required to receive an American Petroleum Institute line pipe stencil? That the scope raises this question and does not answer it means that there is an ambiguity that must be resolved, and thus a much deeper evaluation of the (k)(1) materials is necessary to understand the boundaries of the

scope. After reviewing the (k)(1) materials, the Court finds that the original petition, the injury determination, and the sunset reviews do not support Commerce's final scope ruling on the Thailand Order with substantial evidence. They instead reflect that Commerce has unlawfully expanded the scope of its original order.

### **i. Initial Investigation and Injury Determination**

In their first petition in 1985, the initial petitioners requested an investigation of pipe imported from Thailand under a variety of item numbers found in the Tariff Schedules of the United States at the time, including item numbers 610.3208 and 3209. *See* J.A. at 1706. Dual-stenciled pipe imported as line pipe would have been imported under these numbers at the time of the original Thailand Order. *See* TSUSA 1985 Version; *see also* Tr. of Oral Arg. 7:11–22, ECF No. 51, July 26, 2021. But after Commerce sent an inquiry asking for evidence that Thailand produced such pipes, the initial petitioners decided to expressly withdraw their “petitions insofar as they concern line pipe, TSUS numbers 610.3208 and 3209.” *Letter Dated March 14, 1985, from Petitioner Regarding Partial Withdrawal of Petition*, J.A. at 1781–82.

Once the initial petitioners withdrew all pipes that were importable under 610.3208 and 3209 from consideration by the ITC and Commerce, those pipes were not included in either the resulting injury investigation conducted by the ITC or the antidumping order issued by Commerce. *See Letter Dated March 14, 1985, from Petitioner Regarding Partial Withdrawal of Petition*, J.A. at 1781–82 (letter from petitioners withdrawing from their “petitions insofar as they concern line pipe, TSUS numbers 610.3208 and 3209”). Consequently, the ITC has never conducted an injury investigation, nor made an injury determination, on pipes imported from Thailand that are dual-stenciled, or obtain an API stencil, regardless of whether those pipes also have an ASTM stencil.

Commerce cannot impose a duty on a fiction. API stenciled pipes, *i.e.* line and dual-stenciled pipes, were omitted by the decision of the petitioners themselves from the ITC's original injury investigation. The parties have also admitted that Thailand *did not produce* line pipes, dual-stenciled or otherwise, at the time the ITC conducted its injury investigation. Tr. of Oral Arg. 6:12–16, 7:1–3, ECF No. 51, July 26, 2021. It is well settled that Commerce cannot “assess antidumping duties on products intentionally omitted from the ITC's injury investigation.” *Wheatland Tube Co.*, 161 F.3d at 1371. Allowing Commerce to assess such duties without an injury determination “would

itself frustrate the purpose of the antidumping laws.” *Id.* And finding that the ITC determined a product that did not yet exist somehow injured domestic industry would frustrate common sense.

Since their initial omission from the original injury investigation, the ITC has conducted no subsequent injury investigation to determine whether API stenciled pipe from Thailand injures a domestic industry. Given that it is “a fundamental requirement” in our law “that an antidumping duty order must be supported by an ITC determination of material injury covering the merchandise in question,” the lack of such an injury determination for API stenciled pipes is fatal to Commerce’s case. *See Wheatland Tube Co.*, 973 F. Supp. at 158, *aff’d*, 161 F.3d 1365 (Fed. Cir. 1998).

It is worthwhile to note that, when the ITC conducted its injury investigation of domestic industries affected by pipes imported from Thailand, the ITC’s preliminary report on the subject addressed the injury caused to domestic industries by not only standard pipes imported from Thailand but also the injury caused by imported standard and line pipes from Venezuela. *See Certain Welded Carbon Steel Pipes and Tubes from Thailand and Venezuela*, Inv. Nos. 701-TA-242 and 731-TA-252 and 253 (Preliminary), USITC Pub. 1680 (April 1985). In that report, the ITC emphasized that imported standard pipe and line pipe affect separate industries and are different products. At every point, it was careful to not conflate line pipe and standard pipe when discussing imports from Thailand. *See id.* at 7–8.

The same holds true for the ITC Final Determination. J.A. at 1221. The ITC did not include line pipe or dual-stenciled pipe imported as line pipe within the description of the investigation’s scope into Thailand circular welded pipes. *See Circular Welded Carbon Steel Pipes and Tubes from Thailand; Final Determination of Sales at Less Than Fair Value*, 51 Fed. Reg. 8384 (Jan. 27, 1986). The only discussion of line pipe appears in the sections of the report addressing Turkish imports, and the Commissioners were cautious even in their section headings to use “line pipe” only in conjunction with Turkey. *See, e.g.*, ITC Final Determination, J.A. at 1244–45 (differentiating among “standard pipe imports from Thailand,” “standard pipe imports from Turkey,” and “line pipe imports from Turkey”).

Most notably, the only conflation of standard pipe and line pipe came from the two Commissioners in *dissent*. *Id.* at 1263–83 (dissenting views of Vice Chairman Liebler and Commissioner Brunsdale). Commissioner Brunsdale thought that the Commission should not separate its analysis of standard pipes and line pipes but should

instead consider them as one product to be analyzed together.<sup>7</sup> *Id.* at 1281. That this view was in dissent further points to the lack of evidence of *any* harm finding from the ITC regarding the importation of line pipe, including dual-stenciled line pipe, from Thailand. With no harm determination from the ITC, Commerce lacks legal authority to impose duties on dual-stenciled pipe. *See Wheatland Tube Co.*, 161 F.3d at 1371.

## ii. Sunset Reviews

Although a finding that the ITC's injury determination did not cover dual-stenciled pipe is sufficient to overturn Commerce's scope determination, the ITC's sunset reviews reinforce the Court's finding that dual-stenciled, or API stenciled pipe of any kind, was not included in the Thailand Order's scope. *See Quiedan Co.*, 294 F.Supp.3d 1345, 1351–53 (including sunset reviews among the (k)(1) materials), *aff'd*, 927 F.3d 1328 (Fed. Cir. 2019). Every sunset review of the Thailand Order treats dual-stenciled pipe as line pipe. For example, the first two sunset reviews did not find that dual-stenciled pipe imported from any country affected the domestic standard pipe industry. *See First Sunset Review* (makes no findings as to whether dual-stenciled pipe imported as line pipe affects the domestic standard pipe industry); *see also Second Sunset Review* at 13 n.66. Additionally, when the first two sunset reviews discussed duties on dual-stenciled pipe from countries that produced it at the time, it was solely in the context of President Clinton's safeguard duties on line pipe. The ITC consistently understood those duties to apply to dual-stenciled pipe, not just mono-stenciled line pipe, and *not to apply* to standard pipe. *First Sunset Review* at 28 (“In the case of Korea...until safeguard duties on line pipe went into effect on March 1, 2000, they enjoyed unlimited access to the U.S. CWP market by exporting dual-stenciled line pipe”); *Second Sunset Review* at Overview-5 n.1 (“Following an affirmative determination by the Commission, in March 2000, President Clinton issued Proclamation 7274, imposing additional duties of 19 percent on line pipe imports of more than 9,000 short tons annually (including “dual-stenciled” pipe but excluding “arctic grade” line pipe).”). If dual-stenciled pipe is standard pipe and is only excluded from antidumping orders on standard pipe when it is expressly excluded in the language of those orders' scopes, then dual-

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<sup>7</sup> Interestingly, the dissent found that, if viewed as one product instead of two, there would be no harm to domestic producers. Thus, the dissent wished to conflate line pipe and standard pipe to block the imposition of tariffs on either type of pipe. ITC Final Determination, J.A. 1281. Nearly forty years later, Commerce wants to conflate the two types of pipe to achieve the exact opposite result.

stenciled pipe would have fallen under neither the antidumping orders that excluded it nor the safeguard duties imposed by President Clinton that covered line pipe. But dual-stenciled pipe *was* treated as falling under the safeguard duties imposed by President Clinton, even though the proclamation only mentions “line pipe.” *Id.*

The *Second Sunset Review* also expressly rejected the argument that dual or multiple-stenciled pipe affected the same industry as standard pipe. The review found that “multiple-stenciled line pipe requires additional steel than CWP to meet American Petroleum Institute (API) specifications applicable to line pipe. At [then] current steel prices, this would require that a multiple-stenciled product be sold at a considerable price premium over a product that satisfies ASTM specifications but not API specifications.” *Second Sunset Review* at 13 n.66.

Consistent with the first two sunset reviews, the *Third* and *Fourth Sunset Reviews* also treat dual-stenciled pipe as line pipe. The *Fourth Sunset Review* states in its scope that “[d]ual-stenciled pipe, which enters as line pipe under a different subheading of the Harmonized Tariff Schedule of the United States (“HTS”) for U.S. customs purposes, is not within the scope of the orders.” *Fourth Sunset Review* at 6–7. The *Third Sunset Review’s* language is largely identical. *See Third Sunset Review* at 8. Both statements are unqualified and give no indication that the scope language does not apply to the Thailand Order. Commerce’s argument that the language in these sunset reviews only applied to dual-stenciled pipe imported from every country other than Thailand is not persuasive. The language of the third and fourth reviews is unqualified and consistent with the treatment of dual-stenciled pipe, or API stenciled pipe, at each stage of the administrative process. *Cf., e.g.,* ITC Final Determination at J.A. 1233–34 (differentiating among “standard pipe imports from Thailand,” “standard pipe imports from Turkey,” and “line pipe imports from Turkey”).

No review, original or sunset, has determined that dual-stenciled or API stenciled pipe from Thailand injures a domestic industry. Given that when a “domestic industry is not injured, it cannot avail itself of the relief accorded under the antidumping statute,” Commerce’s expansion of the Thailand Order’s scope is unlawful. *Badger-Powhatan*, 608 F. Supp. at 657.

### **iii. The Defendants’ Letters to the Court**

In response to an invitation extended at oral argument, the Government and Wheatland did provide isolated examples of dual-stenciled pipe being referred to as standard pipe within the record.

But these quotes came from documents that the Government and Wheatland themselves argue are irrelevant and not (k)(1) materials. *See* Def.'s Resp. at 18–20, ECF No. 37; and Def.-Int.'s Resp. at 21, ECF No. 34. The Court agrees with the Defendants.

The (k)(1) materials consist of “[t]he descriptions of the merchandise contained in the petition, the initial investigation, and the determinations of the Secretary (including prior scope determinations) and the Commission.” 19 C.F.R. § 351.225(k)(1). The interpretive canon *noscitur a sociis* is relevant here. This canon holds that “words grouped in a list should be given related meanings.” *Third Nat’l Bank in Nashville v. Impac Ltd.*, 432 U.S. 312, 322 (1977). The regulation 19 C.F.R. § 351.225(k)(1) first lists among the (k)(1) materials “*the* petition,” and “*the* initial investigation.” (emphasis added). This indicates that the relevant petition and initial investigation are the ones related to the antidumping order at hand, in this case the Thailand Order. The identical use of the definitive article for “*the* determinations by the Secretary . . . and the Commission” in 19 C.F.R. § 351.225(k)(1) indicates that the references to the determinations by the Secretary and Commission are references to determinations that resulted from “*the* petition” and “*the* initial investigation.” In this case, that is the Thailand Order. Thus, the Government and Wheatland’s appeal to language in other countries’ orders is unavailing.

Even were one to consider the language proffered by the Government and Wheatland, it remains true that, after an exhaustive search and a further opportunity provided by the Court, neither has found a single instance of dual-stenciled pipe being referenced as “standard pipe” throughout the entire history of the Thailand Order and the sunset reviews of *that* order. That fact damns the strongest. From 1985 until 2020, there is no record evidence of dual-stenciled pipe being considered as standard pipe for purposes of the Thailand Order. Evidence from other proceedings should not overrule the consistent import of the record of the order actually at issue. Here, the absence of evidence is indeed evidence of absence. Substantial evidence does not support the Commerce Department’s scope determination. *See* 19 U.S.C. § 1516a(b)(1)(B)(i) (requiring the Court to “hold unlawful any determination” that is “unsupported by substantial evidence on the record, or otherwise not in accordance with law”); *see also Universal Camera Corp.*, 340 U.S. at 488 (“The substantiality of evidence must take into account whatever in the record fairly detracts from its weight.”).

## CONCLUSION

The Court finds that Commerce's determination is both unsupported by substantial evidence and not issued in accordance with the law. No Thai manufacturer produced dual-stenciled pipe imported as line pipe at the time of the order; therefore, dual-stenciled pipe could not have been included within the scope. Tr. of Oral Arg. 5:24–25, 6:12–16, 7:1–3, ECF No. 51, July 26, 2021. The initial petitioners expressly withdrew from Commerce and the ITC's consideration the item numbers under which dual-stenciled pipe would have been imported. *Letter Dated March 14, 1985, from Petitioner Regarding Partial Withdrawal of Petition*, J.A. at 1781–82. There has been no injury determination as required by 19 U.S.C. § 1673 and case law. See *Badger-Powhatan*, 608 F. Supp. at 657 (“Where the domestic industry is not injured, it cannot avail itself of the relief accorded under the antidumping statute”). The ITC has not included dual-stenciled pipe imported as line pipe in any injury determination concerning pipe imported from Thailand. And for nearly four decades, the ITC has treated dual-stenciled pipe as line pipe and has noted in the relevant sunset reviews the exclusion of dual-stenciled pipe imported as line pipe from the scope of the orders imposing duties on standard pipes.

For the foregoing reasons, this matter is remanded for Commerce to conduct an analysis that considers the sources listed in 19 C.F.R. § 351.225(k)(1) in assessing whether dual-stenciled pipe falls within the scope of the Thailand Order, and it shall do so in compliance with the reasoning in this Opinion and Order. Commerce may not assess tariffs on any item absent an injury determination from the ITC. This Opinion and Order in no way disturbs Commerce's finding that mono-stenciled line pipe is outside the scope of the Thailand Order.

Thus, on consideration of the Plaintiff's Motion for Judgment on the Agency Record and all papers and proceedings had in relation to this matter, and on due deliberation, it is hereby:

**ORDERED** that Plaintiff's motion for judgment on the agency record is **GRANTED**;

**ORDERED** that Commerce, within 90 days from the date of issuance of this Opinion and Order, shall submit a Remand Redetermination in compliance with this Opinion and Order;

**ORDERED** that Defendant shall supplement the administrative record with all documents considered by Commerce in reaching its decision in the Remand Redetermination;

**ORDERED** that Plaintiff shall have 30 days from the filing of the Remand Redetermination to submit comments to the Court; and

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

Dated: October 6, 2021  
New York, New York

*/s/ Stephen Alexander Vaden*  
STEPHEN ALEXANDER VADEN, JUDGE



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