

U.S. Customs and Border Protection



19 CFR PART 177

REVOCATION OF FIVE RULING LETTERS AND REVOCATION OF TREATMENT RELATING TO THE TARIFF CLASSIFICATION OF COMPOSITE PORTABLE STORAGE BATTERIES

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

ACTION: Notice of revocation of five ruling letters, and of revocation of treatment relating to the tariff classification of composite portable storage batteries.

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 five ruling letters concerning tariff classification of composite portable storage batteries under the Harmonized Tariff Schedule of the United States (HTSUS). Similarly, CBP is revoking any treatment previously accorded by CBP to substantially identical transactions. Notice of the proposed action was published in the *Customs Bulletin*, Vol. 56, No. 26, on July 6, 2022. One comment was received in response to that notice.

EFFECTIVE DATE: This action is effective for merchandise entered or withdrawn from warehouse for consumption on or after November 13, 2022.

FOR FURTHER INFORMATION CONTACT: Dwayne Rawlings, Electronics, Machinery, Automotive and International Nomenclature Branch, Regulations and Rulings, Office of Trade, at (202) 325–0092.

SUPPLEMENTARY INFORMATION:**BACKGROUND**

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

Pursuant to 19 U.S.C. § 1625(c)(1), a notice was published in the *Customs Bulletin*, Vol. 56, No. 26, on July 6, 2022, proposing to revoke five ruling letters pertaining to the tariff classification of composite portable storage batteries. 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 H82059 (June 28, 2001); NY R04727 (September 14, 2006); NY N005077 (January 23, 2007); NY N034766 (August 12, 2008); and NY N081177 (November 4, 2009), CBP classified composite portable storage batteries in subheading 8504, HTSUS, specifically in subheading 8504.40.95, HTSUS, which provided for "Electrical transformers, static converters (for example, rectifiers) and inductors; parts thereof: Other." CBP has reviewed NY H82059, NY R04727, NY N005077, NY N034766 and NY N081177, and has determined the ruling letters to be in error. It is now CBP's position that the composite portable storage batteries are properly classified, in heading 8507, HTSUS, specifically in subheading 8507.20.80, HTSUS, which provides for "Electric storage batteries, including separators therefor,

whether or not rectangular (including square); parts thereof: Other lead-acid storage batteries: Other.”

Pursuant to 19 U.S.C. § 1625(c)(1), CBP is revoking NY H82059, NY R04727, NY N005077, NY N034766 and NY N081177, and revoking or modifying any other ruling not specifically identified to reflect the analysis contained in Headquarters Ruling Letter (“HQ”) H206455, 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*.

GREGORY CONNOR,
Acting Director
Commercial and Trade Facilitation Division

Attachment

HQ H206455

August 26, 2022

CLA-2 OT:RR:CTF:EMAIN H206455 DSR

CATEGORY: Classification

TARIFF NO.: 8507.20.80

MS. RACHEL DEBROSSE
OVERSEAS ADMINISTRATOR
RALLY MANUFACTURING, INC.
5255 NW 159TH STREET
MIAMI, FL 33014

MR. DEREK K. SAKAGUCHI
PRESIDENT
MICOM CHB, INC.
460 S. HINDRY AVE.
UNIT C
INGLEWOOD, CA 90301

MR. HARLEY ALLEN
MANAGER CUSTOMS COMPLIANCE
BLACK & DECKER CORP.
PORTER CABLE/DELTA DEVILBISS DIVISIONS
825 HIGHWAY 45 NORTH
JACKSON, TN 38305

MS. JOAN JEROME
ALLIED INTERNATIONAL
13207 BRADLEY AVE.
SYLMAR CA 91342

RE: Revocation of NY H82059, NY R04727, NY N005077, NY N081177 and NY N034766; Classification of composite portable storage batteries.

DEAR MS. DEBROSSE AND MS. JEROME, AND MESSRS. SAKAGUCHI AND ALLEN:

This letter is in reference to New York Ruling Letters (NY) H82059 (June 28, 2001); NY R04727 (September 14, 2006); NY N005077 (January 23, 2007); NY N034766 (August 12, 2008); and NY N081177 (November 4, 2009), regarding the classification under the Harmonized Tariff Schedule of the United States (HTSUS) of composite portable storage batteries. The rulings classified the devices under subheading 8504.40.95 HTSUS, which provides for static converters, other.

We have reviewed the tariff classification of the devices and have determined that the cited rulings are in error. Therefore, we are revoking NY H82059, NY R04727, NY N005077, NY N034766 and NY N081177 for the reasons set forth in this ruling. Notice of the proposed action was published in the *Customs Bulletin*, Vol. 56, No. 26, on July 6, 2022. One comment in support of the proposed revocation was received in response to that notice.

FACTS:

The device at issue in NY H82059 (June 28, 2001) is described as a “Jumper with 260PSI Compressor.” The item has three main features: jumper cable clamps, battery jumper (with lead-acid battery, including housing) and a

260PSI compressor. The item is for use in automobiles, boats and other moving vehicles to provide battery power to dead batteries, cell phones and charges along with lighting. It can also be used to inflate tires and recreation inflatables such as beach balls, soccer balls and more.

The device at issue in NY R04727 (September 14, 2006) is described as a portable 12-volt rechargeable power station jump-start for vehicles (JNS 1800). The unit is designed for auxiliary and emergency use and has the following features: 12-volt DC sockets with overload protection, an on/off switch, a 15-amp fuse, a battery condition indicator light, a work light, a light switch and a charging adaptor input. A 120-volt AC power supply with one spare 3-watt light bulb and one spare 15-amp fuse are included in the accessories compartment found on the back of the JNS 1800 unit, which is secured by two heavy-duty plastic handle battery clamps (red = positive (+) and black = negative (-)). The battery charging life is as high as 36 months and can be recycled after its use.¹

The device at issue in NY N005077 (January 23, 2007) is described as a 12-volt AC/DC portable power supply, jump starter and inflator. It is identified as product number VEC026BD. The VEC026BD is cordless and rechargeable. It powers and/or charges AC/DC appliances (includes two 120-volt receptacles and two 12-volt receptacles), jump starts vehicles, functions as an air compressor for inflating tires and sports equipment and includes an LED work light for emergency roadside assistance.²

The device at issue in NY N034766 (August 12, 2008) is described as a 12-volt DC portable power supply, jump starter, and inflator, all within one housing. This item is identified within your letter as product number VEC012CBD. The VEC012CBD has a 12-volt DC accessory outlet to power and/or charge DC electronics. The jump starter jump-starts vehicles without the need of another vehicle's battery. The air compressor can be used to inflate tires and sports equipment. The VEC012CBD, which is cordless and rechargeable, includes an LED light for emergency roadside assistance, a 12-volt DC charger, a 120-volt AC charger, heavy-duty cables & clamps, and an adapter nozzle set.³

The device at issue in NY N081177 (November 4, 2009) is described as a 5-In-1 portable power pack. It is identified within the product literature as ITEM 96157-1VGA. It contains a 12V, 17-amp hour rechargeable lead acid battery with dual 12V outlets. It has 36" jump-start cables with copper-plated clamps, a 260 PSI air compressor with gauge, a 400-watt power inverter with dual AC outlets, an LED map light, AC and DC power ports and a battery level indicator. The 5-In-1 portable power pack is housed in a heavy-duty rubberized case. This product is used in automobiles, on boats, and other types of vehicles to provide battery power to dead batteries, cell phones, and other devices that require power. It can also be used to inflate tires, and recreation inflatables, such as sports balls. The LED light can be used to read a map or for emergency lighting.

¹ Although not explicitly indicated in NY R04727, our research indicates that the JNS 1800 device contains a rechargeable, sealed lead-acid storage battery. See <https://www.batteryspec.com/cgi-bin/cart.cgi?action=link&product=67G1103&uid=8> (last visited June 2, 2022).

² Although not explicitly indicated in NY R04727, the user manual for the VEC026BD device states that the device contains a rechargeable, sealed lead-acid storage battery.

³ Although not explicitly indicated in NY N034766, the user manual for the VEC012CBD device states that the device contains a rechargeable, sealed lead-acid storage battery.

LAW AND ANALYSIS:

Classification under the Harmonized Tariff Schedule of the United States (HTSUS) is made in accordance with the General Rules of Interpretation (GRI). GRI 1 provides that the classification of goods shall be determined according to the terms of the headings of the tariff schedule and any relative Section or Chapter Notes. The HTSUS provisions under consideration are as follows:

8504 Electrical transformers, static converters (for example, rectifiers) and inductors; parts thereof:

8507 Electric storage batteries, including separators therefor, whether or not rectangular (including square); parts thereof:

Note 3 to Section XVI, HTSUS, of which headings 8504 and 8507, HTSUS, are a part, provides that:

Unless the context otherwise requires, composite machines consisting of two or more machines fitted together to form a whole and other machines designed for the purpose of performing two or more complementary or alternative functions are to be classified as if consisting only of that component or as being that machine which performs the principal function.

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 EN to heading 8504, HTSUS, states, in pertinent part, the following:

The apparatus of this group are used to convert electrical energy in order to adapt it for further use. They incorporate converting elements (e.g., valves) of different types. They may also incorporate various auxiliary devices (e.g., transformers, induction coils, resistors, command regulators, etc.). Their operation is based on the principle that the converting elements act alternatively as conductors and non-conductors.

The fact that these apparatus often incorporated auxiliary circuits to regulate the voltage of the emerging current does not affect their classification in this group, nor does the fact that they are sometimes referred to as voltage or current regulators.

This group includes: ...

(D) Direct current converters by which direct current is converted to a different voltage...

This heading also includes stabilized suppliers (rectifiers combined with a regulator), e.g., uninterruptible power supply units for a range of electronic equipment.

The EN to heading 8507, HTSUS, states, in pertinent part, the following:

Electric accumulators (storage batteries or secondary batteries) are characterized by the fact that the electrochemical action is reversible so that the accumulator may be recharged. They are used to store electricity and supply it when required. A direct current is passed through the accumu-

lator producing certain chemical changes (charging); when the terminals of the accumulator are subsequently connected to an external circuit these chemical changes reverse and produce a direct current in the external circuit (discharging). This cycle of operations, charging and discharging, can be repeated for the life of the accumulator.

Accumulators consist essentially of a container holding the electrolyte in which are immersed two electrodes fitted with terminals for connection to an external circuit. In many cases the container may be subdivided, each subdivision (cell) being an accumulator in itself; these cells are usually connected together in series to produce a higher voltage. A number of cells so connected is called a battery. A number of accumulators may also be assembled in a larger container. Accumulators may be of the wet or dry cell type...

Accumulators are used for supplying current for a number of purposes, e.g., motor vehicles, golf carts, fork-lift trucks, power hand-tools, cellular telephones, portable automatic data processing machines, portable lamps....

Accumulators containing one or more cells and the circuitry to interconnect the cells amongst themselves, often referred to as “battery packs”, are covered by this heading, whether or not they include any ancillary components which contribute to the accumulator’s function of storing and supplying energy, or protect it from damage, such as electrical connectors, temperature control devices (e.g., thermistors), circuit protection devices, and protective housings. They are classified in this heading even if they are designed for use with a specific device.

The devices of the subject rulings NY R04727, NY N005077, NY N034766 and NY N081177, were each classified as static converters of heading 8504, HTSUS. In HQ H176833 (November 17, 2011), CBP defined a “static converter” as:

... [a] unit that employs solid state devices such as semiconductor rectifiers or controlled rectifiers (thyristors), gated power transistors, electron tubes, or magnetic amplifiers to change ac power to dc power, dc power to ac power, or fixed frequency ac power to variable frequency ac power.” According to EN 85.04(II), a static converter is “used to convert electrical energy in order to adapt it for further use.” EN 85.04(II) further states that rectifiers, inverters, alternating current converters, cycle converters and direct current converters are all examples of static converters.

See also ENI Technology Inc. v. United States, 641 F. Supp. 2d 1337, 1353 -1354 (Ct. Int’l Trade 2009), citing *The Authoritative Dictionary of IEEE Standards Terms* (IEEE 100) 912, 1103 (7th ed. 2000).

Heading 8507, HTSUS, provides for “Electric storage batteries, including separators therefor, whether or not rectangular (including square); parts thereof.” Electric accumulators of the heading, which the ENs specifically call storage batteries or secondary batteries, are characterized by the fact that the electrochemical action is reversible so that the accumulator may be recharged. Furthermore, the merchandise of the heading is used to store electricity and supply it when required, and functions by way of a direct current passing through the accumulator and producing certain chemical changes (i.e., the charging function of the battery itself). When the terminals

of the accumulator are later connected to an external circuit, these chemical changes reverse and produce a direct current in the external circuit (i.e., the charging of the device to which it is connected). This cycle of operations, charging and discharging, can be repeated for the life of the accumulator.

Each device under consideration is capable of performing multiple functions (such as jump-starting vehicles and providing power and lighting, and also functioning as an inflator in one case), with each function provided for under a different heading, e.g., headings 8504 or 8507, HTSUS. As such, the devices meet the terms of Note 3 to Section XVI, HTSUS, because each device is designed for the purpose of performing two or more complementary or alternative functions, and each device is therefore classified according to the device's principal function.

With respect to the devices' principal functions, we note that none of the functions, e.g., the provision of power for external devices, lighting, or jump-starting motor vehicles or inflating tires, would be possible without the devices' ability to store power or serve as a battery. Ultimately, we conclude that the principal function is indeed to maintain an independent source of electricity to use for one of these other secondary purposes. The subject merchandise is properly classified under heading 8507, HTSUS.

We note that the instant merchandise differs from products that merely serve to charge other devices but lack a battery. These products are properly classified under heading 8504, HTSUS. *See, e.g.*, NY N018172 (October 31, 2007). The classification of the instant composite portable storage batteries, on the other hand, is consistent with prior CBP rulings. *See, e.g.*, HQ H070632 (January 10, 2011) (classifying lithium-ion cell phone battery packs in heading 8507, HTSUS); HQ 966268 (May 21, 2003) (classifying battery packs for cell phones in heading 8507, HTSUS, and holding that battery packs are "essentially electric storage batteries"). *See also* HQ 966328 (March 31, 2003); HQ H176833 (November 17, 2011); HQ H155376 (June 22, 2011); HQ 963870 (July 14, 2000); HQ H136116 (March 2, 2011); NY N152037 (April 1, 2011); NY N240050 (April 18, 2013).

HOLDING:

By application of GRI 1 (Note 3 to Section XVI), the subject composite portable storage batteries are classifiable under heading 8507, HTSUS. Specifically, by application of GRI 6, they are classifiable under subheading 8507.20.80, HTSUS, which provides for "Electric storage batteries, including separators therefor, whether or not rectangular (including square); parts thereof: Other lead-acid storage batteries: Other." The column one, general rate of duty is 3.5% *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.

EFFECT ON OTHER RULINGS:

NY H82059 (June 28, 2001), NY R04727 (September 14, 2006), NY N005077 (January 23, 2007), NY N034766 (August 12, 2008) and NY N081177 (November 4, 2009) are hereby revoked.

To the extent that the devices subject to this ruling are products of China, note that pursuant to U.S. Note 20 to Subchapter III, Chapter 99, HTSUS, products of China classified under subheading 8507.20.80, HTSUS, unless specifically excluded, are subject to an additional xx percent *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 8507.20.80, HTSUS, listed above.

The HTSUS is subject to periodic amendment, so you should exercise reasonable care in monitoring the status of goods covered by the Note cited above and the applicable Chapter 99 subheading. For background information regarding the trade remedy initiated pursuant to Section 301 of the Trade Act of 1974, including information on exclusions and their effective dates, 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.

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

Sincerely,

GREGORY CONNOR,
Acting Director

Commercial and Trade Facilitation Division



19 CFR PART 177

MODIFICATION OF ONE RULING LETTER AND REVOCATION OF ONE RULING LETTER, AND REVOCATION OF TREATMENT RELATING TO THE TARIFF CLASSIFICATION OF WOODEN PAINT MIXING STICKS WITH AND WITHOUT MEASUREMENT MARKINGS, AND WOODEN YARDSTICKS

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

ACTION: Notice of modification of one ruling letter and revocation of one ruling letter, and revocation of treatment relating to the tariff classification of wooden paint mixing sticks with and without measurement markings, and wooden yardsticks.

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 wooden paint mixing sticks with and without measurement markings, and revoking one ruling letter concerning tariff classification of a wooden paint mixing stick, under the Harmonized Tariff Schedule of the United States (HTSUS). Similarly, CBP is revoking any treatment

previously accorded by CBP to substantially identical transactions. Notice of the proposed action was published in the Customs Bulletin, Vol. 56, No. 26, on July 6, 2022. No comments were received in response to that notice.

EFFECTIVE DATE: This action is effective for merchandise entered or withdrawn from warehouse for consumption on or after November 13, 2022.

FOR FURTHER INFORMATION CONTACT: Dwayne Rawlings, Electronics, Machinery, Automotive and International Nomenclature Branch, Regulations and Rulings, Office of Trade, at 202-325-0092.

SUPPLEMENTARY INFORMATION:

BACKGROUND

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

Pursuant to 19 U.S.C. § 1625(c)(1), a notice was published in the *Customs Bulletin*, Vol. 56, No. 26, on July 6, 2022, proposing to modify one ruling letter and revoke one ruling letter pertaining to the tariff classification of certain wooden paint mixing sticks with and without measurement markings, and a wooden yardstick. 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 N266261 and NY N266749, CBP classified certain wooden paint mixing sticks with and without measurement markings, and a wooden yardstick, in heading 4417, HTSUS, specifically in subheading 4417.00.8090, HTSUS, which provides for “Tools, tool bodies, tool handles, broom or brush bodies and handles, of wood; boot or shoe lasts and trees, of wood: Other: Other.” CBP has reviewed NY N266261 and NY N266749, and has determined the ruling letters to be in error. It is now CBP’s position that the wooden paint mixing sticks with measurement markings, and the wooden yardstick, are properly classified in heading 9017, HTSUS, specifically in subheading 9017.80.00, HTSUS, which provides for “Drawing, marking-out or mathematical calculating instruments (for example, drafting machines, pantographs, protractors, drawing sets, slide rules, disc calculators); instruments for measuring length, for use in the hand (for example, measuring rods and tapes, micrometers, calipers), not specified or included elsewhere in this chapter; parts and accessories thereof: Other instruments.”

Pursuant to 19 U.S.C. § 1625(c)(1), CBP is modifying NY N266261 and revoking NY N266749, and revoking or modifying any other ruling not specifically identified to reflect the analysis contained in the Headquarters Ruling Letter (“HQ”) H309089, 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*.

GREGORY CONNOR,
Acting Director
Commercial and Trade Facilitation Division

Attachment

HQ H309089

August 30, 2022

CLA-2 OT:RR:CTF:EMAIN H309089 DSR

CATEGORY: Classification

TARIFF NO.: 9017.80.00; 9903.88.03

MR. GANG HE
SHLA GROUP, INC.
615 HAWAII AVENUE
TORRANCE, CA 90503

RE: Modification of NY N266261 and revocation of NY N266749; Tariff classification of wooden paint mixing sticks with and without measurement markings, and a wooden yardstick

DEAR MR. HE:

This letter is in reference to a request submitted on behalf of SHLA Group, Inc., to reconsider New York Ruling Letters (“NY”) N266261 (July 21, 2015) and NY N266749 (July 22, 2015). NY N266261 pertains to the classification under the Harmonized Tariff Schedule of the United States (“HTSUS”) of wooden paint mixing sticks with and without measurement markings. NY N266749 pertains to the HTSUS classification of an article identified as a one-yard wooden stick (Item LYS-3). Each article is imported from China.

Both rulings classified the above articles under subheading 4417.00.80, HTSUS, which provides for “Tools, tool bodies, tool handles, broom or brush bodies and handles, of wood; boot or shoe lasts and trees, of wood: Other.” We have reviewed the tariff classification of the articles and have determined that the cited rulings are in error. Therefore, NY N266261 is modified, and NY N266749 is revoked, for the reasons set forth in this ruling.

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, notice proposing to modify NY N266261 and revoke NY N266749 was published on July 6, 2022, in Vol. 56, No. 26 of the *Customs Bulletin*. No comments were received in response to the notice.

FACTS:

In NY N266261, the subject articles are described as follows:

Item HDYS-3 is a one-yard wooden stick. The yard stick is used as a ruler for measurement. The wooden yard stick will be imported with the “The Home Depot” company logo imprinted on it. The yard stick will be sold exclusively to The Home Depot. Additional information submitted with the reconsideration request shows that item HDYS-3 is also imprinted with measurement markings along its length.

Item PS1 is a paint wooden mixing stick for one gallon paint. The mixing stick has a 7-inch ruler printed on one side for the user to estimate how much paint is left in the can. The mixing stick will be imported with the “The Home Depot” company logo and the wording: “Don’t forget to pick up your painting supplies: paint brush, paint roller, paint roller cover, paint tray, tape, drop cloth, rag, stir sticks, paint kits, and the letters FSC® as well as FSC® A000519.”

Item PS-5 is a paint wooden mixing stick for five-gallon paint. The mixing stick has a 15-inch ruler printed on one side for the user to estimate how much paint is left in the can. The Home Depot company logo and the

wording: “Don’t forget to pick up your painting supplies: paint brush, paint roller, paint roller cover, paint tray, tape, drop cloth, rag, stir sticks, paint kits, and the letters FSC® as well as FSC® A000519.”*

In NY N266749, the article is described as follows:

Item # LYS-3 is a one yard wooden stick. The yard stick is used as a ruler for measurement. The wooden yard stick will be imported with the Lowe’s company logo imprinted on it. The yard stick will be sold exclusively to Lowe’s Inc.

Additional information submitted with the reconsideration request shows that Item LYS-3 is also imprinted with measurement markings along its length and is useful for “gardening,” but does not indicate how the item would be used for gardening.

ISSUE:

Whether the articles described above are classified in heading 4417, HTSUS, as tools of wood, or in heading 9017, HTSUS, as instruments for use in the hand for measuring length.

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 (“AUSR”). The GRIs and the AUSR are part of the HTSUS and are 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 and, unless otherwise required, according to the remaining GRIs taken in order. 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.

The HTSUS provisions under consideration are as follows:

4417	Tools, tool bodies, tool handles, broom or brush bodies and handles, of wood; boot or shoe lasts and trees, of wood: * * *
4417.00.80	Other. * * *
9017	Drawing, marking-out or mathematical calculating instruments (for example, drafting machines, pantographs, protractors, drawing sets, slide rules, disc calculators); instruments for measuring length, for use in the hand (for example, measuring rods and tapes, micrometers, calipers), not specified or included elsewhere in this chapter; parts and accessories thereof: * * *
9017.80.00	Other instruments.

* NY N266261 also addressed a fourth product, which was identified as “item HDPS-10” and described as a 10 pack of blank paint wooden mixing sticks put up for retail sale. This product is not at issue in this ruling.

In addition, in interpreting the HTSUS, the Explanatory Notes (ENs) of the Harmonized Commodity Description and Coding System may be utilized. The ENs, although not dispositive or legally binding, provide a commentary on the scope of each heading, and are generally indicative of the proper interpretation of the HTSUS. See T.D. 89–80, 54 *Fed. Reg.* 35127 (August 23, 1989).

Note 1(m) to Chapter 44, HTSUS, excludes goods of Section XVIII from Chapter 44, HTSUS (Section XVIII, HTSUS, contains Chapter 90, HTSUS). As such, if the subject articles are within the scope of heading 9017, HTSUS, they are precluded from classification in heading 4417, HTSUS.

Heading 9017, HTSUS, refers to “instruments for measuring length, for use in the hand (for example, measuring rods and tapes, micrometers, calipers), not specified or included elsewhere in this chapter.” As EN 90.17 (D) explains:

These instruments are capable of indicating the length, i.e., linear dimensions, of the object to be measured, for example a line drawn or imaginary (straight or curved) on the object. The instruments are therefore capable of measuring dimensions such as diameters, depths, thicknesses and heights which are indicated as a unit of length (e.g., millimeters). These instruments must also have characteristics (size, weight, etc.) which enable them to be held in the hand to carry out the measurement.

Items HDYS-3, PS-1 and PS-5 at issue in NY N266261 and Item LYS-3 at issue in NY N266749 are imprinted with markings that enable a user of the items to perform the act of measuring as required by heading 9017, HTSUS. In short, they are rulers that measure, and are therefore *prima facie* classifiable under heading 9017, HTSUS, as instruments for measuring length and for use in the hand. That these articles can also be used to stir paint does not cause them to fall outside the scope of heading 9017, HTSUS. Consequently, they are precluded from classification in heading 4417, HTSUS, by operation of Note 1(m) to Chapter 44.

HOLDING:

By application of GRIs 1 and 6, the items designated as HDYS-3, PS-1, PS-5 and LYS-3 are classified in heading 9017, HTSUS, specifically in subheading 9017.80.00, HTSUS, which provides for “Drawing, marking-out or mathematical calculating instruments (for example, drafting machines, pantographs, protractors, drawing sets, slide rules, disc calculators); instruments for measuring length, for use in the hand (for example, measuring rods and tapes, micrometers, calipers), not specified or included elsewhere in this chapter; parts and accessories thereof: Other instruments.” The column one, general rate of duty is 5.3% *ad valorem*.

Duty rates are provided for your convenience and are subject to change. The text of the most recent HTSUS and the accompanying duty rates are provided at www.usitc.gov.

Pursuant to U.S. Note 20(f) to Subchapter III, Chapter 99, HTSUS, products of China classified under subheading 9017.80.00, HTSUS, unless specifically excluded, are subject to an additional 25% percent *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 9017.80.00, HTSUS, listed above.

The HTSUS is subject to periodic amendment so you should exercise reasonable care in monitoring the status of goods covered by the Note cited

above and the applicable Chapter 99 subheading. For background information regarding the trade remedy initiated pursuant to Section 301 of the Trade Act of 1974, you may refer to the relevant parts of the USTR and CBP websites, which are available at <https://ustr.gov/issue-areas/enforcement/section-301-investigations/tariff-actions> and <https://www.cbp.gov/trade/remedies/301-certain-products-china>, respectively.

EFFECT ON OTHER RULINGS:

NY N266261 (July 21, 2015) is hereby modified and NY N266749 (July 22, 2015) is hereby revoked.

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

Sincerely,

GREGORY CONNOR,
Acting Director

Commercial and Trade Facilitation Division



**PROPOSED REVOCATION OF TWO RULING LETTERS,
PROPOSED MODIFICATION OF TWO RULING LETTERS,
AND PROPOSED REVOCATION OF TREATMENT
RELATING TO THE TARIFF CLASSIFICATION OF
QUILTED MATTRESS COVERS**

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

ACTION: Notice of proposed revocation of two ruling letters, proposed modification of two ruling letters, and proposed revocation of treatment relating to the tariff classification of quilted mattress covers.

SUMMARY: Pursuant to section 625(c), Tariff Act of 1930 (19 U.S.C. § 1625(c)), as amended by section 623 of title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties U.S. Customs and Border Protection (CBP) intends to revoke two ruling letters and modify two ruling letters concerning tariff classification of quilted mattress covers 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 October 14, 2022.

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

FOR FURTHER INFORMATION CONTACT: 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 two ruling letters and modify two ruling letters concerning tariff classification of quilted mattress covers. Although in this notice, CBP is specifically referring to New York Ruling Letter (NY) N314433, dated October 1, 2020 (Attachment A); NY H87864, dated February 6, 2002 (Attachment B); Headquarters Ruling Letter (HQ) H265611, dated October 21, 2015 (Attachment C); and NY N303580, dated April 10, 2019 (Attachment D), this notice also covers any rulings on this merchandise which may exist, but have not been specifically identified. CBP has undertaken reasonable efforts to search existing databases for rulings in addition to the four identified. No further rulings have been found. Any party

who has received an interpretive ruling or decision (*i.e.*, a ruling letter, internal advice memorandum or decision, or protest review decision) on the merchandise subject to this notice should advise CBP during the comment period.

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

In NY N314433, CBP classified quilted mattress covers of knitted polyester in subheading 9404.29.90, HTSUS, which provides for "Mattress supports; articles of bedding and similar furnishing (for example, mattresses, quilts, eiderdowns, cushions, pouffes and pillows) fitted with springs or stuffed or internally fitted with any material or of cellular rubber or plastics, whether or not covered: Mattresses: Of other materials: Other". In NY H87864, CBP classified quilted mattress covers in subheading 9404.21.00, HTSUS, which provides for "Mattress supports; articles of bedding and similar furnishing (for example, mattresses, quilts, eiderdowns, cushions, pouffes and pillows) fitted with springs or stuffed or internally fitted with any material or of cellular rubber or plastics, whether or not covered: Mattresses: Of cellular rubber or plastics, whether or not covered". The quilted mattress covers of knitted polyester in HQ H265611 were classified in subheading 9404.90.20, HTSUS, which provides for "Mattress supports; articles of bedding and similar furnishing (for example, mattresses, quilts, eiderdowns, cushions, pouffes and pillows) fitted with springs or stuffed or internally fitted with any material or of cellular rubber or plastics, whether or not covered: Other: Pillows, cushions and similar furnishings: Other". Lastly, in NY N303580, CBP classified quilted mattress covers of nonwoven polyester in heading 9404, HTSUS, specifically in subheading 9404.90.95, HTSUS, which provides for "Mattress supports; articles of bedding and similar furnishing (for example, mattresses, quilts, eiderdowns, cushions, pouffes and pillows) fitted with springs or stuffed or internally fitted with any material or of cellular rubber or plastics, whether or not covered: Other: Other: Other".

CBP has reviewed NY N314433, NY H87864, HQ H265611, and NY N303580, and has determined the ruling letters to be in error. It is now CBP's position that quilted mattress covers are properly classi-

fied in heading 6304, HTSUS. Quilted mattress covers of knitted polyester are specifically provided for in subheading 6304.91.01, HTSUS, which provides for “Other furnishing articles, excluding those of heading 9404: Other: Knitted or crocheted”. Quilted mattress covers of nonwoven polyester are specifically provided for in subheading 6304.93.00, HTSUS, which provides for “Other furnishing articles, excluding those of heading 9404: Other: Not knitted or crocheted, of synthetic fibers (666)”.

Pursuant to 19 U.S.C. § 1625(c)(1), CBP is proposing to revoke NY N314433 and NY H87864; to modify HQ H265611 and NY N303580; and to revoke or modify any other ruling not specifically identified to reflect the analysis contained in the proposed HQ H317995, set forth as Attachment E to this notice. Additionally, pursuant to 19 U.S.C. § 1625(c)(2), CBP is proposing to revoke any treatment previously accorded by CBP to substantially identical transactions.

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

ALLYSON MATTANAH
for

YULIYA A. GULIS,
Acting Director
Commercial and Trade Facilitation Division

Attachments

N314433

October 1, 2020

CLA-2-94:OT:RR:NC:N4:463

CATEGORY: Classification

TARIFF NO.: 9404.29.9087; 9903.88.03

JILL LOU

VP OF MERCHANDISING

INNOVATEX, LLC

577 AIRPORT BLVD

BURLINGAME, CA 94010

RE: The tariff classification of mattress covers from China.

DEAR MS. LOU:

In your letter dated September 4, 2020, you requested a tariff classification ruling on quilted mattress covers. A sample was provided and subsequent information was exchanged via email and telephone.

In your submission and our subsequent communications, you stated that mattress covers, with style number "SFMC-CK-XXXX," will be imported from China into the United States where either a foam or a foam-and-spring core will be inserted to produce finished mattresses. All of the mattress covers will be made of the same materials and with the same construction, and will vary only in size and stitching pattern. The "XXXX" in the style number will be a number from 0001 to 9999 that will indicate the mattresses' quilt-stitch pattern, size (Twin, Queen, King, etc.) and height.

You also stated that the top panel and side panels are constructed of three fabric layers: the outer layer is 100% polyester knit fabric, the middle layer is a 100% polyester filling, and the inner layer is 100% polyester knit fabric. The three layers are stitched together in various patterns. The bottom piece of the mattress covers is cut from a 100% polypropylene non-woven fabric. The finished mattress cover sizes are: 35" x 75", 38" x 75", 38" x 79", 53" x 75", 53" x 79", 59" x 79", 76" x 79" and 71" x 83", with heights ranging from 6" to 15".

This office notes that the top and side panels are sewn together and one side of a zipper is affixed along the lower edge of the piece. The other side of the zipper is affixed along the edge of the bottom fabric. The two pieces are zipped together to form the mattress cover.

The submitted sample measures approximately 35" x 75" x 10.5" and is constructed as indicated above.

You suggest classification of the subject mattress covers in subheading 9404.90.9522 Harmonized Tariff Schedule of the United States (HTSUS), which provides for: Mattress supports; articles of bedding and similar furnishing (for example, mattresses, quilts, eiderdowns, cushions, pouffes and pillows) fitted with springs or stuffed or internally fitted with any material or of cellular rubber or plastics, whether or not covered: Other: Other: Other: Other: With outer shell of man-made fibers. This office disagrees with that classification.

Per General Rule of Interpretation (GRI) 2(a), HTSUS, any 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 article has the essential character of the complete or finished article.

In NY L81761 dated January 21, 2005, and NY L81762 dated January 24, 2005, essentially similar quilted mattress covers designed to be fitted with a foam or foam-and-spring core by a manufacturer subsequent to importation were determined to have the essential character of finished mattresses. The minor differences between those mattress covers and the subject mattress covers (that those were pillow-top mattress covers and the subject mattress covers are not; that those exhibited a flap-covered zipper and the subject mattress covers do not; that those positioned the zipper along the side of the mattress covers, whereas the subject mattress covers position it at the base) are inconsequential.

Based upon the aforementioned analysis, this office finds that the subject mattress covers have the essential character of finished mattresses and are appropriately classified in subheading 9404.29.9087, HTSUS, which provides for: Mattress supports; articles of bedding and similar furnishing (for example, mattresses, quilts, eiderdowns, cushions, pouffes and pillows) fitted with springs or stuffed or internally fitted with any material or of cellular rubber or plastics, whether or not covered: Mattresses: Of other materials: Other: Other: Of a width exceeding 91 cm, of a length exceeding 184 cm, and a depth exceeding 8 cm. The rate of duty will be 6 percent ad valorem.

Pursuant to U.S. Note 20 to Subchapter III, Chapter 99, HTSUS, products of China classified under subheading 9404.29.9087, HTSUS, unless specifically excluded, are subject to an additional 25 percent 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 9404.29.9087, HTSUS, listed above.

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

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

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

A copy of the ruling or the control number indicated above should be provided with the entry documents filed at the time this merchandise is imported. If you have any questions regarding the ruling, contact National Import Specialist Seth Mazze at seth.mazze@cbp.dhs.gov.

Sincerely,

STEVEN A. MACK

Director

National Commodity Specialist Division

NY H87864

February 6, 2002

CLA-2-94:RR:NC:TA:349 H87864

CATEGORY: Classification

TARIFF NO.: 9404.21.0000

MR. JAMES H. VOGLAND
PARKLAND DESIGNS, INC.
P.O. BOX 1136
ST. HELENS, OREGON 97051

RE: The tariff classification of an unfinished mattress from China.

DEAR MR. VOGLAND:

In your letter dated January 25, 2002 you requested a classification ruling. You submitted various photographs of an unfinished mattress. The outer shell is comprised of an inner and outer fabric with layers of latex or other types of foam in between the fabrics. Some versions will include a 1.5 to 2 inch thick foam and other versions may contain 4 to 5 inch thick foam. The two fabric layers and the foam are quilted together. The outer shell will have turning handles for turning or moving the mattress. It will also contain a zipper for easy insertion of the inner springs or additional components to complete the mattress.

The General Rules of Interpretation (GRI's) governs classification of goods under the Harmonized Tariff Schedule of the United States Annotated (HTSUSA). GRI 1 provides that classification shall be determined according to the terms of the headings and any relative section or chapter notes, taken in order. Heading 9404, HTSUS provides for, among other things, articles of bedding and similar furnishings, provided that such articles are fitted with springs or stuffed or internally fitted with any material. GRI 2(a) provides the following:

Any 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 article has the essential character of the complete or finished article. It shall also include a reference to that article complete or finished (or falling to be classified as complete or finished by virtue of this rule), entered unassembled or disassembled.

Given the general appearance of the submitted sample the unfinished mattress has the essential character of the finished article. Although the main section is not filled, the top and/or the bottom panels are sufficiently stuffed so that it may be classified in heading 9404.

The applicable subheading for the unfinished mattress will be 9404.21.0000, Harmonized Tariff Schedule of the United States (HTS), which provides for mattress supports; articles of bedding and similar furnishing (for example, mattresses, quilts, eiderdowns, cushions, pouffes and pillows) fitted with springs or stuffed or internally fitted with any material or of cellular rubber or plastics, whether or not covered: mattresses: of cellular rubber or plastics, whether or not covered. The duty rate will be 3 percent ad valorem.

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 John Hansen at 646-733-3043.

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

HQ H265611

October 21, 2015

CLA-2 OT: RR: CTF: TCM: H265611ERB

CATEGORY: Classification

TARIFF NO.: 9404.90.2000

Ms. JENNIFER DIAZ
BECKER & POLIAKOFF
121 ALHAMBRA PLAZA, 10TH FLOOR
CORAL GABLES, FL 33134

RE: Tariff classification of stuffed mattress covers; NAFTA Country of Origin of the finished stuffed mattress cover imported from Mexico

DEAR Ms. DIAZ:

This is in reply to your letter dated April 17, 2015 to the U.S. Customs and Border Protection (CBP) National Commodity Specialist Division (NCS) in New York, on behalf of your client Dolven Enterprises (Dolven), seeking a prospective ruling under the Harmonized Tariff Schedule of the United States (HTSUS) regarding the tariff classification of Dolven's stuffed mattress covers. One complete sample and three sample swatches (the uppermost padded layer, the interlock, and the "sandman" (the side or edges of the mattress cover)) was provided to this office, and are being returned with this ruling. Our analysis also includes information provided in a conference call between you, your client, and this office which took place on August 27, 2015.

FACTS:

The subject merchandise is two styles of mattress covers. Each style comes in numerous sizes, (i.e. twin, long twin, double, queen, king, California king, and split c-king), however, the characteristics of both styles and all sizes are the same. There are two separate compartments to this product. The top, uppermost layer has polyester stuffing, permanently sewn into it akin to quilting. This layer is zippered on all sides and attaches to or detaches from the lower compartment and the remainder of the mattress cover. A separate removable pad (not included) could be inserted between the top, uppermost quilted layer, and the lower mattress cover. The lower compartment of the mattress cover is comprised of a polyester and spandex interlock, and a polyester sandman. It is completely sewn together, and has dual zippers that allow the insertion of the mattress (not included). Put simply, there are two zippered compartments: one for an optional pad and one for the mattress.

Post-importation into the United States the mattress cover will fully enclose a mattress in its lower compartment via the double zipper closure. Again, the mattress is not imported with the subject mattress cover. Dolven does not manufacture, produce or sell mattresses. Rather, the fabric and other materials or components are imported into Mexico where they are cut and sewn into the final finished good, that is, the padded mattress cover. Upon importation into the United States, Dolven sells the mattress cover to certain mattress and bed manufacturers, which in turn, cover their own mattresses and sell the combined unit to consumers.

You argue that the instant mattress cover is classified under heading 9404, HTSUS, which provides for, "Mattress supports; articles of bedding and similar furnishing (for example, mattresses, quilts, eiderdowns, cushions, puffs and pillows) fitted with springs or stuffed or internally fitted with any material or of cellular rubber or plastics, whether or not covered."

ISSUE:

Whether merchandise described as a padded, fitted textile mattress cover is classified as a textile of chapter 63, or as stuffed bedding of heading 9404, HTSUS.

LAW AND ANALYSIS:

Classification under the HTSUS is made 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 may then be applied in their appropriate order.

The HTSUS headings under consideration are the following:

- 6302 Bed linen, table linen, toilet linen and kitchen linen:
- 6304 Other furnishing articles, excluding those of heading 9404:
- 6307 Other made up articles, including dress patterns:
- 9404 Mattress supports; articles of bedding and similar furnishing (for example, mattresses, quilts, eiderdowns, cushions, pouffes and pillows) fitted with springs or stuffed or internally fitted with any material or of cellular rubber or plastics, whether or not covered:

The Harmonized Commodity Description and Coding System Explanatory Notes (ENs) constitute the official interpretation of the Harmonized System at the international level. While not legally binding, the ENs provide a commentary on the scope of each heading of the HS and are thus useful in ascertaining the proper classification of merchandise. *See* T.D. 89-90, 54 Fed. Reg. 35127 (August 23, 1989).

The EN to heading 9404, HTSUS, states, in relevant part:

This heading covers:

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

Tariff Classification

In Headquarters Ruling Letter (HQ) H015427, dated January 5, 2010, classifying electric blankets and seat pads, this office stated that heading 9404, HTSUS, is limited to “Articles of bedding and similar furnishings which are...stuffed or internally fitted with any material.” This highlights the key distinction between bedding of chapter 63 and bedding of chapter 94. Articles of bedding properly classified in heading 9404, HTSUS, are stuffed. Linens and other bedding furnishings classified in chapter 63 are not.

The subject merchandise is a mattress cover, which is certainly an article of bedding. While mattress covers may or may not be stuffed, the instant merchandise is comprised of textiles (of polyester or of polyester and spandex) sized and shaped to a particular mattress size, and the upper-most layer is stuffed with polyester stuffing. When in use by consumers, the mattress cover will enclose the mattress and will remain there underneath sheets or other

bedding. The tariff and the ENs both state that articles of bedding of heading 9404, HTSUS, may be fitted with springs, or stuffed or internally fitted with any material or of cellular rubber or plastics. The ENs continue in this vein, clarifying that goods classified therein may be stuffed with cotton, wool, horsehair, down or synthetic fibers. See EN 94.04. Each of these exemplars of “material” are basic, homogenous, stuffing materials. The polyester used here is a homogenous, synthetic fiber, and it is permanently sewn (or stuffed) into the upper-most layer of the subject mattress cover creating comfortable, padded surface for the slumbering occupant of the bed. Hence, the mattress cover contains a stuffed quilted portion, even though a separate pad is not included.

Thus, the subject polyester stuffed mattress covers are provided for *eo nomine* in heading 9404, HTSUS, because they are described as “articles of bedding, “stuffed” with “any material”. They are beyond the scope of bedding of chapter 63. This is consistent with previous CBP rulings of similar merchandise. See New York Ruling (NY) N140355, dated January 14, 2011, and see NY N222087, dated July 11, 2012.

NAFTA Claim

The subject finished mattress cover is comprised of component parts which, individually, are classified in different parts of the tariff. The stuffed knit fabric covering is classifiable in subheading 6006.33.0040, which provides for, “Other knitted or crocheted fabrics: Of synthetic fibers: Of yarns of different colors: Of double knit or interlock construction: Of polyester.” The interlock material is classified in subheading 6004.10.0085, which provides for, “Knitted or crocheted fabrics of a width exceeding 30 cm, containing by weight 5 percent or more of elastomeric yarn or rubber thread, other than those of heading 6001: Containing by weight 5 percent or more elastomeric yarn but not containing rubber thread: Warp knit: Other.” Finally, what is called a “sandman” is classified in subheading 5801.36.0010, which provides for, “Woven pile fabrics and chenille fabrics, other than fabrics of heading 5802 or 5806: Of man-made fibers: Chenille fabrics.” The zippers are slide fasteners of chapter 69. The components do not originate within any of the three NAFTA countries: United States, Canada, or Mexico. See 19 CFR § 134.1(i) which states “*NAFTA country*. “NAFTA country” means the territory of the United States, Canada or Mexico as defined in Annex 201.1 of the NAFTA.”

However, the components are shipped into Mexico where they are cut and sewn into the finished good. As such, our analysis starts with HTSUS General Note 12 which provides for the NAFTA. Specifically, General Note 12(b), HTSUS, sets forth the criteria for determining whether a good is originating under the NAFTA. General Note 12(b), 19 U.S.C. § 1202 states, in relevant part, the following:

For purposes of this note, goods imported into the customs territory of the United States are eligible for the tariff treatment and quantitative limitations set forth in the tariff schedule as “*goods originating in the territory of a NAFTA party*” only if -

- (i) They are goods wholly obtained or produced entirely in the territory of Canada, Mexico and/or the United States; or
- (ii) They have been transformed in the territory of Canada, Mexico and/or the United States so that

- (A) Except as provided in subdivision (f) of this note, each of the non-originating material used in the production of such goods undergoes a change in tariff classification described in subdivisions (r), (s) and (t) of this note or the rules set forth therein,...

Thus, if the goods are sufficiently transformed in Mexico so that the non-originating materials undergo a change in tariff classification described in subdivision (t) to General Note 12, HTSUS, then they will be eligible for the NAFTA preference. General Note 12(t), Rule 7, which regards the relevant subheadings of Chapter 94 states the following:

7. A change to subheading 9404.90 from any other chapter, except from headings 5007, 5111 through 5113, 5208 through 5212, 5309 through 5311, 5407 through 5408 or 5512 through 5516.

The exceptions noted therein do not apply in this case.

In Mexico, the textiles are cut and sewn into the finished good, the zippers are attached, and it becomes the stuffed mattress cover of heading 9404, HTSUS, which is thereafter imported into the United States. Therefore, the goods have experienced the requisite tariff shift and are entitled to the NAFTA duty preference, under General Note 12.

Our analysis next turns to the goods' country of origin. Part 102 of Customs Regulations regards the Rules of Origin. Specifically, 19 CFR § 102.20 regards specific rules by tariff classification. Therein it states the following:

The following rules are the rules specified in § 102.11(a)(3) and other sections of this part. Where a rule under this section permits a change to a subheading from another subheading of the same heading, the rule will be satisfied only if the change is from a subheading of the same level specified in the rule.

Regarding Section XX, which includes Chapters 94 the following is stated:

9404.30 – 9404.90..... A change to down-and/or feather-filled goods classified in subheading 9404.30 through 9404.90 from any other heading; or

For all other goods classified in subheading 9404.30 through 9404.90, a change from any other heading, **except from heading 5007 ... 5801 through 5804 ... or 6001 through 6006 ...**

[Emphasis added]

The textile components of the subject stuffed mattress cover each fall within the exceptions noted above. As a result, our analysis must consider 19 CFR § 102.19 which provides for the NAFTA preference override. Customs regulations 19 CFR § 102.19 states:

- (a) Except in the case of goods covered by paragraph (b) of this section, if a good which is originating within the meaning of § 181.1(q) of this chapter is not determined under § 102.11(a) or (b) or § 102.21 to be a good of a single NAFTA country, the country of origin of such good is the last NAFTA country in which that good underwent production other than minor processing, provided that a Certificate of Origin (see § 181.11 of this chapter) has been completed and signed for the good.

Paragraph (b) is not applicable here, as the country of origin of all materials is not the United States. The aforementioned § 181.1(q) states:

Originating. *Originating*, when used with regard to a good or a material, means a good or material which qualifies as originating in the United States, Canada and/or Mexico under the rules set forth in General Note 12, HTSUS, and in the appendix to this part.

19 CFR § 102.1(m) defines “minor processing” as:

- (1) Mere dilution with water or another substance that does not materially alter the characteristics of the good;
- (2) Cleaning, including removal of rust, grease, paint, or other coatings;
- (3) Application of preservative or decorative coatings, including lubricants, protective encapsulation, preservative or decorative paint, or metallic coatings;
- (4) Trimming, filing or cutting off small amounts of excess materials;
- (5) Unloading, reloading or any other operation necessary to maintain the good in good condition;
- (6) Putting up in measured doses, packing, repacking, packaging, repackaging;
- (7) Testing, marking, sorting, or grading;
- (8) Ornamental or finishing operations incidental to textile good production designed to enhance the marketing appeal or the ease of care of the product, such as dyeing and printing, embroidery and appliques, pleating, hemstitching, stone or acid washing, permanent pressing, or the attachment of accessories notions, findings and trimmings; or
- (9) Repairs and alterations, washing, laundering, or sterilizing.

Cutting and sewing the various polyester materials and fabrics into the finished stuffed mattress cover is more than “minor processing” as referenced in 19 CFR § 102.19(a), and defined in § 102.1(m), listed above.

Therefore, the goods are NAFTA originating by means of General Note 12, Chapter 94, subheading Rule 7, HTSUS. The override provision of § 102.19 is therefore satisfied and the country of origin of the subject finished stuffed mattress cover is Mexico. This determination is consistent with a previous CBP decision on similar merchandise. *See* HQ 956240, dated January 20, 1995, regarding a down comforter shell classifiable in subheading 6307.90, HTSUS, and down feathers of subheading 0505.10, HTSUS.

The finished mattress cover is classifiable in subheading 9404.90, HTSUS, and therefore the requisite tariff classification shift requirement of General Note 12(t) was met. The merchandise may utilize a “Made in Mexico” country of origin statement.

HOLDING:

By application of GRI 1, the subject stuffed mattress cover is classified in heading 9404, HTSUS. Specifically, it is provided for in subheading 9404.90.2000, HTSUSA (Annotated) which provides for, “Mattress supports; articles of bedding and similar furnishing (for example, mattresses, quilts, eiderdowns, cushions, pouffes and pillows) fitted with springs or stuffed or internally fitted with any material or of cellular rubber or plastics, whether or not covered: Other: Other.” The 2015 column one, general rate of duty for merchandise of this subheading is 6% *ad valorem*.

The subject stuffed mattress cover is eligible for NAFTA preferential duty treatment. Also, in accordance with 19 CFR § 102, it is a product of Mexico for country of origin marking purposes.

Duty rates are subject to change. The text of the most recent HTSUS and the accompany duty rates are provided at *www.usitc.gov* A copy of this ruling letter should be attached to the entry documents filed at the time the goods are entered. If the documents have been filed without a copy, this ruling should be brought to the attention of the CBP officer handling the transaction.

Sincerely,

MYLES B. HARMON,

Director

Commercial and Trade Facilitation

N303580

April 10, 2019

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

CATEGORY: Classification; Marking;
Trade Agreement

TARIFF NO.: 9404.90.9522

JENNIFER R. DIAZ, Esq.

DIAZ TRADE LAW

12700 BISCAYNE BOULEVARD, SUITE 301

NORTH MIAMI, FL 33181

RE: The tariff classification, marking, and status under the Dominican Republic-Central America-United States Free Trade Agreement (DR-CAFTA), of stuffed mattress covers from El Salvador.

DEAR MS. DIAZ:

In your letter dated March 21, 2019, you requested a binding ruling on behalf of your client, Dolven Enterprises, Inc. Illustrative literature, product descriptions and samples were received.

Dolven Enterprises items, S-10", S-12", S-14", T-10", and T-12" are man-made, nonwoven, zippered, stuffed mattress covers used to encase and protect twin, twin long, full, queen, king, and California king mattress frames. You indicate the expectation of the subject merchandise are to provide an additional layer of cushioned surface for slumbering.

You assert classification of the subject merchandise to be within subheading 9404.90.2000, Harmonized Tariff Schedule of the United States, (HTSUS). This office disagrees.

The applicable subheading for the subject merchandise is 9404.90.9522, HTSUS, which provides for "Mattress supports; articles of bedding and similar furnishing (for example, mattresses, quilts, eiderdowns, cushions, pouffes and pillows) fitted with springs or stuffed or internally fitted with any material or of cellular rubber or plastics, whether or not covered: Other: Other: Other: Other: With outer shell of man-made fibers."

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 <https://hts.usitc.gov/current>.

Dolven Enterprises presents a group of circumstances wherein the subject merchandise raw material components (fabric, zippers, labels) originates in the United States, China, Mexico and El Salvador. In each circumstance cutting, sewing, and assembly operations will be performed in El Salvador along with folding, packaging, boxing, marking, and loading into a container for export.

Section 334 of the Uruguay Round Agreements Act (codified at 19 U.S.C. 3592) (URAA), enacted on December 8, 1994, provided rules of origin for textiles and apparel entered, or withdrawn from warehouse for consumption, on and after July 1, 1996. Section 102.21, Customs Regulations (19 C.F.R. 102.21), published September 5, 1995 in the Federal Register, implements Section 334 (60 FR 46188). Section 334 of the URAA was amended by section 405 of the Trade and Development Act of 2000, enacted on May 18, 2000, and accordingly, section 102.21 was amended (68 Fed. Reg. 8711). Thus, the country of origin of a textile or apparel product shall be determined by the sequential application of the general rules set forth in paragraphs (c)(1) through (5) of Section 102.21.

Paragraph (c)(1) states, “The country of origin of a textile or apparel product is the single country, territory, or insular possession in which the good was wholly obtained or produced.” As the subject merchandise is not wholly obtained or produced in a single country, territory or insular possession, paragraph (c)(1) of Section 102.21 is inapplicable.

Paragraph (c)(2) states, “Where the country of origin of a textile or apparel product cannot be determined under paragraph (c)(1) of this section, the country of origin of the good is the single country, territory, or insular possession in which each of the foreign materials incorporated in that good underwent an applicable change in tariff classification, and/or met any other requirement, specified for the good in paragraph (e) of this section.” Paragraph (e) in pertinent part states, “The following rules will apply for purposes of determining the country of origin of a textile or apparel product under paragraph (c)(2) of this section”:

HTSUS Tariff shift and/or other requirements

9404.90 Except for goods of subheading 9404.90 provided for in paragraph (e)(2) of this section, the country of origin of a good classifiable under subheading 9404.90 is the country, territory, or insular possession in which the fabric comprising the good was formed by a fabric-making process.

The subject merchandise are made from manmade fabrics and polyester fill. As the material components comprising the subject merchandise are formed in more than one country, Section 102.21(c)(2) is inapplicable.

Paragraph (c)(3) states, “Where the country of origin of a textile or apparel product cannot be determined under paragraph (c)(1) or (2) of this section”:

(i) If the good was knit to shape, the country of origin of the good is the single country, territory, or insular possession in which the good was knit; or

(ii) Except for goods of heading 5609, 5807, 5811, 6213, 6214, 6301 through 6306, and 6308, and subheadings 6209.20.5040, 6307.10, 6307.90, and 9404.90, if the good was not knit to shape and the good was wholly assembled in a single country, territory, or insular possession, the country of origin of the good is the country, territory, or insular possession in which the good was wholly assembled.

As the subject merchandise is neither knit to shape, nor wholly assembled in a single country, territory, or insular possession, and subheading 9404.90 is excepted from provision (ii), Section 102.21 (c)(3) is inapplicable.

Paragraph (c)(4) states, “Where the country of origin of a textile or apparel product cannot be determined under paragraph (c)(1), (2) or (3) of this section, the country of origin of the good is the single country, territory, or insular possession in which the most important assembly or manufacturing process occurred.”

As the most important assembly or manufacturing process of the subject merchandise is the cutting, sewing, and assembly of the fabric panels and zippers, Section 102.21(c)(4) is applicable. Therefore, the country of origin is El Salvador, the country in which those operations are performed.

Marking

Part 134, of 19 CFR implements the country of origin marking requirements of 19 U.S.C. 1304. Unless excepted by law, every article of foreign origin imported into the United States shall be marked in a conspicuous place

as legibly, indelibly, and permanently as the nature of the article (or container) will permit, in such a manner as to indicate to the ultimate purchaser in the United States the English name of the country of origin of the article. As a product of El Salvador, the subject merchandise is to be marked accordingly.

Trade Agreement - DR-CAFTA

GN29, HTSUS, sets forth the criteria for determining whether a good is originating under the DR-CAFTA. To be an “originating good” the material components must be transformed in the territory of El Salvador pursuant to GN29(b)(ii)(A)(n), HTSUS, which states:

Chapter 94, Rule 5: A change to subheading 9404.90 from any other chapter, except from headings 5007, 5111 thru 5113, 5208 through 5212, 5309 through 5311, 5407 through 5408 or 5512 through 5516 or subheading 6307.90.

A change in tariff occurs in El Salvador as a result of manufacturing operations. Based on the circumstances presented, the material components from the United States, China, and Mexico are classifiable outside of Section XX (miscellaneous manufactured articles), and a change in tariff occurs in El Salvador as a result of manufacturing, therefore, the subject merchandise is eligible for DR-CAFTA preferential duty treatment.

The holding set forth above applies only to the specific factual situation and merchandise description as identified in the ruling request. This position is clearly set forth in 19 CFR 177.9(b)(1). In the event that the facts or merchandise are modified in any way, you should bring this to the attention of U.S. Customs and Border Protection (CBP) and resubmit for a new ruling in accordance with 19 CFR 177.2.

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, please contact National Import Specialist Dharmendra Lilia at dharmendra.lilia@cbp.dhs.gov.

Sincerely,

STEVEN A. MACK

Director

National Commodity Specialist Division

HQ H317995
OT:RR:CTF:CPMMA H317995 AJK
CATEGORY: Classification
TARIFF NO: 6304.91.01; 6304.93.00

Ms. JILL LOU
INOVATEX, LLC
577 AIRPORT BLVD, STE 200
BURLINGAME, CA 94010

RE: Revocation of NY N314433 and NY H87864; Modification of HQ H265611 and NY N303580; Classification of Quilted Mattress Covers

DEAR Ms. LOU:

This letter is in response to your correspondence, dated October 5, 2020, on behalf of Inovatex, LLC, in which you request reconsideration of New York Ruling Letter (NY) N314433, issued to you on October 1, 2020, concerning the classification of quilted mattress covers under the Harmonized Tariff Schedule of the United States (HTSUS). In NY N314433, U.S. Customs and Border Protection (CBP) classified the quilted mattress covers in subheading 9404.29.9087, HTSUSA (Annotated), as mattresses. We have reviewed NY N314433, together with the information in your request for reconsideration, and found the ruling letter to be in error.

We have also reviewed the following ruling letters and have determined that the classification of quilted mattress covers therein was incorrect: Headquarters Ruling Letter (HQ) H265611, dated October 21, 2015; NY H87864, dated February 6, 2002; and NY N303580, dated April 10, 2019. Accordingly, we are revoking NY N314433 and NY H87864, and modifying HQ H265611 and NY N303580 with respect to the classification of quilted mattress covers.

FACTS:

The subject merchandise was described in NY N314433 as follows:

[M]attress covers, with style number “SFMC-CK-XXXX,” will be imported from China into the United States where either a foam or a foam-and-spring core will be inserted to produce finished mattresses. All of the mattress covers will be made of the same materials and with the same construction, and will vary only in size and stitching pattern....

[T]he top panel and side panels are constructed of three fabric layers: the outer layer is 100% polyester knit fabric, the middle layer is a 100% polyester filling, and the inner layer is 100% polyester knit fabric. The three layers are stitched together in various patterns. The bottom piece of the mattress covers is cut from a 100% polypropylene non-woven fabric. The finished mattress cover sizes are: 35” x 75”, 38” x 75”, 38” x 79”, 53” x 75”, 53” x 79”, 59” x 79”, 76” x 79” and 71” x 83”, with heights ranging from 6” to 15”.

This office notes that the top and side panels are sewn together and one side of a zipper is affixed along the lower edge of the piece. The other side of the zipper is affixed along the edge of the bottom fabric. The two pieces are zipped together to form the mattress cover.

Images of the merchandise are set forth below:



The quilted mattress covers in HQ H265611¹, NY H87864², and NY N303580³ are substantially similar to the products described above.

ISSUE:

Whether quilted mattress covers are classified in heading 6304, HTSUS, as other furnishing articles excluding those of heading 9404, or in heading 9404, HTSUS, as mattresses, or articles of bedding and similar furnishing.

LAW AND ANALYSIS:

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

GRI 2(a) addresses, in part, the classification of incomplete or unfinished articles:

- 2. (a) Any 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 article has the essential character of the complete or finished article. It shall also include a reference to that article complete or finished (or falling to be classified as complete or finished by virtue of this rule), entered unassembled or disassembled.

* * * * *

The HTSUS provisions at issue are as follows:

6304 Other furnishing articles, excluding those of heading 9404:

¹ HQ H265611 classified quilted mattress covers of knitted polyester in subheading 9404.90.20, HTSUS, which provides for other pillows, cushions, and similar furnishings.

² NY H87864 classified quilted mattress covers in subheading 9404.21.00, HTSUS, as mattresses. The exact composition of fabric is unknown.

³ NY N303580 classified quilted mattress covers of nonwoven polyester in subheading 9404.90.95, HTSUS, as other articles of bedding.

Other:

- 6304.91.01 Knitted or crocheted
- 6304.93.00 Not knitted or crocheted, of synthetic fibers (666)
- 9404 Mattress supports; articles of bedding and similar furnishing (for example, mattresses, quilts, eiderdowns, cushions, pouffes and pillows) fitted with springs or stuffed or internally fitted with any material or of cellular rubber or plastics, whether or not covered:

Mattresses:

- 9404.21.00 Of cellular rubber or plastics, whether or not covered
- 9404.29 Of other materials:
- 9404.29.10 Of Cotton
- 9404.29.90 Other
- 9404.90 Other:
- 9404.90.20 Pillows, cushions and similar furnishings:
- 9404.90.20 Other
- 9404.90.20 Other:
- 9404.90.20 Other:
- 9404.90.95 Other

Note 3(b) to chapter 94 states as follows:

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

* * * * *

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

EN 63.04 provides, in pertinent part:

This heading covers furnishing articles of textile materials, other than those of the preceding headings or of heading 94.04, for use in the home ...

These articles include ... bedspreads (but not including bed coverings of heading 94.04); [and] cushion covers

EN 94.04 provides, in pertinent part:

This heading covers: ...

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

(1) Mattresses, including mattresses with a metal frame.

(2) Quilts and bedspreads (including counterpanes, and also quilts for baby-carriages), eiderdowns and duvets (whether of down or any other filling), mattress-protectors (a kind of thin mattress placed between the mattress itself and the mattress support), bolsters, pillows, cushions,

pouffes, etc.

(3) Sleeping bags.

* * * * *

As a preliminary matter, we clarify the similarities and differences between the quilted mattress covers in the four rulings at issue. First, all of the subject merchandise are textile covers that are quilted and contain zipper closures. Second, the subject quilted mattress covers are utilized to encase foam or foam-spring cores to create finished mattresses. They are not intended to be removed once the foam or foam-spring cores are inserted. Thus, they are imported as intermediate goods, which are used by manufacturers to create complete mattresses after importation. Third, the imported merchandise are neither designed to be used by themselves nor sold to final consumers prior to the manufacturing of mattresses. Lastly, each quilted mattress cover is constructed of varying fabrics: (1) the merchandise in NY N314433 and HQ H265611 are constructed of knitted polyester; and (2) the merchandise in NY N303580 is constructed of nonwoven polyester.⁴

Heading 9404, HTSUS, provides for “articles of bedding and similar furnishing (for example, mattresses, quilts, eiderdowns, cushions, pouffes and pillows)”. Accordingly, mattresses—of which the subject merchandise is a part—are generally classified in heading 9404, HTSUS, as mattresses. Because the quilted mattress covers are components of mattresses, the merchandise would be classifiable in heading 9404, HTSUS, if, as entered, they have the essential character of a complete or finished mattress under GRI 2(a). “The ‘essential character’ of an article is ‘that which is indispensable to the structure, core or condition of the article, i.e., what it is.’” *Structural Industries v. United States*, 360 F. Supp. 2d 1330, 1336 (Ct. Int’l Trade 2005). Generally, the physical measures of bulk, quantity, weight or value are considered to determine the constituent material that imparts the essential character of the merchandise. See EN to GRI 3(b). Accordingly, the classification of merchandise under GRI 2(a) is determined by the component or material that imparts the essential character of the complete article. In the instant case, however, the quilted mattress covers do not impart the essential character of complete or finished mattresses. First, the quilted mattress covers, which comprise the outer textile portion of mattresses, do not predominate by any of the physical measures. Second, although the mattress covers may be identifiable as parts of mattresses by their shape, they cannot be used as mattresses by themselves without the inner core of the mattresses—the foam or foam-and-spring inserts. Thus, the quilted mattress covers are not classifiable as mattresses in heading 9404, HTSUS, because, as entered, they do not have the essential character of complete or finished mattresses. Furthermore, as there is no provision for parts within heading 9404, HTSUS, the quilted mattress covers cannot be classified as parts of mattresses. See Note 3(b) to chapter 94.

In addition, the subject quilted mattress covers do not constitute “articles of bedding and similar furnishing” within heading 9404, HTSUS. The term “bedding” is not defined in chapter 94 of the HTSUS, nor is it defined elsewhere in the Nomenclature or the ENs. The terms of heading 9404, HTSUS, however, provide for “mattresses, quilts, eiderdowns, cushions,

⁴ While the fabric composition of the quilted mattress covers in NY H876864 is unknown, such absence of information does not affect the reclassification of the merchandise as explained below.

pouffes and pillows” as examples of “articles of bedding and similar furnishing”. Accordingly, CBP has generally defined “bedding” as an article that is capable of serving a primary function of covering a bed. *See e.g.*, HQ H305101, dated Oct. 5, 2020; HQ 958268, dated Sept. 24, 1999; HQ 957480, dated Apr. 14, 1995. The exemplars set forth in heading 9404, HTSUS, support CBP’s interpretation of “bedding” as items that are used to cover or furnish beds. For example, a mattress is placed on top of a bedframe or a foundation while quilts, eiderdowns, cushions, and pillows are generally placed on top of a mattress to cover or furnish a bed. These articles are necessary and essential items to complete a bed, as users utilize them while relaxing or sleeping on a bed (*i.e.*, to lay down on the bed; to rest their heads on pillows or cushions; or to cover their bodies with quilts or eiderdowns). In the instant case, however, the subject merchandise are distinguishable from the exemplars of “articles of bedding and similar furnishing” within heading 9404, HTSUS, because they cannot be utilized as “bedding,” but rather, are needed to create “bedding”. Whereas these exemplars, which are finished goods that are used to cover or furnish a bed, are generally sold to final consumers, the subject merchandise are sold to mattress manufacturers. Thus, the subject quilted mattress covers are intermediate goods; they are neither finished products that are intended to be used by themselves nor do they cover or furnish beds in a practical sense, as they are used to create mattresses—not to cover finished mattresses like the exemplars in heading 9404, HTSUS. The subject merchandise, therefore, do not constitute “articles of bedding” within heading 9404, HTSUS.

Generally, CBP has held that pillow or cushion covers with zipper closures, which are designed to be filled with loose polyester fiber or memory foam for pillows, are classified in heading 6304, HTSUS, which provides for “[o]ther furnishing articles, excluding those of heading 9404”, HTSUS. *See e.g.*, HQ 967166, dated Sept. 22, 2004; HQ 966808, dated Sept. 22, 2004; HQ 964490, dated Oct. 19, 2000. Specifically, such textile covers with some means of closure, which encase the inner portion of pillows to form the outermost portion of pillows, constitute a finished item within heading 6304, HTSUS. *See id.* As the subject merchandise—a textile mattress cover with a zipper closure—is analogous to the aforementioned pillow or cushion covers, the quilted mattress covers are accordingly classified in heading 6304, HTSUS, pursuant to GRI 1. Furthermore, by application of GRIs 1 and 6, the quilted mattress covers of knitted polyester in HQ H265611 and NY N314433 are classified in subheading 6304.91.01, HTSUS, which provides for “[o]ther furnishing articles of, excluding those heading 9404: [o]ther: [k]nitted or crocheted”. Similarly, the quilted mattress covers of nonwoven polyester in NY N303580 are classified in subheading 6304.93.00, HTSUS, which provides for “[o]ther furnishing articles, excluding those heading 9404: [o]ther: [n]ot knitted or crocheted, of synthetic fibers (666)”.⁵ Lastly, due to the lack of information regarding the fabric composition of the merchandise in NY H87864, we can only classify the merchandise therein at the heading level. Accordingly, by application of GRI 1, the quilted mattress covers in NY H87864 are classified in heading 6304, HTSUS. The classification of the subject merchandise in heading 6304, HTSUS, is consistent with prior CBP rulings classifying similar merchandise therein. *See e.g.*, NY N322667, dated Dec. 6, 2021; HQ H137795, dated July 9, 2015.

⁵ Polyester fabrics constitute synthetic fibers under the HTSUS. *See* EN to ch. 54.

In your reconsideration request, you assert that the quilted mattress covers in NY N314433 are similar to the stuffed mattress covers in NY N303580 and NY G88110, dated March 28, 2001, and that NY N314433 should be reconsidered accordingly. As explained above, the quilted mattress covers in NY N303580 are properly classified in subheading 6304.93.00, HTSUS, as “other furnishing articles.” In NY G88110, CBP classified finished padded mattress covers, which were designed to completely cover finished mattresses and act as mattress pads by providing an additional layer of cushioned surface for mattresses, in subheading 9404.90.9522, HTSUSA. Unlike the subject quilted mattress covers, however, the merchandise in NY G88110 were finished goods that were sold to final consumers to protect mattresses and to supplement the padding of those mattresses.

In light of the foregoing, the quilted mattress covers in NY N314433, NY H87864, HQ H265611, and NY N303580 are properly classified in various subheadings of heading 6304, HTSUS, as “[o]ther furnishing articles, excluding those of heading 9404”.

HOLDING:

In accordance with the above analysis and by application of GRI 1, the quilted mattress covers of knitted polyester are classified in heading 6304, HTSUS, and, by application of GRI 6, are specifically classified in subheading 6304.91.01, HTSUS, which provides for “Other furnishing articles, excluding those of heading 9404: Other: Knitted or crocheted”. The 2022 column one, general rate of duty is 5.8 percent *ad valorem*.

Pursuant to U.S. note 20 to subchapter III, chapter 99, HTSUS, products of China classified under subheading 6304.91.01, HTSUS, unless specifically excluded, were subject to an additional 7.5 percent *ad valorem* rate of duty. At the time of importation, an importer was required to report the chapter 99 subheading, *i.e.*, 9903.88.15, in addition to subheading 6304.91.01, HTSUS, listed above.

In addition, by application of GRI 1, the quilted mattress covers of nonwoven polyester are classified in heading 6304, HTSUS, and, by application of GRI 6, are specifically classified in subheading 6304.93.00, HTSUS, which provides for “Other furnishing articles, excluding those of heading 9404: Other: Not knitted or crocheted, of synthetic fibers (666)”. The 2022 column one, general rate of duty is 9.3 percent *ad valorem*.

Pursuant to U.S. note 20 to subchapter III, chapter 99, HTSUS, products of China classified under subheading 6304.93.00, HTSUS, unless specifically excluded, were subject to an additional 15 percent *ad valorem* rate of duty. At the time of importation, an importer was required to report the chapter 99 subheading, *i.e.*, 9903.88.16, in addition to subheading 6304.93.00, HTSUS, listed above. We note, however, that this additional duty is currently suspended.

The HTSUS is subject to periodic amendment. Therefore, an importer should exercise reasonable care in monitoring the status of goods covered by the note cited above and the applicable chapter 99 subheading. For background information regarding the trade remedy initiated pursuant to Section 301 of the Trade Act of 1974, one 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 subject to change. The text of the most recent HTSUS and the accompanying duty rates are provided at *www.usitc.gov*.

EFFECT ON OTHER RULINGS:

NY N314433, dated October 1, 2020, and NY H87864, dated February 6, 2002, are hereby revoked.

In addition, HQ H265611, dated October 21, 2015, and NY N303580, dated April 10, 2019, are hereby modified with respect to the quilted mattress covers only.

*Sincerely,
For*

YULIYA A. GULIS,
Acting Director

Commercial and Trade Facilitation Division

CC: Ms. Jennifer Diaz
Becker & Poliakoff
121 Alhambra Plaza, 10th Floor
Coral Gables, FL 33134

Mr. James H. Vogland
Parkland Designs, Inc.
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**PROPOSED REVOCATION OF THE ONE RULING LETTER,
PROPOSED MODIFICATION OF FIVE RULINGS LETTERS,
AND PROPOSED REVOCATION OF TREATMENT
RELATING TO THE TARIFF CLASSIFICATION OF
VARIOUS PIPE FITTINGS**

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

ACTION: Notice of proposed revocation of one ruling letter, proposed modification of five rulings letters, and proposed revocation of treatment relating to the tariff classification of various pipe fittings.

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 and to modify five ruling letters concerning tariff classification of various pipe fittings 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 October 14, 2022.

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

FOR FURTHER INFORMATION CONTACT: Reema Bogin, Chemicals, Petroleum, Metals and Miscellaneous Articles Classification Branch, Regulations and Rulings, Office of Trade, at (202) 325–7703.

SUPPLEMENTARY INFORMATION:

BACKGROUND

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

Pursuant to 19 U.S.C. § 1625(c)(1), this notice advises interested parties that CBP is proposing to revoke one ruling letter and to modify five ruling letters pertaining to the tariff classification of

various pipe fittings. Although in this notice, CBP is specifically referring to New York Ruling Letter (“NY”) B87364, dated July 15, 1997 (Attachment A); NY 898504, dated June 9, 1994 (Attachment B); NY N118077, dated August 18, 2010 (Attachment C); NY B85728, dated June 12, 1997 (Attachment D); NY J82246, dated April 9, 2003 (Attachment E); and Headquarters Ruling Letter (“HQ”) 967490, dated November 14, 2005 (Attachment F), 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 six 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 B87364, NY 898504, NY N118077, and NY B85728, CBP classified various pipe fittings in heading 7325, HTSUS, specifically in subheading 7325.99.10, HTSUS, which provides for “[o]ther cast articles of iron or steel: [o]ther: [o]ther: [o]f cast iron.” In HQ 967490 and NY J82246, CBP classified various pipe fittings in heading 7326, HTSUS, specifically in subheading 7326.90.85, HTSUS, which provides for “[o]ther articles of iron or steel: [o]ther: [o]ther: [o]ther: [o]ther.”¹ CBP has reviewed NY B87364, NY 898504, NY N118077, NY B85728, HQ 967490 and NY J82246, and has determined the ruling letters to be in error. It is now CBP’s position that the subject pipe fittings are properly classified, in heading 7307, HTSUS, specifically in subheading 7307.19.30, HTSUS, which provides for “[t]ube or pipe fittings (for example, couplings, elbows, sleeves), of iron or steel: [c]ast fittings: [o]ther: [d]uctile fittings.”

Pursuant to 19 U.S.C. § 1625(c)(1), CBP is proposing to revoke NY B87364; to modify NY 898504, NY N118077, HQ 967490, NY J82246,

¹ Merchandise previously classified in subheading 7326.90.85, HTSUS, has been moved to subheading 7326.90.86, HTSUS, in the 2022 version of the Harmonized Tariff Schedule of the United States.

and NY B85728; and to revoke or modify any other ruling not specifically identified to reflect the analysis contained in the proposed HQ H320950, set forth as Attachment G 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.

YULIYA A. GULIS,
Acting Director
Commercial and Trade Facilitation Division

Attachments

NY B87364

July 15, 1997

CLA-2-73:RR:NC:1:117 B87364

CATEGORY: Classification

TARIFF NO.: 7325.99.10

MR. JAMES D. GILLISON
FORD METER BOX CO., INC.
815 MILES PARKWAY
PELL CITY, ALABAMA 35125

RE: The tariff classification of cast iron retainer glands from People's Republic of China.

DEAR MR. GILLISON:

In your letter dated June 25, 1997, you requested a tariff classification ruling.

The products to be imported are cast ductile iron retainer glands for ductile iron mechanical joints. The retainer glands are made to ASTM Specification A536, Grade 65-45-12. ASTM Spec A536 is the Standard Specification for Ductile Iron Castings. Sizes range from 3 inches to 24 inches. All sizes meet ANSI/AWWA C111/A21.11.

The applicable subheading for the cast ductile iron retainer glands will be 7325.99.10, Harmonized Tariff Schedule of the United States (HTS), which provides for other cast articles of iron or steel, other, other, of cast iron. The rate of duty will be 1.2 percent ad valorem.

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

Certain ductile iron glands from China are covered by antidumping orders, case number A 570-214. We are therefore enclosing some information on this case including types of products covered by these orders.

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 Paula Ilardi at 212-466-5476.

Sincerely,

ROBERT B. SWIERUPSKI
Chief,

*Metals & Machinery Branch
National Commodity Specialist Division*

NY 898504

June 9, 1994

CLA-2-73:S:N:N3:115 898504

CATEGORY: Classification

TARIFF NO.: 7325.99.1000

MR. ROBERT T. GIVENS

GIVENS AND KELLY

950 ECHO LANE, SUITE 360

HOUSTON, TEXAS 77024-2788

RE: The tariff classification of gland packs and ductile iron fittings from China.

DEAR MR. GIVENS:

In your letter dated May 19, 1994, you requested a tariff classification ruling and application of antidumping duties.

The subject items, gland packs or joint kits and retainer glands, are further described as follows:

a) Mechanical Joint Gland Packs or Mechanical Joint Accessory Kits consists of: ductile iron gland, rubber gaskets and T-head bolts

b) Retainer Glands and Retainer Gland Accessories 3" - 36" consists of: ductile iron gland, rubber gaskets and T-head bolts

These items are used in the oil, gas and water industry.

The applicable subheading for all of the items described above will be 7325.99.1000, Harmonized Tariff Schedule of the United States (HTS), which provides for other cast articles of iron or steel: other: of cast iron... other. The duty rate will 3.1% ad valorem.

Should you require an Antidumping scope determination for this product, please file a request for a formal scope inquiry to: U.S. Department of Commerce, International Trade Administration, Office of Antidumping Compliance, Room 3076. Attention: Ms. Wendy Frankel, 14th Street and Constitution Avenue, N.W., Washington, DC 20230.

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

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

Sincerely,

JEAN F. MAGUIRE

Area Director

New York Seaport

N118077

August 18, 2010
MAR-2 OT:RR:NC:N1:113
CATEGORY: MARKING

MR. ANDREW M. LEMKE
ROMAC INDUSTRIES INC.
21919 20TH AVENUE SE
SUITE 100
BOTHELL, WA 98021

RE: COUNTRY OF ORIGIN AND COUNTRY OF ORIGIN MARKING OF IMPORTED GLANDS

DEAR MR. LEMKE:

This is in response to your letter dated August 4, 2010, requesting a ruling on the country of origin and country of origin marking of imported glands. You are requesting a ruling on whether imported glands are required to be individually marked with the country of origin if the glands are later to be processed in the United States by a United States manufacturer. A marked sample was not submitted with your letter for review.

The subject imported articles are identified as glands. You described the glands in their condition as imported as raw castings. The glands are cast from ductile iron and are used as a subcomponent of a RomaGrip. You stated in your letter that "The RomaGrip product is used to complete the joint between a pipe and fitting. When installed, it creates a seal and retains the pipe from pulling out of a fitting."

You indicated that there are no subcomponents added to the gland prior to import. The sourcing of subcomponents, machining of the gland to accept the subcomponents and the assembly required to produce a functioning product will be accomplished within a Romac owned and operated facility located in the United States. The glands will have minor finishing accomplished to remove surface imperfections prior to import.

You provided a detailed description of the manufacturing processes performed on the imported glands in China. You state that "To create the gland, pig iron and scrap metal are combined with magnesium and other additives within a furnace to create molten ductile iron...used to fill individual sand molds...After the mold has been filled with the molten material it is allowed to cool and solidify. At this point the sand mold is broken away and the gland casting is revealed... finishing is accomplished using a grinder. The finishing process removes surface defects. This is the condition of the casting at time of import." Therefore, the country of origin of the imported glands is China.

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

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

as generally the last person in the U.S. who will receive the article in the form in which it was imported. 19 CFR 134.1(d)(1) states that if an imported article will be used to manufacture, the manufacturer may be the ultimate purchaser if he subjects the imported article to a process which results in substantial transformation of the article. The case of *United States v. Gibson-Thomsen Co., Inc.*, 27 C.C.P.A. 267 (C.A.D. 98) (1940), provides that an article used in manufacture which results in an article having a name, character or use differing from that of the constituent article will be considered substantially transformed and that the manufacturer or processor will be considered the ultimate purchaser of the constituent materials. In such circumstances, the imported article is excepted from marking and only the outermost container is required to be marked. See 19 C.F.R. 134.35.

In this case, the imported glands are substantially transformed as a result of the United States processing, and therefore the United States manufacturer is the ultimate purchaser of the imported glands and under 19 C.F.R. 134.35 only the containers which reach the ultimate purchaser are required to be marked with the country of origin China.

You indicated in your letter that you believe the imported glands are appropriately classified in subheading 7307.19.30, Harmonized Tariff Schedule of the United States (HTSUS), which provides for tube or pipe fittings (for example, couplings, elbows, sleeves), of iron or steel: cast fittings: other: ductile fittings. However, the National Import Specialist that handles heading 7307, HTSUS, has indicated that the glands do not function as fittings; they do not connect the pipes. The subject glands are used to create a seal and restrain pipe from pulling out of the fittings. Therefore, the subject glands are not classifiable in subheading 7307.19.30, HTSUS. Based on the information available to our office, the imported glands have not been advanced beyond the condition of a basic cast iron article and are classified under heading 7325, HTSUS, which provides for other cast articles of iron or steel.

This ruling is being issued under the provisions of Part 177 of the Customs Regulations (19 CFR Part 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 Ann Taub at (646) 733-3018.

Sincerely,

ROBERT B. SWIERUPSKI

Director

National Commodity Specialist Division

NY B85728

June 12, 1997

CLA-2-73:RR:NC:1:117 B85728

CATEGORY: Classification

TARIFF NO.: 7307.19.30; 7325.99.10

MR. SHANE BRONSTON
ANCHOR INTERNATIONAL TRADING
P.O. BOX 1027
3N505 NORTH 17TH STREET
ST. CHARLES, IL 60174

RE: The tariff classification of cast iron flange adaptor fitting and retainer gland from People's Republic of China.

DEAR MR. BRONSTON:

In your letter dated May 28, 1997, you requested a tariff classification ruling. Descriptive literature was submitted with your ruling request.

The products to be imported are ductile iron flange adaptor fittings and retainer glands made by a casting process. The Series 200, 400 and 420 flange adaptor fittings are made to ASTM Specification A536, Grade 65-45-12. ASTM Spec A536 is the Standard Specification for Ductile Iron Castings. The mechanical joint retainer gland is made to ASTM specification A536, Grade 65-45-12. Sizes range from 3" - 24". All sizes meet ANSI/AWWA C111/A21.11.

The applicable subheading for the ductile cast iron flange adaptor fittings will be 7307.19.30, Harmonized Tariff Schedule of the United States (HTS), which provides for tube or pipe fittings (for example, couplings, elbows, sleeves), of iron or steel, cast fittings, other, ductile fittings. The rate of duty will be 5.8 percent ad valorem.

The applicable subheading for the ductile cast iron retainer gland will be 7325.99.10, HTS, which provides for other cast articles of iron or steel, other, other, of cast iron. The rate of duty will be 1.2 percent ad valorem.

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

Certain compact ductile iron waterworks (CDIW) fittings and glands from China are covered by antidumping orders, case numbers A 570-213 and A 570-214. We are therefore enclosing some information on these cases including types of products covered by these orders.

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 Paula Ilardi at 212-466-5476.

Sincerely,

ROBERT B. SWIERUPSKI
Chief,

*Metals & Machinery Branch
National Commodity Specialist Division*

NY J82246

April 9, 2003

CLA-2-73:RR:NC:1:118 J82246

CATEGORY: Classification

TARIFF NO.: 7326.90.85; 7307.29.00; 7507.20.00;
7508.90.50; 8109.90.00; 8108.90.60; 8108.90.30

MS. SHELLEY VYBIRAL
SNAP-TITE INC.
8325 HESSINGER DR
ERIE, PA 16509

RE: The tariff classification of collet gland assemblies, glands, collars and plugs.

DEAR MS. VYBIRAL:

In your letter dated March 7, 2003, you requested a tariff classification ruling for items that you have described as collet gland assemblies, glands, collars and plugs. You state that the materials of these items are either stainless steel, nickel, zirconium or titanium. A typical use of collet gland assembly is to connect a tubing line to a compressor. Glands, collars and plugs are used in conjunction with tubing, valves and fittings. The collar and gland component connect to the end of a tube to allow the tube to connect to a valve or fitting. The plug seals off the connection so no media can pass through it. You indicate that the part numbers are KGL-40 for the collet gland assemblies, AGL-40 for the glands, ACL-40 for the collars and AP-40 for the plugs. The 40 designation is indicative of the products diameter of ¼". An additional designation of the material is added after the size (i.e. SS (stainless steel), Ni (nickel), Zi (zirconium), and Ti (titanium)).

The applicable subheading for the stainless steel collet gland assemblies will be 7307.29.00, Harmonized Tariff Schedule of the United States (HTS), which provides for tube or pipe fittings (for example, couplings, elbows, sleeves), of iron or steel: other: of stainless steel: other.

The applicable subheading for the stainless steel glands, collars and plugs will be 7326.90.85, HTS, which provides for other articles of iron or steel: other: other: other: other: other.

The applicable subheading for all of the nickel collet gland assemblies will be 7507.20.00, HTS, which provides for nickel tubes, pipes and tube or pipe fittings (for example, couplings, elbows, sleeves): tube or pipe fittings.

The applicable subheading for the nickel glands, collars and plugs will be 7508.90.50, HTS, which provides for other articles of nickel: other: other.

The applicable subheading for the zirconium collet gland assemblies, glands, collars and plugs will be 8109.90.00, HTS, which provides for zirconium and articles thereof, including waste and scrap: other.

The applicable subheading for the titanium collet gland assemblies, will be 8108.90.60, HTS, which provides for titanium and articles thereof, including waste and scrap: other: other: other.

The applicable subheading for the titanium glands, collars and plugs will be 8108.90.30, HTS, which provides for titanium and articles thereof, including waste and scrap: other: articles of titanium: other.

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 Kathy Campanelli at 646-733-3021.

Sincerely,

ROBERT B. SWIERUPSKI

Director,

National Commodity Specialist Division

HQ 967490

November 14, 2005

CLA-2: RR:CR:TE 967490 ASM

CATEGORY: Classification

TARIFF NO.: 7307.29.0090; 7326.90.8587

PORT DIRECTOR
CUSTOMS AND BORDER PROTECTION
610 S. CANAL STREET
ROOM 306
CHICAGO, ILLINOIS 60607

RE: Decision on Application for Further Review (AFR) of Protest No. 3901-04-101240, concerning the classification of “Bi-Lok”(r) pipe fittings

DEAR PORT DIRECTOR:

This is a decision on a protest timely filed on August 26, 2004, on behalf of the Importer, Generant Company, Inc. (“Generant”) against your decision in the classification and liquidation under the Harmonized Tariff Schedule of the United States Annotated (HTSUSA) of “Bi-Lok” pipe fittings, entered at the Customs and Border Protection (CBP) port of Chicago, Illinois. Samples have been provided and were examined by this office. On July 19, 2005, a meeting was held with counsel and representatives of Generant. In correspondence dated September 7, 2005, counsel for Generant submitted supplemental comments regarding the classification of the subject merchandise.

FACTS:

The articles under consideration are various components of a “Bi-Lok”(r) pipe fitting system. The first item is a hexagon shaped article, which is labeled as a 3/4 nut and identified as part number DNA 12 SS. This article is a stainless steel nut with an interior circular shape of approximately 1-inch in diameter. The inside of the nut has internal threading, which descends about 3/4 of the way down. There is a shoulder or flange inside the rim with no threading, which prevents a pipe or tube from being threaded through it and emerging at the other end. The second item, labeled a “bulk nut”, is identified as part number DNN 6 SS. The DNN 6 SS is similar to the DNA 12 SS in that it is stainless steel with a hexagon shaped exterior. The interior of the DNN 6 SS is also a circular shape. However, the internal circle is only about 3/4 inch in diameter and there is threading all the way through the interior with no shoulder or flange. The third item is labeled a “back ferrule” and is identified as part number DOB 8 SS.

The DOB 8 SS “back ferrules” are unthreaded, narrow stainless steel rings that come two in a package on a plastic spike that is merely used to package the rings. The rings are circular in shape on both the exterior and interior and measure approximately 1/2 inch in diameter. The DOB 8 SS also has a shoulder or flange.

The CBP port of Chicago classified the subject merchandise identified under part numbers DNA 12 SS, DNN 6 SS, and DOB 8 SS, under subheading 7307.29.0090, HTSUSA, which provides for “Tube or pipe fittings (for example, couplings, elbows, sleeves), of iron or steel: Other, of stainless steel: Other, Other”.

The Protestant asserts that the pipe fittings, identified as DNA 12 SS and DNN 6 SS, are properly classifiable under subheading 7318.16.0060, HTSUSA, which provides for “Screws, bolts, nuts, . . . : Threaded articles: Nuts,

Other: Of stainless steel”; and the back ferrules are classifiable under subheading 7318.29.0000, HTSUSA, which provides for “Screws, bolts, nuts, . . . : Non-threaded articles: Other”. The Protestant asserts that the application of GRI 1 serves to preclude classification of these items as fittings in 7307, HTSUSA. It is also noted that the terms of heading 7307, HTSUSA, do not provide for “parts”. Furthermore, the Protestant asserts that the EN to 7307 precludes the classification of “bolts, nuts, screws etc., suitable for use in the assembly of tube or pipe fittings” in the heading and that the EN directs classification to heading 7318. Finally, the Protestant notes that the language of heading 7318 specifically provides for “screws, bolts, nuts . . and similar articles”.

We note that AFR was properly granted as the Protestant argues questions of fact and law, which have not been ruled upon by Customs and Border Protection (CBP) or by the courts. See 19 C.F.R. 174.24(b). This protest involves a unique set of facts as set forth below.

ISSUE:

What is the proper classification for the merchandise?

LAW AND ANALYSIS:

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

7307	Tube or pipe fittings (for example, couplings, elbows, sleeves), of iron or steel:
* * *	
	Other, of stainless steel:
7307.29.00	Other
7307.29.0090	Other
* * *	
7318	Screws, bolts, nuts, coach screws, screw hooks, rivets, cotters, cotter pins, washers (including spring washers) and similar articles, of iron or steel:
	Threaded articles:
* * *	
7318.16.00	Nuts
	Other:

7318.16.60	Of stainless steel
* * *	
	Non-threaded articles:
* * *	
7318.29.00	Other
* * *	
7326	Other articles of iron or steel:
7326.90	Other:
	Other:
7326.90.85	Other
7326.90.8587	Other

EN 73.07 provides in pertinent part as follows:

This heading covers fittings of iron or steel, mainly used for connecting the bores of two tubes together, or for connecting a tube to some other apparatus, or for closing the tube aperture. This heading does not however cover articles used for installing pipes and tubes but which do not form an integral part of the bore e.g., hangers, stays and similar supports which merely fix or support the tubes and pipes on walls, clamping or tightening bands or collars

The connection is obtained:

- by screwing, when using cast iron or steel threaded fittings;

* * *

This heading therefore includes . . . unions

This heading excludes:

* * *

(b) Bolts, nuts, screws, etc., suitable for use in the assembly of tube or pipe fittings (heading 73.18).

[All emphasis in original.]

EN 73.18 provides in pertinent part as follows:

Nuts are metal pieces designed to hold the corresponding bolts in place. They are usually tapped throughout but are sometimes blind. The heading includes wing nuts, butterfly nuts, etc. Lock nuts (usually thinner and castellated) are sometimes used with bolts. [Emphasis in original.]

EN 73.26 provides in pertinent part as follows:

This heading covers all iron or steel articles obtained by forging or punching, by cutting or stamping or by other processes such as folding, assembling, welding, turning, milling or perforating other than articles included in the preceding headings of this Chapter or covered by Note 1 to Section XV or included in Chapter 82 or 83 or more specifically covered elsewhere in the Nomenclature.

The heading includes:

- (1) . . . clamping or tightening bands or collars (hose clips) used for clamping flexible tubing or hose to rigid piping, taps, etc.; hangers, stays and similar supports for fixing piping and tubing . . .

Part Numbers DNA 12 SS and DNN 6 SS

In considering classification of the articles identified as DNA 12 SS and DNN 6 SS in heading 7307, HTSUSA, we find that certain of the language of EN 73.07 is critical to this issue. The language of heading 7307, HTSUSA, provides for “. . . fittings of iron or steel, mainly used for connecting the bores of two tubes together . . .”. Documentation in the file, including illustrations, indicates that the pipe fittings, DNA 12 SS and DNN 6 SS, serve to connect tube components. The documentation of record indicates that the subject pipe fittings, DNA 12 SS and DNN 6 SS, are used to connect the bores of two tubes together. Therefore, we find that the subject pipe fitting nuts are within the scope of the description provided in EN 73.07, above. Accordingly, we find that the subject pipe fitting nuts are provided for in heading 7307, HTSUSA. We find that they are classified in subheading 7307.29.0090, HTSUSA, as: “Tube or pipe fittings (for example, couplings, elbows, sleeves) of iron or steel: Other, of stainless steel: Other, Other.”

The Protestant argues that nuts and ferrules are nothing more than “parts” of a complete fitting and cite to several cases in support of the assertion that “. . . an *eo nomine* provision which does not specifically provide for parts does not include parts”. However, it is important to note that the exemplars in heading 7307, HTSUSA, specifically refer to “couplings” and “elbows” which may also be described as “parts” of a complete tube or pipe fitting. As such, the subject articles, DNA 12 SS and DNN 6 SS, would not necessarily be precluded from classification in heading 7307, HTSUSA, merely because they form part of the “Bi-Lok”(r) pipe fitting system.

Protestant also asserts that DNA 12 SS and DNN 6 SS are “nuts” within the meaning of subheading 7318.16.00, HTSUSA. The common nut performs its fastening function by holding the article in place by the compression that the exterior face creates with the assistance of the threaded bolt, screw, or stud. The Merriam-Webster OnLine Dictionary defines a “nut” as “. . . a perforated block usually of metal that has an internal screw thread and is used on a bolt or screw for tightening or holding something.” Typically, a common nut is marketed as a fastener and sold within the fastener section of a hardware department. The subject articles, DNA 12 SS and DNN 6 SS, are “fitting nuts”, which are specially designed and marketed for use in plumbing systems. This is further evidenced by the fact that the stated dimensions of these articles reference the interior diameter of the pipe they will fit on.

In view of the foregoing, we reject the Protestant’s assertion that DNA 12 SS and DNN 6 SS are *eo nomine* provided for as “nuts” of subheading 7318.16.00, HTSUSA. Our determination is supported by prior CBP Headquarters Ruling Letter (HQ) 965939, dated July 16, 2003, wherein it was determined that “pipe fittings nuts” and “common nuts” are designed differently, function differently, and are marketed differently with no “commercial interchangeability”. As such, HQ 965939 held that the pipe fitting nuts were not described in heading 7318, HTSUSA, and were properly classifiable in subheading 7307.19.90, HTSUSA, which specifically provides for “Tube or pipe fittings (for example, couplings, elbows, sleeves) of iron or steel: Cast fittings: Other: Other”.

In citing to the case of *Mitsubishi International Corp v. United States*, 78 Cust. Ct. 4, C.D. 4686 (1977), Protestant submits that the conclusion drawn from the analysis in HQ 965939 is wrong. We disagree. The *Mitsubishi* case was decided under the Tariff Schedule of the United States (TSUS), which preceded the HTSUSA, and it involved the classification of various articles

consisting of bent pipe, articulation joints, reducers, sliding and fixed base plates and test pieces. Thus, it is not directly applicable to the pipe fitting nuts discussed in HQ 965939. Indeed, the Mitsubishi case sets forth several definitions, which support our determination that the subject “nuts” may be “pipe fittings” as follows:

Audels Mechanical Dictionary (1942) defines “pipe fittings” as follows:

“Connections, appliances, and adjuncts designed to be used in connection with iron pipes, such as elbows and bends to alter the direction of a pipe; tees and crosses to connect a branch with a main; plugs to close an end; bushings, diminishers or reducing sockets to couple to pipes of different dimensions, etc.” (Emphasis in original.)

The Dictionary of Mechanical Engineering, Del Vecchio (1961), defines “fittings” as - -

“Parts of a pipe line other than straight pipe or valves, such as couplings, elbows, tees, unions and increasers.”

In particular the definition contained in the Audels Mechanical Dictionary (1942) broadly defines “pipe fittings” as connections, appliances, and adjuncts, which are designed for use in connection with iron pipes. Such a definition clearly encompasses the DNA 12 SS and DNN 6 SS nuts which are specifically designed for use in connection with the “Bi-Lok”(r) pipe fitting system. Furthermore, these specially designed components are not “straight pipe or valves” that are precluded from the “fittings” definition set forth in the Dictionary of Mechanical Engineering (1961).

We find that the CBP Chicago Port correctly classified the articles identified as DNA 12 SS and DNN 6 SS, as “Tube or pipe fittings . . .” in subheading 7307.29.0090, HTSUSA.

Part Number DOB 8 SS

We disagree with Protestant’s assertion that the article identified as a “back ferrule”, DOB 8 SS, functions like a “washer” of heading 7318, HTSUSA. In relevant part, EN 73.18 states that “Washers are usually small, thin discs with a hole in the centre; they are placed between the nut and one of the parts to be fixed to protect the latter.” However, it is important to note that the subject ferrules are different from “washers” in that they are actually used within the fitting. The back ferrule holds the tube in place so that when the nut is tightened, the back ferrule can engage the front ferrule and the nut compresses them to form a waterproof seal. Thus, the purpose of the ferrule is not to protect any parts but rather to form a tight seal. As such, the “back ferrule”, DOB 8 SS, would not fall into subheading 7318.29, HTSUSA, which is the provision for other non-threaded articles, because it does not perform a fastening function similar to tension pins or clevis pins which do fall in this provision.

In addition, we have reviewed the marketing documentation for the subject ferrules and note that they are designed to contribute to the

high integrity sealing capability of the fitting. The marketing catalogue states, "The tightening of the nut provides the axial thrust required to engage the actively held ferrules against the outside diameter of the tubing. The staged swaging action of the ferrules, with minimal torque transfer to the tubing during make-up, provides the key to Bi-Lok's high integrity sealing capabilities and exceptional service life." Accordingly, the subject ferrules are designed to assist in the connection of the fitting by providing a tight seal. However, the ferrules are not actually performing the connection between the bores of the tubes.

In CBP New York Ruling Letter (NY) K86336, dated June 14, 2004, certain pipe fittings identified as "follower rings", were classified as other cast iron parts in subheading 7325.99.1000, HTSUSA. These "follower rings" functioned in a similar manner to the subject ferrules, i.e., when the bolt was tightened, the "follower rings" were drawn toward each other, compressing the gaskets and forming a leak proof seal. Similarly, in NY J82246, a stainless steel plug, which served to seal off the connection in a collet gland assembly, was classified as other articles of iron or steel in subheading 7326.90.85, HTSUSA.

Based on the above, the articles identified as "back ferrules", DOB 8 SS, are classifiable as "Other articles of iron or steel" in subheading 7326.90.8587, HTSUSA. As such, we find that the CBP Chicago Port incorrectly classified the "back ferrule", DOB 8 SS, in subheading 7307.29.0090, HTSUSA.

HOLDING:

The subject merchandise, identified as part numbers DNA 12 SS and DNN 6 SS, are correctly classified in subheading 7307.29.0090, HTSUSA, which provides for, "Tube or pipe fittings (for example, couplings, elbows, sleeves), of iron or steel: Other, of stainless steel: Other, Other." The general column one duty rate on the date of entry was 5 percent ad valorem.

The subject merchandise, identified as part number DOB 8 SS, is correctly classified in subheading 7326.90.8587, HTSUSA, which provides for "Other articles of iron or steel: Other: Other: Other, Other." The general column one duty rate on the date of entry was 2.9 percent ad valorem.

The protest should be DENIED in part. The protest should be DENIED, except to the extent reclassification of the merchandise as indicated above results in a net duty reduction and partial allowance. In accordance with the Protest/Petition Processing Handbook (CIS HB, January 2002, pp. 18 and 21), you are to mail this decision,

together with the Customs Form 19, to the Protestant no later than 60 days from the date of this letter. Any reliquidation of the entry in accordance with the decision must be accomplished prior to mailing of the decision. Sixty days from the date of the decision, the Office of Regulations and Rulings will make the decision available to CBP personnel, and to the public, on the CBP Home Page on the World Wide Web at www.cbp.gov, by means of the Freedom of Information Act, and other methods of public distribution.

Sincerely,

MYLES B. HARMON,
Director

Commercial and Trade Facilitation Division

HQ H320950
 OT:RR:CTF:CPMM H320950 RRB
 CATEGORY: Classification
 TARIFF NO.: 7307.19.90

MR. JAMES D. GILLISON
 FORD METER BOX CO, INC.
 815 MILES PARKWAY
 PELL CITY, ALABAMA 35125

RE: Revocation of NY B87364; Modification of NY 898504, NY N118077, HQ 967490, NY J82246, and NY B85728; Tariff classification of various pipe fittings

DEAR MR. GILLISON:

This is to inform you that U.S. Customs and Border Protection (“CBP”) has reconsidered New York Ruling Letter (“NY”) B87364, dated July 15, 1997, regarding the classification of pipe fittings described as cast iron retainer glands. We have also reconsidered NY 898504¹, dated June 9, 1994; NY N118077², dated August 18, 2010; NY B85728³, dated June 12, 1997; NY J82246⁴, dated April 9, 2003; and Headquarters Ruling Letter (“HQ”) ⁵, dated November 14, 2005, regarding substantially similar merchandise. The pipe fittings in NY B87364, NY 898504, NY N118077, and NY B85728 were classified under subheading 7325.99.10, Harmonized Tariff Schedule of the United States (“HTSUS”), as “[o]ther cast articles of iron or steel: [o]ther: [o]ther: [o]f cast iron.” Additionally, the pipe fittings in HQ 967490 and NY J82246 were classified under subheading 7326.90.85, HTSUS, as “[o]ther articles of iron or steel: [o]ther: [o]ther: [o]ther.” For the reasons set forth below, we hereby revoke NY B87364, and modify NY 898504, NY N118077, HQ 967490, NY J82246, and NY B85728 with respect to the classification of certain pipe fittings of iron or steel.

FACTS:

In NY B87364, we described the product as follows:

The products to be imported are cast ductile iron retainer glands for ductile iron mechanical joints. The retainer glands are made to ASTM Specification A536, Grade 65–45–12. ASTM Spec A536 is the Standard Specification for Ductile Iron Castings. Sizes range from 3 inches to 24 inches. All sizes meet ANSI/AWWA C111/A21.11.

¹ NY 898504 classified mechanical joint gland packs, retainer glands, and retainer gland accessories in subheading 7325.99.10, HTSUS. This proposed modification is with respect to the retainer glands and retainer gland accessories only.

² NY N118077 determined that China is the country of origin of imported glands cast from ductile iron and used as a subcomponent of a RomaGrip product to complete the joint between a pipe and fitting, and that the proper classification of the merchandise is in heading 7235, HTSUS. This proposed modification is with respect to the classification of the glands only and does not affect the country of origin determination.

³ NY B85728 classified a ductile cast iron retainer gland in subheading 7325.99.10, HTSUS.

⁴ NY J82246 classified stainless steel glands, collars, and plugs used in conjunction with tubing, valves, and fittings in subheading 7326.90.85, HTSUS.

⁵ HQ 967490 classified a back ferrule component of a “Bi-Lok”(r) pipe fitting system in subheading 7326.90.85, HTSUS.

ISSUE:

Whether the subject pipe fittings are classified in heading 7307, HTSUS, as “tube or pipe fittings”; or in heading 7325, HTSUS, as “other cast articles of iron or steel”; or in heading 7326, HTSUS, as “other articles of iron or steel.”

LAW AND ANALYSIS:

The classification of merchandise under the HTSUS is governed by the General Rules of Interpretation (“GRIs”). GRI 1 provides, in part, that “for legal purposes, classification shall be determined according to terms of the headings and any relative section or chapter notes...” In the event that the goods cannot be classified solely on the basis of GRI 1, and if the headings and legal notes do not otherwise require, the remaining GRIs may then be applied in order.

The HTSUS headings under consideration are as follows:

- | | |
|------|---|
| 7307 | Tube or pipe fittings (for example, couplings, elbows, sleeves), of iron or steel: |
| 7325 | Other cast articles of iron or steel: |
| 7326 | Other articles of iron or steel:
<div style="text-align: center; margin-left: 100px;">* * * *</div> |

The Harmonized Commodity Description and Coding System Explanatory Notes (“EN”) 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 the headings. It is CBP’s practice to consult, whenever possible, the terms of the ENs when interpreting the HTSUS. *See* T.D. 89–80, 54 Fed. Reg. 35127, 35128 (August 23, 1989).

As a preliminary matter, the pipe fittings can only be classified in heading 7325 or heading 7326, HTSUS, if they are not more specifically classifiable in heading 7307, HTSUS. *See* EN 73.25 (“This heading covers all cast articles of iron or steel, not elsewhere specified or included.”); *see also* EN 73.26 (“This heading covers all iron or steel articles...other than articles included in the preceding headings of this Chapter.”). We therefore begin our analysis with heading 7307, HTSUS.

Heading 7307 applies to pipe fittings of iron or steel, including, *inter alia*, couplings. Neither “pipe fitting” nor “coupling” are defined in the HTSUS. As such, they are to be construed in accordance with their common meanings, which may be ascertained by reference to “standard lexicographic and scientific authorities,” to the pertinent ENs, and to industry standards. *GRK Can., Ltd. v. United States*, 761 F.3d 1354, 1357 (Fed. Cir. 2014); *see also Rocknel Fastener, Inc. v. United States*, 267 F.3d 1354, 1361 (Fed. Cir. 2001) (“Standards promulgated by industry groups such as ANSI, ASME, and others are often used to define tariff terms.”).

To this end, EN 73.07 states, in pertinent part, as follows with respect to “pipe fittings” of heading 7307, HTSUS:

This heading covers fittings of iron or steel, mainly used for connecting the bores of two tubes together, or for connecting a tube to some other apparatus, or for closing the tube aperture. This heading **does not** how-

ever **cover** articles used for installing pipes and tubes but which do not form an integral part of the bore (e.g., hangers, stays and similar supports which merely fix or support the tubes and pipes on walls, clamping or tightening bands or collars (hose clips) used for clamping flexible tubing or hose to rigid piping, taps, connecting pieces, etc.) (**heading 73.25 or 73.26**).

The connection is obtained:

- by screwing, when using cast iron or steel threaded fittings;
- or by welding, when using butt-welding or socket-welding steel fittings. In the case of butt-welding, the ends of the fittings and of the tubes are square cut or chamfered;
- or by contact, when using removable steel fittings.

This heading therefore includes flat flanges and flanges with forged collars, elbows and bends and return bends, reducers, tees, crosses, caps and plugs, lap joint stub-ends, fittings for tubular railings and structural elements, off sets, multi-branch pieces, couplings or sleeves, clean out traps, nipples, unions, clamps and collars.

We have previously determined, upon consulting both the above EN description and various technical references, that pipe fittings are defined in part as articles used to connect separate pipes to each other. *See* HQ H282297, dated July 6, 2017 (discussing commonalities among EN 73.07 and technical definitions cited in court cases). Both the plain language of the heading and EN 73.07 make clear that articles of this type include “couplings.” The term “coupling,” like “pipe fitting,” is not defined in the HTSUS. According to AWWA C219–11, a technical source promulgated by the American Water Works Association, couplings include “transition couplings” made up of “center sleeves” or “center rings,” “end rings,” and “gaskets.” *See* AMER. WATER WORKS ASS’N, AWWA STANDARD: BOLTED, SLEEVE-TYPE COUPLINGS FOR PLAIN-END PIPE 4–6 (2011) [hereinafter AWWA C219–11]. Insofar as they are used to “join plain-end pipe,” we consider transition couplings to be “pipe fittings” of heading 7307, HTSUS. *See id.* at ix, 1.

At issue in NY B87364 and NY B85728 are cast ductile iron retainer glands for ductile iron mechanical joints. NY N118077 covers cast ductile iron glands used to complete the joint between a pipe and fitting, similar to the cast ductile iron retainer glands in NY B87364 and NY B85728. At issue in NY J82246 are stainless steel glands, collars, and plugs used in conjunction with tubing, valves, and other fittings. Similarly, the merchandise in HQ 867490 consists of unthreaded narrow, stainless steel rings known as “back ferrules” that assist with the connection of the fitting by providing a tight seal. The various fittings described in the above-mentioned rulings are each combined with another component or components to form a complete coupling assembly. Like the coupling glands and Powermax glands in HQ H311162, dated June 13, 2022, the various glands, rings and other fittings at issue in these rulings function like end rings to fit over gaskets in a coupling assembly to compress them when the nuts/bolts are installed and tightened. The purpose of these types of fittings are to join and secure separate pipe segments into various types of coupling assemblies.

As we stated in HQ H311162, the language in EN 73.07 is rather broad regarding what constitutes a pipe fitting of heading 7307, HTSUS. It states

the “heading covers fittings of iron or steel, *mainly used* for connecting the bores of two tubes together, or for connecting a tube to some other apparatus, or for closing the tube aperture” (emphasis added). EN 73.07 includes a wide range of articles used in piping, such as “flat flanges and flanges with forged collars, elbows and bends and return bends, reducers, tees, crosses, caps and plugs, lap joint stub-ends, fittings for tubular railings and structural elements, off sets, multi-branch pieces, couplings or sleeves, clean out traps, nipples, unions, clamps and collars.” The use of the word “mainly” in the EN language implies that the heading may also cover other uses beyond connecting. The only exclusionary language regarding articles that should be classified in heading 7325 or heading 7326 instead of heading 7307 deals with “articles used for installing pipes and tubes but which do not form an integral part of the bore (e.g., hangers, stays and similar supports which merely fix or support the tubes and pipes on walls, clamping or tightening bands or collars (hose clips) used for clamping flexible tubing or hose to rigid piping, taps, connecting pieces, etc.) (heading 73.25 or 73.26).” This means that only articles like hangers and stays—which are used both to install pipes, *and* which do not form an integral part of the bore—are excluded from classification in heading 7307, HTSUS, and are instead, classified in heading 7325 or 7326, HTSUS. Thus, the exclusionary language in EN 73.07 makes a clear distinction between fittings used for *installing* piping/tubing, which are excluded from heading 7307, HTSUS, and all other fittings, which are included in heading 7307, HTSUS.

Even if the glands, rings and other fittings in these rulings do not directly make a connection between pipe, connecting pipe is not required under the language of EN 73.07. Thus, pursuant to the broad language of EN 73.07, and based on the use of the glands, rings, and other fittings in joining and securing pipe segments into coupling assemblies, we find that the subject merchandise was wrongly classified in headings 7325 and 7326, HTSUS, are instead classified in heading 7307, HTSUS, pursuant to GRI 1.

We further incorporate, by reference, the arguments made in HQ H311162 that would alternatively classify the subject merchandise in heading 7307, HTSUS, pursuant to GRI 2(a), which provides that an unfinished or incomplete article with the essential character of a complete or finished article is to be treated as the latter for classification purposes. *See also*, HQ H284443, dated May 8, 2019, concerning the classification of substantially similar ductile iron castings imported separately from other parts that are joined together to form a complete fitting.⁶ The “identity” or “essence” of all of the pipe fittings at issue, including the merchandise in HQ H284443 and HQ H311162, is their ability to join and secure separate pipe segments into various types of coupling assemblies. Specifically, the glands and rings are used to stabilize and secure the coupling assembly connection by fitting and compressing a gasket when the nuts or bolts are installed and tightened. Thus, like the merchandise in HQ H284444 and HQ H311162, the subject pipe fittings are also classifiable in heading 7307, pursuant to GRI 2(a).

⁶ HQ H284443 revoked two earlier rulings involving the classification of certain center sleeves and end rings for coupling assemblies that had been wrongly classified in heading 7325 or 7326, HTSUS.

HOLDING:

By application of GRIs 1 and 2(a), the subject pipe fittings are classified in heading 7307, HTSUS, specifically under subheading 7307.19.3085, HTSUSA (“Annotated”), which provides for: “Tube or pipe fittings of iron or steel: Cast fittings: Other: Ductile fittings: Other.” The 2022 column one general rate of duty for subheading 7307.19.3085, HTSUSA, is 5.6% *ad valorem*.

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

The merchandise in question may be subject to antidumping duties or countervailing duties (AD/CVD). We note that the International Trade Administration in the Department of Commerce is not necessarily bound by a country of origin or classification determination issued by CBP, with regard to the scope of antidumping or countervailing duty orders. Written decisions regarding the scope of AD/CVD orders are issued by the International Trade Administration and are separate from tariff classification and origin rulings issued by CBP. The International Trade Administration can be contacted at <http://www.trade.gov/ia/>. A list of current AD/CVD investigations at the United States International Trade Commission can be viewed on its website at <http://www.usitc.gov>. AD/CVD cash deposit and liquidation messages can be searched using ACE, the system of record for AD/CVD messages, or the AD/CVD Search tool at <http://adcevdcbp.gov/index.asp?ac=home>.

EFFECT ON OTHER RULINGS:

NY B87364, dated July 15, 1997, is hereby REVOKED.

NY 898504, dated June 9, 1994; NY N118077, dated August 18, 2010; NY B85728, dated June 12, 1997; NY J82246, dated April 9, 2003, and HQ 967490, dated November 14, 2005 are hereby MODIFIED with respect to the classification of the pipe glands, rings, and related pipe fittings discussed in this ruling.

Sincerely,

YULIYA A. GULIS,
Acting Director

Commercial and Trade Facilitation Division

Cc: Mr. Robert T. Givens
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**PROPOSED REVOCATION OF ONE RULING LETTER AND
PROPOSED REVOCATION OF TREATMENT RELATING TO
THE TARIFF CLASSIFICATION OF FASHION SHOW ITEMS
FROM FRANCE**

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 runway haute couture wearing apparel, headwear, footwear, jewelry, and accessories from France.

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 runway haute couture wearing apparel, headwear, footwear, jewelry, and accessories 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 October 14, 2022.

ADDRESS: Written comments are to be addressed to U.S. Customs and Border Protection, Office of Trade, Regulations and Rulings, Attention: Erin Frey, Commercial and Trade Facilitation Division, 90 K St., NE, 10th Floor, Washington, DC 20229–1177. Due to the COVID-19 pandemic, CBP is also allowing commenters to submit electronic comments to the following email address: 1625Comments@cbp.dhs.gov. All comments should reference the

title of the proposed notice at issue and the *Customs Bulletin* volume, number and date of publication. Due to the relevant COVID-19-related restrictions, CBP has limited its on-site public inspection of public comments to 1625 notices. Arrangements to inspect submitted comments should be made in advance by calling Ms. Erin Frey at (202) 325-1757.

FOR FURTHER INFORMATION CONTACT: Reema Bogin, Chemicals, Petroleum, Metals and Miscellaneous Articles Classification Branch, Regulations and Rulings, Office of Trade, at reemabogin@cbp.dhs.gov.

SUPPLEMENTARY INFORMATION:

BACKGROUND

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

Pursuant to 19 U.S.C. § 1625(c)(1), this notice advises interested parties that CBP is proposing to revoke one ruling letter pertaining to the tariff classification of runway haute couture wearing apparel, headwear, footwear, jewelry, and accessories. Although in this notice, CBP is specifically referring to New York Ruling Letter ("NY") N297394, dated June 11, 2018 (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 N297394, CBP classified runway haute couture wearing apparel, headwear, footwear, jewelry, and accessories in heading 9705, HTSUS, specifically in subheading 9705.00.0070, HTSUSA ("Annotated") (2018), which provides for "Collections and collectors' pieces of zoological, botanical, mineralogical, anatomical, historical, archeological, paleontological, ethnographic or numismatic interest ... Archaeological, historical, or ethnographic piece." CBP has reviewed NY N297394 and has determined the ruling letter to be in error. It is now CBP's position that runway haute couture wearing apparel, headwear, footwear, jewelry, and accessories are properly classified, in headings 4202 (certain accessories); 4203 (leather apparel and clothing accessories); 4203 (fur apparel and clothing accessories); 4303 (articles of artificial fur); various headings of chapter 61 and 62 (articles of apparel and clothing); 6402, 6403, 6404, and 6405 (footwear); 6504, 6505, and 6506 (various hats and headgear); and 7113 and 7116 (certain jewelry). In order to provide duty rates for the merchandise at issue, each item must be specifically described and identified for purposes of classification.

Pursuant to 19 U.S.C. § 1625(c)(1), CBP is proposing to revoke NY N297394 and to revoke or modify any other ruling not specifically identified to reflect the analysis contained in the proposed Headquarters Ruling Letter ("HQ") H305462, 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.

ALLYSON MATTANAH
for

YULIYA A. GULIS,
Acting Director

Commercial and Trade Facilitation Division

Attachments

N297394

June 11, 2018

CLA-2-97:OT:RR:NC:N4:433

CATEGORY: Classification

TARIFF NO.: 9705.00.0070

AMY J. JOHANNESSEN
JOHANNESSEN ASSOCIATES, PC
ATTORNEYS AT LAW
69 CHARLTON STREET
NEW YORK, NY 10014

RE: The tariff classification of fashion show items from France.

DEAR MS. JOHANNESSEN:

In your letter dated May 21, 2018, on behalf of Chanel, Inc. (Chanel), you requested a tariff classification ruling. A position paper filed by Counsel with various illustrative literature documents was furnished, describing and depicting Coco Chanel and haute couture fashion.

The merchandise concerned as stated by Counsel is Chanel's, "one of a kind haute couture runway items," which include fashion apparel, accessories, jewelry and footwear. No specific year or semi-annual timeframe was mentioned for the runway showcases, nor were styles of identification mentioned for the clothing and accessory items paired together to create specific looks. These showcases occur twice yearly, one in January and one in July. Taken from the position paper filed by Counsel on behalf of Chanel, the haute couture runway apparel items are crafted by hand, some pieces require more than 600 hours to create, and use rare and in many cases one-of-a-kind fabrics and decorative elements.

For purposes of this ruling, we will use the January of 2018, Couture Fashion Week, "Chanel spring/summer Haute Couture Paris show" to further elaborate on the nature of the merchandise concerned.

In the "London Evening Standard" published by Emma McCarthy on Tuesday, January 23 of 2018, for the Chanel 2018 spring/summer Haute Couture Paris show, it is stated ["Of course, this being couture – where garments can require weeks of painstaking labour and in excess of £10,000 to purchase this was far from understated. Instead, this was a showcase in which Karl Lagerfeld sought to allow the clothes to be the star of their own show, rather than the second act."]

In "British Vogue" published by Anders Christian Madsen on Tuesday, January 23, 2018, for the Chanel 2018 spring/summer Haute Couture Paris show, it is stated in part: ["A WALK in the

park isn't normally how you'd describe an haute couture collection. At the Chanel ateliers, petites mains have been toiling away for weeks at the 68 handcrafted looks that made up Karl Lagerfeld's spring/summer 2018 offering this morning in Paris. 69, if you count his adorable godson Hudson Kroenig's princeling blouse and tiny white jeans. The very idea of haute couture daywear epitomised in the first half of the collection's distinctly Chanel-centric sculpted little skirt suits was exactly that: sophisticated, old-world, downplayed glamour. "Runway-side Chanel's elusive haute couture clients smiled contently. They knew these kinds of clothes, they knew what this was about. And so, the total sum of Lagerfeld's collection came to

old world values: comfort in the familiar, and the sentiment he's always promoted: learn from the past and look to the future. And try to behave, even if it's not always easy."]

Published Article on History of Haute Couture:

In "ae world" published by Lara Mansour on March 20, 2016, an article was written called "The History of Haute Couture." The article in part stated "Not only is haute couture steeped in history and nostalgia, it is also worth remembering that these collections are the only branch of fashion that work on a short time line, making clothes for the season they are showing in. For fashion fanatics, the couture week will offer the visual pleasure of looking up close at the artistic merit and imagination of fragile techniques juxtaposed against grand sweeping volumes. Modernised haute couture shows are not designed and made to be sold, they are displayed for show and credibility. Instead of being constructed for the purpose of selling and making money, they are made to further the publicity, as well as perception and understanding of brand image. For the fashion houses taking part in couture week, custom clothing is no longer the main source of income, as there are only an estimated 2,000 female customers globally, meaning it often costs much more than it earns through direct sales. It does however raise the profile of the brand and their ventures, together with adding the aura of fashion to their ready-to-wear clothing and related luxury products."

Roots and History of Haute Couture:

"Haute Couture began with the English couturier, Charles Frederick Worth in 1858, who coined the term 'fashion designer' as opposed to 'tailor' or 'dressmaker' for the first time, and established the first [haute couture house] in Paris, selling luxury fashion to elite women of the upper classes." (Source ~ <http://aeworld.com/fashion/in-focus/the-history-of-haute-couture/>)

"At the origins of the Federation stands the Chambre Syndicale de la Haute Couture. In 1868, the Federation was then known as the Couture, des Confectionneurs et des Tailleurs pour Dame (Chambre Syndicale for Couture, clothing manufacturers and tailors for women), it became the Chambre Syndicale de la Couture Parisienne on December 14th 1910. Following the decision taken on January 23rd 1945 relating to the creation of the legally registered designation of origin « Haute Couture », it became the Chambre Syndicale de la Haute Couture. The only institutions to serve here are the ones that qualify for the designation, which companies approved each year by a dedicated commission held under the aegis of the Ministry for Industry may become eligible for." (Source ~ <https://fhcm.paris/en/the-federation/>)

"To earn the right to call itself a couture house and to use the term *haute couture* in its advertising and any other way, members of the Chambre Syndicale de la Haute Couture must follow specific rules established 1945:

- design made-to-order for private clients, with one or more fittings;
- have a workshop (*atelier*) in Paris that employs at least fifteen staff members full-time;
- have at least twenty full-time technical people, in at least one workshop (*atelier*); and
- present a collection of at least fifty original designs to the public every fashion season (twice, in January and July of each year), of both day and evening garments."

(Source ~ https://en.wikipedia.org/wiki/haute_couture)

Over the course of the 1960s the movement of fashion designers who linked forces with the great couturiers emerged. Consequently the *Chambre Syndicale du Prêt-à-Porter des Couturiers et des Créateurs de Mode* was founded on October 8th 1973. On the same day the *Chambre Syndicale de la Mode Masculine* came into being. This momentum generated by the three *Chambres Syndicales* (*Syndicales 1: Chambre Syndicale de la Haute Couture; Syndicales 2: Chambre Syndicale du Prêt-à-Porter des Couturiers et des Créateurs de Mode; and Syndicales 3: Chambre Syndicale de la Mode Masculine*) led to the creation that same day of the *Fédération Française de la Couture, du Prêt-à-Porter des Couturiers et des Créateurs de Mode*. On June 29th 2017, it became the *Fédération de la Haute Couture et de la Mode*.⁷ (Source ~ <https://fhcm.paris/en/the-federation/>)

Background on Gabrielle Bonheur Chanel and House Chanel:

Gabrielle Bonheur Chanel (Coco Chanel) was born August 19, 1883, Saurmur, France and passed away January 10, 1971. She was a French fashion designer who ruled over Parisian haute couture for almost six decades. In 1915 she opened her first “Couture House” in Biarritz, France and in 1918 she open the second “Couture House” at 31 Rue Cambon, Paris, France. [“Chanel closed the doors of her salon in 1939, when France declared war on Germany. Other couturiers left the country, but Chanel endured the war in Paris. Securing new finances and assembling a new staff, Chanel’s comeback collection of couture debuted in 1953. Within three seasons after her comeback, Chanel regained newfound respect as a one of the great couturiers. Following her death, several of her assistants designed the couture and ready-to-wear lines until Karl Lagerfeld took over the “haute couture” design in 1983 and the ready-to-wear lines in 1984. Lagerfeld’s ability to continuously mine the Chanel achieve for inspiration testifies to the importance of Gabrielle Chanel’s contributions to women’s fashion in the twentieth century.”] (Source ~ https://www.metmuseum.org/toah/hd/chnl/hd_chnl.htm)

Classification under the Harmonized Tariff Schedule of the United States (HTSUS) is made 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.

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

The ENs to heading 9705 “Collections and collectors’ pieces of zoological, botanical, mineralogical, anatomical, historical, archaeological, paleontological, ethnographic or numismatic interest” of the HTSUS, state in pertinent part, the following: These articles are very often of little intrinsic value but derive their interest from their rarity, their grouping or their presentation. The heading includes:

- (B) Collections and collectors’ pieces of historical, ethnographic, paleontological or archaeological interest, for example:

- (1) Articles being the material remains of human activity suitable for the study of the activities of earlier generations, such as: mummies, sarcophagi, weapons, objects of worship, articles of apparel, articles which have belonged to famous persons.

Goods produced as a commercial undertaking to commemorate, celebrate, illustrate or depict an event or any other matter, whether or not production is limited in quantity or circulation do not fall in this heading as collections or collectors' pieces of historical or numismatic interest unless the goods themselves have subsequently attained that interest by reason of their age or rarity.

There exists no strict standard or enumerated criteria for articles which are classified in heading 9705, HTSUS. The word "historic" is not defined by the tariff, nor by the ENs, and the dictionary definition is quite broad. The OXFORD ENGLISH DICTIONARY states it is, "A historical work or subject; a history. Now rare", and "relating to history; concerned with past events". "historic, n. and adj." *OED Online*. Oxford University Press, December 2014. Web. 23 February 2015.

In light of this, we turn to the ENs to inform and shape our understanding of the scope of the heading, but with the caveat that the ENs are used for guidance only in interpretation of the HTSUS. The ENs explain the scope of headings, often by means of exemplars, of which these examples are not necessarily all inclusive or all restrictive. The ENs should not restrict or expand the scope of headings, rather, they should describe and elaborate on the nature of goods falling within those headings, as well as the nature of goods falling outside of those headings. Thus, items must be examined on a case-by-case basis, considering all the relevant factors involved.

Pursuant to the ENs, articles of "historical interest" may include items that by virtue of their age, rarity, connection to a specific historical event, or era, or point in time, may be classified in heading 9705, HTSUS, so long as they are the remains of human activity suitable for the study of earlier generations. Restated with regard to the aforementioned sentence, noting goods obtain the level of collectors' pieces by reason of their age or rarity, we also note that goods obtain the level of collectors' pieces by their (1) placement along the time spectrum as recorded in the annals of historical accountings, (2) recognized accomplishments as documented and recorded in the pages of historical facts, and (3) association to famous persons with or without a nexus to an historical time.

For purposes of entitlement to duty-free status under heading 9705, HTSUS, goods need only show they reach the level of being a collectors' pieces as set by one of the three "parameters" as listed in the last paragraph, last sentence above. The same three parameters as listed in the last paragraph, last sentence above apply also to a collection or collections of historical interest. If goods, or a collection or collections, qualify by their placement in time to be of historical interest, then there is no requirement that those same goods, or collection or collections, be deed-worthy or belong to famous persons.

It is clear from the historical records that "House Chanel" has continued to live on past the lifespan of founder Coco Chanel and the near 6-decades that she ruled over the Parisian haute couture scene, with fashion designer Karl Lagerfeld stepping in to continue her work and vision of traditional and modern haute couture excellence. This is well documented in the recordings of historical accounts by the *Chambre Syndicale de la Haute Couture* desig-

nating “House Chanel” year-after-year a couture house, and continues today with that same designation listing “House Chanel” as a couture house by the current Fédération de la Haute Couture et de la Mode.

With case in point, this office is satisfied that the collection of “House Chanel” couture items, which includes fashion apparel, accessories, jewelry and footwear is of historical interest that showcases twice yearly, during the January Couture Fashion week and the July Couture Fashion week. These bi-yearly couture fashion events, occurring year-after-year, and representing couture apparel with associated accessories, jewelry and footwear are not commercial undertakings nor mass produced items, but rather are for ‘show and credibility’ of the Chanel brand, and more importantly for ‘high-profile’ of the Chanel brand within the fashion world. The fact that “House Chanel” couture collection items are catalogued by experts and enthusiasts, are showcased and displayed in museums throughout the world, are rare and changing twice every year, are priced reflective of their rarity, and are used frequently in photoshoots in France and abroad after these events, is indicative of the historical influence and impact that “House Chanel” has over the couture fashion world.

For CBP purposes it would be prudent to have a Chanel inventory listing of the couture fashion apparel, accessories, jewelry and footwear items pertaining to an associated Couture Fashion Week event to establish that the merchandise concerned has an historical nexus to a particular fashion event of historical interest. Thereby, establishing the claim for duty-free status under heading 9705, HTSUS. This inventory should be available for inspection by CBP personnel.

The applicable subheading for the “House Chanel” couture collection or items of the couture collection, resulting from the bi-yearly Couture Fashion Week events, will be 9705.00.0070, Harmonized Tariff Schedule of the United States (HTSUS), which provides for “Collections and collectors’ pieces of zoological, botanical, mineralogical, anatomical, historical, archeological, paleontological, ethnographic or numismatic interest: Archaeological, historical, or ethnographic pieces.” The rate of duty will be free.

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

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

A copy of the ruling or the control number indicated above should be provided with the entry documents filed at the time this merchandise is imported. If you have any questions regarding the ruling, contact National Import Specialist Neil H. Levy at neil.h.levy@cbp.dhs.gov.

Sincerely,

STEVEN A. MACK

Director

National Commodity Specialist Division

HQ H305462
OT:RR:CTF:CPMM H305462 RRB
CATEGORY: Classification
TARIFF NO.: Various

AMY J. JOHANNESSEN
JOHANNESSEN ASSOCIATES, PC
ATTORNEYS AT LAW
69 CHARLTON STREET
NEW YORK, NY 10014

RE: Revocation of NY N297394; tariff classification of fashion show items from France

DEAR Ms. JOHANNESSEN:

This letter is in reference to New York Ruling Letter (“NY”) N297394, dated June 11, 2018, regarding the classification of Chanel, Inc.’s (“Chanel”) runway haute couture wearing apparel, headwear, accessories, jewelry and footwear under the Harmonized Tariff Schedule of the United States (“HTSUS”). In NY N297394, U.S. Customs and Border Protection (“CBP”) classified the runway haute couture items under subheading 9705.00.0070, HTSUSA (“Annotated”) (2018), as “Collections and collectors’ pieces of zoological, botanical, mineralogical, anatomical, historical, archeological, paleontological, ethnographic or numismatic interest ... Archaeological, historical, or ethnographic pieces.” After reviewing the ruling in its entirety, we find it to be in error. For the reasons set forth below, we are revoking NY N297394.

FACTS:

In NY N297394, the runway haute couture items were described as follows:

The merchandise concerned as stated by Counsel is Chanel’s, “one of a kind haute couture runway items,” which include fashion apparel, accessories, jewelry and footwear. No specific year or semi-annual timeframe was mentioned for the runway showcases, nor were styles of identification mentioned for the clothing and accessory items paired together to create specific looks. These showcases occur twice yearly, one in January and one in July. Taken from the position paper filed by Counsel on behalf of Chanel, the haute couture runway apparel items are crafted by hand, some pieces require more than 600 hours to create, and use rare and in many cases one-of-a-kind fabrics and decorative elements.

Chanel is a member of the *Chambre Syndicale de la Haute Couture* (“*Chambre Syndicale*”) in France. The *Chambre Syndicale* requires its members to adhere to specific criteria as part of its business structure, which includes designing made-to-order clothes for private clients, with more than one fitting, having an *atelier* (workshop) in Paris that employs at least fifteen staff members full-time; having twenty full-time technical workers in one of their workshops; and presenting a collection of at least fifty original designs—both day and evening garments—to the public every fashion season, in January and July of each year.¹

¹ *BUSINESS OF FASHION (BoF)*. “Fashion A-Z: Haute Couture,” <https://www.businessoffashion.com/education/fashion-az/haute-couture> (last visited July 19, 2021).

Nowhere in NY N297394, or in its original submission, did Chanel identify item numbers, product numbers, item descriptions, costs, or material build sheets for the merchandise at issue.

ISSUE:

Whether the Chanel runway haute couture wearing apparel, headwear, accessories, jewelry, and footwear are properly classified in heading 9705 as a collectors' piece of historical interest or in the HTSUS heading that corresponds to the constituent material of each item.

LAW AND ANALYSIS:

Classification under the HTSUS is made 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.

GRI 6 provides that for legal purposes, the classification of goods in the subheadings of a heading shall be determined according to the terms of those subheadings and any related Subheading Notes and, *mutatis mutandis*, to the above Rules, on the understanding that only subheadings at the same level are comparable. For the purposes of this Rule the relative Section and Chapter Notes also apply, unless the context otherwise requires.

The HTSUS headings under consideration are the following:

- 4202 Trunks, suitcases, vanity cases, attache cases, briefcases, school satchels, spectacle cases, binocular cases, camera cases, musical instrument cases, gun cases, holsters and similar containers; traveling bags, insulated food or beverage bags, toiletry bags, knapsacks and backpacks, handbags, shopping bags, wallets, purses, map cases, cigarette cases, tobacco pouches, tool bags, sports bags, bottle cases, jewelry boxes, powder cases, cutlery cases and similar containers, of leather or of composition leather, of sheeting of plastics, of textile materials, of vulcanized fiber or of paperboard, or wholly or mainly covered with such materials or with paper
- 4203 Articles of apparel and clothing accessories, of leather or of composition leather
- 4303 Articles of apparel, clothing accessories and other articles of furskin
- 4304 Artificial fur and articles thereof
- Various headings of chapter 61: Articles of apparel and clothing accessories, knitted or crocheted
- Various headings of chapter 62: Articles of apparel and clothing accessories, not knitted or crocheted
- 6402 Other footwear with outer soles and uppers of rubber or plastics
- 6403 Footwear with outer soles of rubber, plastics, leather or composition leather and uppers of leather

- 6404 Footwear with outer soles of rubber, plastics, leather or composition leather and uppers of textile materials
- 6405 Other footwear
- 6504 Hats and other headgear, plaited or made by assembling strips of any material, whether or not lined or trimmed
- 6505 Hats and other headgear, knitted or crocheted, or made up from lace, felt or other textile fabric, in the piece (but not in strips), whether or not lined or trimmed; hair-nets of any material, whether or not lined or trimmed
- 6506 Other headgear, whether or not lined or trimmed
- 7113 Articles of jewelry and parts thereof, of precious metal or of metal clad with precious metal
- 7116 Articles of natural or cultured pearls, precious or semiprecious stones (natural, synthetic or reconstructed)
- 9705 Collections and collectors' pieces of zoological, botanical, mineralogical, anatomical, historical, archeological, paleontological, ethnographic or numismatic interest

Note 1(c) to chapter 97, HTSUS, provides that the chapter does not cover "Pearls, natural or cultured, or precious or semiprecious stones (7101 to 7103)."

Note 4(a) to chapter 97, HTSUS, provides that "...articles of this chapter are to be classified in this chapter and not in any other chapter of the tariff schedule." Consequently, classification in heading 9705, HTSUS, must be considered before resorting to any other heading in the HTSUS. *See* Headquarters Ruling Letter ("HQ") H021886, dated August 6, 2008.

The Explanatory Notes ("ENs") to the Harmonized Commodity Description and Coding System represent the official interpretation of the tariff 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 at the international level. *See* T.D. 89-80, 54 Fed. Reg. 35127, 35128 (Aug. 23, 1989).

EN 97.05 states, in pertinent part, the following:

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

(B) Collections and collectors' pieces of historical, ethnographic, palaeontological or archaeological interest, for example:

- (1) Articles being the material remains of human activity suitable for the study of the activities of earlier generations, such as mummies, sarcophagi, weapons, objects of worship, articles of apparel, articles which have belonged to famous persons.
- (2) Articles having a bearing on the study of the activities, manners, customs and characteristics of contemporary primitive peoples, for example, tools, weapons or objects of worship.

(3) Geological specimens for the study of fossils (extinct organisms which have left their remains or imprints in geological strata), whether animal or vegetable....

Goods produced as a commercial undertaking to commemorate, celebrate, illustrate or depict an event or any other matter, whether or not production is limited in quantity or circulation, **do not fall** in this heading as collections or collectors' pieces of historical or numismatic interest unless the goods themselves have subsequently attained that interest by reason of their age or rarity.

There exists no strict standard or enumerated criteria for articles classified in heading 9705, HTSUS. The word "historic" is not defined by the tariff, nor by the ENs, and the dictionary definition is quite broad. The OXFORD ENGLISH DICTIONARY states that it is, "[a] historical work or subject; a history. Now rare," and "relating to history; concerned with past events"; "historic, n. and adj." OED ONLINE. Oxford University Press, July 2022, <https://www.oed.com/view/Entry/87298?redirectedFrom=HISTORIC#eid> (last visited July 14, 2022).

Translated directly from French, *couture* means "dressmaking," while *haute* means "high." A haute couture item is always created for an individual client, tailored specifically for the client's measurements and body proportions based on the couturier's unique and original design for a particular season.² The commercial undertaking in exhibiting Chanel haute couture twice a year in January and July during Paris Fashion Week serves a primary purpose of generating interest in the products displayed and in attracting prospective future business. A secondary objective is the expectation, solicitation, and acquiring of commercial and retail orders for future delivery. The main purpose of showcasing the subject merchandise as runway articles is to further Chanel's commercial undertaking of advertising and offering its custom haute couture pieces to prospective clients and are thus excluded by EN 97.05, HTSUS, which excludes "goods produced as a commercial undertaking to commemorate, celebrate, illustrate, or depict an event or any other matter, whether or not production is limited in quantity or circulation" from classification in heading 9705, HTSUS, as collections or collectors' pieces of historical interest unless the goods themselves have subsequently attained that interest by reason of their age or rarity. Moreover, Customs stated in HQ 961279, dated November 5, 1998, that not all collections qualify for classification in heading 9705, HTSUS. In relation to the runway haute couture merchandise in NY N297394, although such merchandise is limited in circulation based on the specific business structure rules set forth by the *Chambre Syndicale*, such items are nevertheless produced by Chanel as a commercial undertaking and are not a collection of pieces of historical interest.

Our analysis of how to classify merchandise in heading 9705, HTSUS, is further guided by past CBP precedent. In HQ 961279, dated November 5, 1998, Customs held that two collector automobiles, one produced in 1929 and the other produced in 1936, did not qualify for classification in heading 9705, HTSUS. One automobile was a 1929 Bentley racing car. The other automo-

² *FÉDÉRATION DE LA HAUTE COUTURE ET DE LA MODE*. "Haute Couture," <https://fhcm.paris/en/haute-couture-2/> (last visited July 19, 2021).

bile was a 1936 Mercedes-Benz Special Roadster. Only 50 Bentleys of this type were produced; the first five were produced for racing purposes. It is estimated that less than 15 of the 1936 Mercedes-Benz Special Roadsters still exist. Both automobiles were owned by the Connor Living Trust that maintains a collection of unique and unusual automobiles, mainly produced during the late 1920's through the 1950's that are exhibited at museums and public exhibitions. However, there was no claim that the automobiles in HQ 961279 were connected to famous persons or a historical event.³ Accordingly, they did not meet the criteria for classification in heading, 9705, HTSUS. Customs also stated in HQ 961279 that EN 97.05 describes a narrow interpretation of coverage that would not include all collection pieces and that heading 9705 is to be applied narrowly.

The runway haute couture wearing apparel, headwear, accessories, jewelry, and footwear present an interesting scenario in a heading 9705 analysis as apparel, headwear, fashion accessories, jewelry, and footwear, even luxury ones, are—generally speaking—mass-produced for commercial consumption. The EN 97.05 provides that “Goods produced as a commercial undertaking to commemorate, celebrate, illustrate or depict an event or any other matter whether or not product is limited in quantity or circulation, do not fall in this heading as collections or collectors’ pieces of historical or numismatic interest unless the goods themselves have subsequently attained that interest by reason of their age or rarity.” Thus, where an item is merely noteworthy, but not of historical significance, CBP will not classify it in heading 9705, HTSUS. For example, in HQ 961279, Customs denied duty-free treatment under heading 9705 to two vehicles: a 1929 Bentley Supercharger (Blower) 4 1/2 liter racing car and a 1936 Mercedes-Benz 500K “Special Roadster,” noting that “[t]here is no claim of a specific incident or occurrence involving these automobiles in a significant historical event and there is no specific claim that these automobiles ‘belonged to famous (historical) persons.’”

In reaching its conclusion in HQ 088031 that jewelry owned by the Duke and Duchess of Windsor was eligible for classification in heading 9705, HTSUS, Customs considered the following factors: 1) the articles belonged to famous people; 2) the individuals were not only famous, but historically significant; 3) the articles had a markedly increased value because of their historical significance⁴; 4) the jewelry was not just owned by the Duke and Duchess but was very closely associated with them⁵; and 5) jewelry in general, and this jewelry in particular, is useful in the study of earlier generations.

Applying EN 97.05, the factors considered in HQ 088031, and the above-cited CBP precedent for interpreting heading 9705, HTSUS, to the runway haute couture merchandise in NY N297394, we find that the subject merchandise was improperly classified in heading 9705, HTSUS, which is to be applied narrowly. Here, it is almost impossible to apply the factors that were considered in HQ 088031 or to otherwise analyze the historical significance of the runway haute couture merchandise in NY N297394 because no item numbers, product numbers, item descriptions, cost or material build sheets,

³ See NY 815818, dated December 7, 1995, in which CBP classified a 1938 Talbot Lago T-150 C Ficoni Falaschi Goutte d’Eau automobile in heading 8703, HTSUS.

⁴ In HQ 088031, the importer paid \$117,000 for a pair of cufflinks owned by the Duke of Windsor, that would normally sell for \$800.

⁵ In HQ 088031, the Duke of Windsor personally designed many of the pieces at issue.

or other inventory listing are set forth in the ruling. In addition, NY N297394 does not describe how any of the individual haute couture runway items rises to the level of specific historical interest, rarity or authenticity of ownership. Further, the ruling does not identify an individual item by its rarity, grouping, or presentation. While Chanel's founder, Coco Chanel, may be considered a historical famous person on the spectrum of fashion and design, there is no indication that any of the runway haute couture merchandise was designed by Coco Chanel herself, such that there would be a nexus or close association with a famous person. More contemporary designers employed by Chanel do not rise to the level of being historically significant for purposes of heading 9705, HTSUS, just because they design for Chanel. Neither is there an indication that any of the haute couture runway items was owned by or otherwise associated with a historical famous person.

Moreover, in HQ 089226, dated July 29, 1991, Customs found that a one-of-a-kind watch, valued at \$4,975,000.00, taking five years to design, four years to complete, consisting of 1,728 parts and made of 18 carat gold was not classified in heading 9705, HTSUS, because none of these factors associated with its high value established a "historical interest." Similarly, while Chanel haute couture runway items are one of a kind, high in value, take hours to craft by hand and consist of luxury materials, there is no indication that the exceptionally high value of a particular piece is tied to any historically famous person or specific historically significant event, as no specific pieces are identified in the ruling and the merchandise is only described broadly.

While Chanel itself may be considered an iconic fashion house, that alone does not bestow all of its haute couture runway merchandise with historical significance for purposes of classification in heading 9705, HTSUS. Ultimately, what Chanel has described in its underlying ruling request to NY N297394 is the business structure of a haute couture fashion house as part of a larger commercial undertaking. Chanel adheres to particular industry requirements set forth by the *Chambre Syndicale* pertaining to its business structure of engaging in the production of high end, customized fashion merchandise in which price is a factor contributing to an item's rarity. Although limited in circulation because of this business structure, Chanel runway haute couture merchandise is produced as a commercial undertaking. Beyond that, unless a particular piece is closely associated with a historically significant event or historically famous person, it does not qualify for classification in heading 9705, HTSUS.

Based on the foregoing, we find that the runway haute couture wearing apparel, headwear, footwear, jewelry, and accessories in NY N297394, none of which are specifically described or identified, were improperly classified in heading 9705, HTSUS. Rather, they are classified according to their constituent materials in headings 4202 (certain accessories); 4203 (leather apparel and clothing accessories); 4203 (fur apparel and clothing accessories); 4303 (articles of artificial fur); various headings of chapter 61 and 62 (articles of apparel and clothing); 6402, 6403, 6404, and 6405 (footwear); 6504, 6505, and 6506 (various hats and headgear); and 7113 and 7116 (certain jewelry).

HOLDING:

Pursuant to GRI 1, the Chanel runway haute couture wearing apparel, headwear, footwear, jewelry and accessories in NY N297394 are classified according to their constituent materials in headings 4202 (certain accesso-

ries); 4203 (leather apparel and clothing accessories); 4203 (fur apparel and clothing accessories); 4303 (articles of artificial fur); various headings of chapter 61 and 62 (articles of apparel and clothing); 6402, 6403, 6404, and 6405 (footwear); 6504, 6505, and 6506 (various hats and headgear); and 7113 and 7116 (certain jewelry). In order to provide duty rates for the merchandise at issue, each item must be specifically described and identified for purposes of classification.

The text of the most recent HTSUS and the accompanying duty rates are provided for at www.usitc.gov.

EFFECT ON OTHER RULINGS:

NY N297394 is revoked in accordance with the above analysis.

Sincerely,

YULIYA A. GULIS,
Acting Director

Commercial and Trade Facilitation Division

cc: NIS Dharmendra Lilia

U.S. Court of Appeals for the Federal Circuit

YC RUBBER CO. (NORTH AMERICA) LLC, SUTONG TIRE RESOURCES, INC.,
MAYRUN TYRE (HONG KONG) LIMITED, ITG VOMA CORPORATION, KENDA
RUBBER (CHINA) Co., LTD., Plaintiffs-Appellants v. UNITED STATES,
Defendant-Appellee

Appeal No. 2021–1489, 2021–1698, 2021–1699, 2021–1700

Appeals from the United States Court of International Trade in No. 1:19-cv-00069-
MAB, Judge Mark A. Barnett.

Decided: August 29, 2022

NICHOLAS SPARKS, Hogan Lovells US LLP, Washington, DC, argued for plaintiffs-appellants ITG Voma Corporation, Mayrun Tyre (Hong Kong) Limited, Sutong Tire Resources, Inc., YC Rubber Co. (North America) LLC. Plaintiff-appellant ITG Voma Corporation also represented by CRAIG A. LEWIS, JONATHAN THOMAS STOEL.

NED H. MARSHAK, Grunfeld, Desiderio, Lebowitz, Silverman & Klestadt LLP, New York, NY, for plaintiffs-appellants YC Rubber Co. (North America) LLC, Sutong Tire Resources, Inc. Also represented by ALAN LEBOWITZ, MAX F. SCHUTZMAN; JORDAN CHARLES KAHN, Washington, DC.

JOHN MICHAEL PETERSON, Neville Peterson LLP, New York, NY, for plaintiff-appellant Mayrun Tyre (Hong Kong) Limited. Also represented by PATRICK KLEIN, RICHARD F. O'NEILL, Seattle, WA.

LIZBETH ROBIN LEVINSON, Fox Rothschild LLP, Washington, DC, for plaintiff-appellant Kenda Rubber (China) Co., Ltd. Also represented by BRITTNEY RENEE POWELL, RONALD MARK WISLA.

ASHLEY AKERS, Commercial Litigation Branch, Civil Division, United States Department of Justice, Washington, DC, argued for defendant-appellee. Also represented by BRIAN M. BOYNTON, JEANNE DAVIDSON, PATRICIA M. MCCARTHY; AYAT MUJ AIS, Office of the Chief Counsel for Trade Enforcement & Compliance, United States Department of Commerce, Washington, DC.

Before NEWMAN, SCHALL, and PROST, *Circuit Judges*.

NEWMAN, *Circuit Judge*.

This appeal is from the second administrative review of antidumping duties for certain passenger-vehicle and light-truck tires from the People's Republic of China. Under review, there were forty-two exporters and producers of the subject products. The Department of Commerce initially selected two respondents as representative; one of these two then withdrew from the review, and Commerce reviewed the remaining respondent and applied the resultant antidumping duty rate to all exporters and producers subject to review. Commerce denied all requests to withdraw from the review after publishing its Preliminary Results.

On appeal by several exporters and producers (collectively, “YC Rubber”), the Court of International Trade (“CIT”) affirmed. This appeal followed.

BACKGROUND

This second administrative review was initiated on October 16, 2017. *Initiation of Antidumping and Countervailing Duty Administrative Reviews*, 82 Fed. Reg. 48,051, 48,055 (Oct. 16, 2017). Pursuant to 19 U.S.C. § 1677(c)(1), Commerce is generally required to examine all known exporters/producers of the subject products and determine an individual weighted-average dumping margin for each exporter and producer. As is routine, Commerce allowed individual exporters/producers to apply for separate rate status. Such respondents receive an individually calculated dumping margin separate from the country-wide margin.

§ 1677(c) Determination of dumping margin

(1) General rule

In determining weighted average dumping margins under section 1673b(d), 1673d(c), or 1675(a) of this title, the administering authority shall determine the individual weighted average dumping margin for each known exporter and producer of the subject merchandise.

During the second review, forty-two exporters and producers applied for and were initially granted separate rate status. Due to the high number of separate rate respondents, Commerce determined that it would not be feasible to review each of them individually. *U.S. Dep’t of Commerce Respondent Selection Mem.* (Apr. 12, 2018), Appx223–231. Thus, Commerce invoked § 1677(c)(2), which provides the following exception:

(c)(2) Exception

If it is not practicable to make individual weighted average dumping margin determinations under paragraph (1) because of the large number of exporters or producers involved in the investigation or review, the administering authority may determine the weighted average dumping margins for a reasonable number of exporters or producers by limiting its examination to—

(A) a sample of exporters, producers, or types of products that is statistically valid based on the information available to the administering authority at the time of selection, or

(B) exporters and producers accounting for the largest volume of the subject merchandise from the exporting country that can be reasonably examined.

Several exporters requested that Commerce select three mandatory respondents for its sample. However, Commerce selected only two mandatory respondents: Zhaoqing Junhong Co., Ltd. (“Junhong”) and Shandong Haohua Tire Co., Ltd. (“Haohua”). *Selection Mem.*, at 7. Commerce explained that it selected these two because they were “the top two publicly identifiable exporters/producers of passenger vehicle and light truck tires sold to the United States.” *Id.*

On April 12, 2018, Commerce issued its initial questionnaires to Junhong and Haohua. Two weeks later, Haohua gave notice of its withdrawal from participation in the review. *Letter from DeKieffer & Horgan, PLLC to the Honorable Wilbur L. Ross, Jr., Sec’y of Commerce*, (Apr. 26, 2018); Appx408–411. Commerce did not select a replacement respondent, and over the next three months Commerce investigated only Junhong.

On September 11, 2018, Commerce issued its Preliminary Results based on the examination of Junhong and applied an individual dumping margin of 73.63%. This margin was then designated as the rate for all of the exporters and producers.

Several separate rate respondents contested Commerce’s decision to apply the 73.63% margin to all other entities because this margin was based on examination of only one respondent. Several respondents also took issue with how Junhong’s individual rate was calculated. In particular, they disagreed with Commerce valuing Junhong’s factors of production by selecting Thailand as the primary surrogate country and disregarding Thai import values from India, Indonesia, and South Korea. Commerce explained that the Thai import values were disregarded because they came from countries providing non-industry-specific export subsidies.

Several respondents then sought to withdraw their review requests. Commerce denied these requests as untimely, for they were submitted after the 90-day period established by 19 C.F.R. § 351.213(d)(1).

On April 22, 2019, Commerce issued the Final Results for the second review and addressed various concerns that had been raised. Commerce continued to use a single mandatory respondent, Junhong, for its investigation but reduced the weighted-average dumping margin to 64.57%. Commerce applied this rate to all participants in the review. *Certain Passenger Vehicle and Light Truck Tires from the People’s Republic of China: Final Results of Antidumping Duty Administrative Review 2016–2017*, 84 Fed. Reg. 17,782–83 (Apr. 26,

2019). Commerce stated that section 1677(c)(2) does not require it to base the rate on examination of more than one exporter or producer. Commerce stated that after Haohua's withdrawal, "no exporter/producer subject to the review requested individual examination, requested treatment as a voluntary respondent, submitted voluntary questionnaire responses, or submitted a request for Commerce to select an additional respondent." *Certain Passenger Vehicle and Light Truck Tires from the People's Republic of China: Issues and Decision Memorandum for the Final Results of the 2016–2017 Antidumping Duty Administrative Review: 2016–2017*, (Dep't of Commerce Apr. 19, 2019).

YC Rubber, Sutong Tire, and ITG Voma, along with Mayrun Tyre (Hong Kong) Ltd. and Kenda Rubber (China) Co., Ltd., sought review of the Final Results by the CIT pursuant to 19 U.S.C. § 1516a(a)(2)(B)(iii) and 28 U.S.C. § 1581(c). The CIT held that Commerce's use of a sole mandatory respondent was a reasonable exercise of agency discretion. The court also determined that Commerce's interpretation of § 1677f-1(c)(2)(B) was permissible, and the court deferred to Commerce's reading of the statute.

The CIT sustained Commerce's decision to exclude Thai import data from India, Indonesia, and South Korea when determining surrogate values for Junhong. The court held that Commerce's determination was supported by substantial evidence because Commerce had determined that broadly available export subsidies existed as determined in prior administrative reviews. *Y.C. Rubber Co., LLC v. United States*, 487 F. Supp. 3d 1367, 1386 (Ct. Int'l Tr. 2020).

After the CIT affirmed Commerce's Final Results, YC Rubber, Sutong Tire, and ITG Voma filed the present appeal on the grounds that 1) Commerce impermissibly interpreted § 1677(c)(2) and based the separate rate dumping margin on the examination of a single respondent; 2) Commerce's application of Junhong's rate to other separate rate respondents is unsupported by substantial evidence and unlawful; 3) Commerce's decision to deny the withdrawal requests is unsupported by substantial evidence; and 4) Commerce's decision to exclude Thai import data from India, Indonesia, and South Korea when determining Junhong's factors-of-production value is unsupported by substantial evidence. Appellant Mayrun Tyre joins the appeal on grounds 1) and 3).

DISCUSSION

The Federal Circuit reviews tariff decisions of the CIT de novo; thus, we apply the same standard used by the CIT to review the

Commerce decision. *Downhole Pipe & Equip., L.P. v. United States*, 776 F.3d 1369, 1373 (Fed. Cir. 2015). Pursuant to 19 U.S.C. § 1516a(b)(1)(B)(i), “[our] court shall hold unlawful any determination, finding, or conclusion found . . . to be unsupported by substantial evidence on the record or otherwise not in accordance with law.” Substantial evidence is “more than a mere scintilla, as well as evidence that a reasonable mind might accept as adequate to support a conclusion,” and Commerce’s ‘finding may still be supported by substantial evidence even if two inconsistent conclusions can be drawn from the evidence.’” *SolarWorld Americas, Inc. v. United States*, 910 F.3d 1216, 1222 (Fed. Cir. 2018) (quoting *Downhole Pipe & Equip., L.P.*, 776 F.3d at 1374). To implement this standard, Commerce must provide a “rational connection between the facts found and the choice made.” *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962).

I

The statute requires a reasonable foundation for the average dumping margin calculated for multiple importers. If a large number of exporters and producers are under review, Commerce may “determine the weighted average dumping margins for a reasonable number of exporters or producers by limiting examination to— a sample of exporters, producers or types of products that is statistically valid . . . or [to] exporters and producers accounting for the largest volume of the subject merchandise.” 19 U.S.C. § 1677(c)(2)(B).

The government states that nothing in § 1677f-1(c)(2)(B) compels Commerce to individually review more than one respondent, and that Commerce’s position that it suffices to review only one respondent warrants *Chevron* deference. See *Chevron U.S.A., Inc. v. Nat. Res. Def. Council*, 467 U.S. 837 (1984). When reviewing an agency’s interpretation of a statute under *Chevron*, we first determine “whether Congress has directly spoken to the precise question at issue,” and if so, the court must follow Congress’s intent. *Id.* at 842. When the statute is silent or ambiguous, the court must determine whether the agency’s interpretation is reasonable. *Id.* at 842–45.

We conclude that Commerce’s interpretation is contrary to the statute’s unambiguous language. The statute calls for all respondents to be individually investigated, unless the large number makes separate review impracticable. This statutory “exception” authorizes review of a smaller number of exporters or producers than have requested review. 19 U.S.C. § 1677f-1(c)(2). The question is whether the statute permits Commerce to review a single exporter or producer when multiple have requested review and Commerce has not dem-

onstrated that it was otherwise reasonable to calculate the all-others rate based on only one respondent.

The criterion for a reasonable number is set forth in § 1677(c), as whether the sample rate is “statistically valid.” The statute generally requires that the “reasonable number” is greater than one. It provides:

19 U.S.C. § 1673d(c)(5) Method for determining estimated all-others rate

(A) General rule

For purposes of this subsection and section 1673b(d) of this title, the estimated all-others rate shall be an amount equal to the weighted average of the estimated weighted average dumping margins established for exporters and producers individually investigated, excluding any zero and de minimis margins, and any margins determined entirely under section 1677e of this title.

(B) Exception

If the estimated weighted average dumping margins established for all exporters and producers individually investigated are zero or de minimis margins, or are determined entirely under section 1677e of this title, the administering authority may use any reasonable method to establish the estimated all-others rate for exporters and producers not individually investigated, including averaging the estimated weighted average dumping margins determined for the exporters and producers individually investigated.

In addition, 19 U.S.C. § 1677f-1(c)(2) specifies that Commerce “may determine the weighted average dumping margins for a reasonable number of exporters or producers.” Congress contemplated the possibility of multiple exporters and producers, and that antidumping duties could be determined for a reasonable number of exporters and producers that was less than the total number. To be sure, Commerce correctly notes that “unless the context indicates otherwise . . . words importing the plural include the singular.” Appellee’s Br. 15 (citing 1 U.S.C. § 1). But here, Commerce must “determine the weighted average” for that reasonable number, and Commerce provides no reason why it would be reasonable to “average” a single rate. We conclude that a “reasonable number” is generally more than one.

Notably, the CIT has reached the same conclusion we arrive at today. In *Shaeffler Italia S.R.L. v. United States*, the court explained:

In using the terms “reasonable number of exporters or producers” and “large number of exporters or producers” in section 777A(c)(2) of the Tariff Act, Congress has directly spoken to the precise question at issue. The plural term “*reasonable* number of *exporters* or *producers*,” read according to its plain meaning, does not encompass a quantity of one. 19 U.S.C. § 1677f-1(c)(2) (emphasis added).

781 F. Supp. 2d 1358, 1362–3 (Ct. Int’l Tr. 2011) (holding that “a reasonable number of exporters or producers must be greater than one”); see also, e.g., *Mid Continent Nail Corp. v. United States*, 949 F. Supp. 2d 1247, 1269 n.18 (Ct. Int’l Tr. 2013) (referring to “the incontrovertible observation that [t]he plural term “*reasonable* number of *exporters* or *producers*,” read according to its plain meaning, does not encompass a quantity of one” (emphases in original)).

For these reasons, we conclude that Commerce erred in relying on a single entity for calculation of a dumping margin for all respondents.

II

Having determined that Commerce unlawfully restricted its examination to a single mandatory respondent, substantial evidence does not support Commerce’s application of Junhong’s rate to the other separate rate respondents.

Appellants also ask us to decide whether Commerce’s decision to exclude Thai import data from India, Indonesia, and South Korea when determining Junhong’s factors of production value is correct. Such a decision is premature, for these fact-dependent situations may vary with the specific circumstances under review. We also do not reach Appellants’ challenge to Commerce’s decision to deny Appellants’ withdrawal requests.

CONCLUSION

We conclude that Commerce erred in restricting its examination to only one exporter/producer. We vacate the decision of the Court of International Trade, and remand for further proceedings in conformity with this opinion.

VACATED AND REMANDED

COSTS

No costs.

U.S. Court of International Trade

Slip Op. 22–93

JIANGSU SENMAO BAMBOO AND WOOD INDUSTRY CO., LTD.; JIANGSU KERI WOOD CO., LTD.; AND SINO-MAPLE (JIANGSU) CO., LTD., Plaintiffs, and BAROQUE TIMBER INDUSTRIES (ZHONGSHAN) CO., LTD.; RIVERSIDE PLYWOOD CORPORATION; EVOLUTIONS FLOORING, INC.; STRUXTUR, INC.; METROPOLITAN HARDWOOD FLOORS, INC.; FLOOR & DECOR HOLDINGS, INC.; GALLEHER CORP.; GALLEHER LLC; MCI INTERNATIONAL; FINE FURNITURE (SHANGHAI) LIMITED; DOUBLE F LIMITED; AND ZHEJIANG DADONGWU GREENHOME WOOD CO., LTD., Consolidated Plaintiffs, and SHENZHENSHI HUANWEI WOODS CO., LTD.; ZHEJIANG BIYORK WOOD CO., LTD.; DALIAN QIANQIU WOODEN PRODUCT CO., LTD.; FUSONG JINLONG WOODEN GROUP CO., LTD.; FUSONG JINQIU WOODEN PRODUCT CO., LTD.; FUSONG QIANQIU WOODEN PRODUCT CO., LTD.; DUNHUA CITY JISEN WOOD INDUSTRY CO., LTD.; DALIAN PENGHONG FLOOR PRODUCTS CO., LTD.; DALIAN SHUMAIKE FLOOR MANUFACTURING CO., LTD.; FINE FURNITURE (SHANGHAI) LIMITED; DOUBLE F LIMITED; JIANGSU GUYU INTERNATIONAL TRADING CO., LTD.; KEMIAN WOOD INDUSTRY (KUNSHAN) CO., LTD.; JIANGSU SIMBA FLOORING CO., LTD.; DONGTAI FUAN UNIVERSAL DYNAMICS, LLC; JIASHAN HUIJIALE DECORATION MATERIAL CO., LTD.; AND DALIAN JIAHONG WOOD INDUSTRY CO., LTD., Plaintiff-Intervenors, v. UNITED STATES, Defendant, and AMERICAN MANUFACTURERS OF MULTILAYERED WOOD FLOORING, Defendant-Intervenor.

Before: Timothy M. Reif, Judge
Consol. Court No. 20–03885
PUBLIC VERSION

[The court remands Commerce’s Final Determination.]

Dated: August 11, 2022

Jeffrey S. Neeley and Stephen W. Brophy, Husch Blackwell, LLP, of Washington, D.C., argued for plaintiffs Jiangsu Senmao Bamboo and Wood Industry Co., Ltd., Jiangsu Keri Wood Co., Ltd., and Sino-Maple (Jiangsu) Co., Ltd.

Gregory S. McCue, Steptoe & Johnson, LLP, of Washington, D.C., argued for consolidated plaintiffs Struxtur, Inc. and Evolutions Flooring, Inc.

Adams C. Lee, Harris Bricken McVay Sliwoski LLP, of Seattle, WA, argued for consolidated plaintiff Zhejiang Dadongwu GreenHome Wood Co., Ltd.

Andrew T. Schutz and Kavita Mohan, Grunfeld, Desiderio, Lebowitz, Silverman & Klestadt LLP, of Washington, D.C., argued for consolidated plaintiffs Baroque Timber Industries (Zhongshan) Co., Ltd., and Riverside Plywood Corporation. With them on the brief was *Francis J. Sailer*.

Lizbeth R. Levinson, Fox Rothschild LLP, of Washington, D.C., argued for consolidated plaintiffs Metropolitan Hardwood Floors, Inc., Floor & Décor Holdings, Inc., Galleher Corp., Galleher LLC, and MCI International. With her on the brief were *Ronald M. Wisla and Brittny R. Powell*.

Sarah M. Wyss and *Wenhui (Flora) Ji*, Mowry & Grimson, PLLC, of Washington, D.C., argued for consolidated plaintiffs and plaintiff-intervenors Fine Furniture (Shanghai) Limited and Double F Limited. With them on the brief was *Kristin H. Mowry*.

Gregory S. Menegaz and *Alexandra H. Salzman*, deKieffer & Horgan, PLLC, of Washington, D.C., argued for plaintiff-intervenors Dalian Penghong Floor Products Co., Ltd., Dalian Shumaike Floor Manufacturing Co., Ltd., Dunhua City Jisen Wood Industry Co., Ltd., Fusong Jinlong Wooden Group Co., Ltd., Fusong Jinqiu Wooden Product Co., Ltd., Fusong Qianqiu Wooden Product Co., Ltd., and Dalian Qianqiu Wooden Product Co., Ltd. With them on the brief was *J. Kevin Horgan*.

Mark R. Ludwikowski, Clark Hill PLC of Washington, D.C., argued for plaintiff-intervenors Shenzhenshi Huanwei Woods Co., Ltd., Zhejiang Biyork Wood Co., Ltd., Jiangsu Guyu International Trading Co., Ltd., Kemiao Wood Industry (Kunshan) Co., Ltd., Jiangsu Simba Flooring Co., Ltd., Dongtai Fuan Universal Dynamics, LLC, Jiashan Huijiale Decoration Material Co., Ltd., and Dalian Jiahong Wood Industry Co., Ltd. With him on the brief was *Courtney Gayle Taylor*.

Sonia M. Orfield, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, D.C., argued for defendant United States. With her on the brief were *Brian M. Boynton*, Acting Assistant Attorney General, *Jeanne E. Davidson*, Director, and *Tara K. Hogan*, Assistant Director. Of counsel on the brief was *Jon Zachary Forbes*, Office of the Chief Counsel, Trade Enforcement and Compliance, U.S. Department of Commerce, of Washington, D.C.

Stephanie M. Bell and *Theodore P. Brackemyre*, Wiley Rein LLP, of Washington, D.C., argued for defendant-intervenor American Manufacturers of Multilayered Wood Flooring. With them on the brief was *Timothy C. Brightbill*.

OPINION AND ORDER

Reif, Judge:

This action arises from a challenge by plaintiffs, Jiangsu Senmao Bamboo and Wood Industry Co., Ltd. (“Senmao”), Jiangsu Kerry Wood Co., Ltd. and Sino-Maple (Jiangsu) Co., Ltd. (together, “plaintiffs”), consolidated plaintiffs,¹ consolidated plaintiffs and plaintiff-intervenors Fine Furniture (Shanghai) Limited and Double F Limited (together, “Fine Furniture”) and plaintiff-intervenors² (all collectively “the moving parties”) to the final results published by the Department of Commerce (“Commerce”) in *Multilayered Wood Flooring from the People’s Republic of China: Final Results and Partial Rescission of Countervailing Duty Administrative Review; 2017* (“Fi-

¹ Consolidated plaintiffs are formed by Struxtur, Inc. and Evolutions Flooring Inc., Baroque Timber Industries (Zhongshan) Co., Ltd. and Riverside Plywood Corporation, Zhejiang Dadongwu GreenHome Wood Co., Ltd., Metropolitan Hardwood Floors, Inc., Floor & Décor Holdings, Inc., Galleher Corp., Galleher LLC and MCI International and Fine Furniture (Shanghai) Limited and Double F Limited (“Fine Furniture”).

² Plaintiffs-intervenors are formed by Fine Furniture, Shenzhenshi Huanwei Woods Co., Ltd., Zhejiang Biyork Wood Co., Ltd., Jiangsu Guyu International Trading Co., Ltd., Kemiao Wood Industry (Kunshan) Co., Ltd., Jiangsu Simba Flooring Co., Ltd., Dongtai Fuan Universal Dynamics, LLC, Jiashan Huijiale Decoration Material Co., Ltd., Dalian Jiahong Wood Industry Co., Ltd., Dalian Penghong Floor Products Co., Ltd., Dalian Shumaike Floor Manufacturing Co., Ltd., Dunhua City Jisen Wood Industry Co., Ltd., Fusong Jinlong Wooden Group Co., Ltd., Fusong Jinqiu Wooden Product Co., Ltd., Fusong Qianqiu Wooden Product Co., Ltd., and Dalian Qianqiu Wooden Product Co., Ltd.

nal Determination”), 85 Fed. Reg. 76,011 (Dep’t of Commerce Nov. 27, 2020) and accompanying Issues and Decision Memorandum (“IDM”). Collectively, the moving parties challenge the final determination with respect to:³

- (1) Commerce’s selection of mandatory respondents for individual examination;
- (2) Commerce’s finding of cross ownership between the affiliates of Jiangsu Guyu International Trading Co., Ltd. (“Jiangsu Guyu”);
- (3) Commerce’s inclusion of poplar core sheets in the provision of veneers for less than adequate remuneration (“LTAR”);
- (4) Commerce’s inclusion of “internally-consumed plywood” in its plywood for LTAR calculation;
- (5) Commerce’s determination that Jiangsu Guyu’s suppliers of poplar cores are authorities³;
- (6) Commerce’s inclusion of Harmonized Schedule Category 4412.99 in calculating the plywood benchmark;
- (7) Commerce’s investigation of non-alleged subsidies;
- (8) Commerce’s use of adverse facts available (“AFA”) for the Export Buyer’s Credit Program (“EBCP”); and,
- (9) Commerce’s use of AFA to make its specificity determination concerning electricity for LTAR and benchmark selection.

Defendant United States (“defendant”) maintains that the Final Determination is supported by substantial evidence and is in accordance with law. Def.’s Resp. to Pls.’ Mot. for J. on Agency R. (“Def. Br.”), ECF No. 54.

³ Mem. Supp. Pls.’ Rule 56.2 Mot. for J. on Agency R., ECF No. 42; Pls.’ Rule 56.2 Mot. for J. on Agency R., ECF No. 44; Pl.-Intervenors’ Rule 56.2 Mem. Supp. Mot. for J. Upon Agency R., ECF No. 45; Mem. of P. & A. Supp. Consolidated Pl. Zhejiang Dadongwu GreenHome Wood Co., Ltd. Rule 56.2 Mot. for J. on Agency R., ECF No. 46; Mem. of Law Supp. Consolidated Pls.’ Mot. for J. on Agency R., ECF No. 47; Mem. P. & A. Supp. Rule 56.2 Mot. for J. Upon Agency R. of Consol. Pls. and Pl.-Intervenors Fine Furniture (Shanghai) Ltd. and Double F Ltd., ECF No. 49; Consolidated Pls.’ 56.2 Mot. for J. on Agency R., ECF No. 51; Pl.-Intervenors’ Rule 56.2 Mot. for J. on Agency R., ECF No. 52; Reply Br. of Pls. Jiangsu Senmao Bamboo and Wood Industry Co., Ltd., Et. Al., ECF No. 60; Reply Br. Supp. Rule 56.2 Mot. for J. on Agency R. of Consolidated Pls. and Pl.-Intervenors Fine Furniture (Shanghai) Ltd. and Double F Ltd., ECF No. 62; Pls.’ Reply Br. to Rule 56.2 Mot. for J. on Agency R., ECF No. 64; Pl.-Intervenors’ Reply Br., ECF No. 65; Consolidated Pls.’ Reply Br., ECF No. 66; Consolidated Pls.’ Reply Br., ECF No. 67; Pl.-Intervenors’ Reply Br., ECF No. 68.

For reasons addressed below, the court remands the Final Determination with respect to Commerce’s selection of mandatory respondents and defers examination of the remaining issues until after Commerce issues the remand results.

BACKGROUND

On December 8, 2011, Commerce issued a countervailing duty (“CVD”) order on wood flooring from China. Preliminary Decision Memorandum (Jan. 31, 2020) (“PDM”) at 1, PR 263 (citing *Multilayered Wood Flooring from the People’s Republic of China: Countervailing Duty Order*, 76 Fed. Reg. 76,693 (Dec. 8, 2011); *Multilayered Wood Flooring from the People’s Republic of China: Amended Antidumping and Countervailing Duty Orders*, 77 Fed. Reg. 5,484 (Feb. 3, 2012) (collectively “2011 CVD Order”). On December 4, 2018, Commerce published a notice for an opportunity to request an administrative review of the 2011 CVD Order. *Id.* (citing *Antidumping or Countervailing Duty Order, Finding, or Suspended Investigation; Opportunity to Request Administrative Review*, 83 Fed. Reg. 62,293 (Dec. 3, 2018)). Petitioner, American Manufacturers of Multilayered Wood Flooring (“AMMWF”), and other interested parties sent Commerce timely requests, and, on March 14, 2019, Commerce initiated the administrative review. *Id.* at 1–2 (footnotes omitted); see *Initiation of Antidumping and Countervailing Duty Administrative Reviews* (Mar. 14, 2019) (“Initiation Notice”), PR 21.

On May 21, 2019, based on data from U.S. Customs and Border Protection (“Customs”), Commerce selected Baroque Timber Industries (Zhongshan) Co., Ltd. (“Baroque Timber”) and Jiangsu Guyu as mandatory respondents. PDM at 2–3 (footnote omitted). Between May 24, 2019, and December 19, 2019, Commerce issued initial and supplemental questionnaires to Baroque Timber, Jiangsu Guyu and the Government of China (“GOC”). *Id.* at 3 (footnote omitted). The two companies submitted affiliation responses, initial responses and supplemental responses. *Id.* (footnote omitted). The GOC provided an initial response and supplemental responses. *Id.* (footnote omitted).

On October 17, 2019, Commerce initiated an investigation of four new subsidy programs alleged by petitioner: (1) the provision of plywood for LTAR; (2) the provision of sawn wood and continuously shaped wood for LTAR; (3) the provision of particleboard for LTAR; and (4) the provision of fiberboard for LTAR. *Id.* (footnote omitted).

On February 6, 2020, Commerce issued its preliminary results. Preliminary Results of Review, 85 Fed. Reg. 6,908 (Dep’t of Commerce Feb. 6, 2020), PR 264. Commerce found that countervailable subsidies were being provided to producers and exporters of multilayered

wood flooring programs, including the provision of veneers for LTAR, provision of electricity for LTAR, “other subsidies” self-reported by Baroque Timber and Jiangsu Guyu, and the EBCP. PDM at 34–41. Commerce explained that, due to the GOC’s failure to provide certain requested information, Commerce applied AFA with respect to electricity for LTAR and the EBCP. *Id.* at 36–37, 39. Moreover, Commerce found, as AFA, that certain producers of fiberwood, plywood and veneers are “authorities.” *Id.* at 19–20. Commerce also applied AFA as to the specificity of various “other subsidies” investigated. *Id.* at 33. In its calculations for veneers for LTAR, Commerce included poplar sheets that Jiangsu Guyu reported as purchased by its affiliate, Siyang County Shunyang Wood Co., Ltd. *Id.* at 34. Commerce also included Harmonized Tariff Schedule (“HTS”) category 4412.99 data in its preliminary benchmark calculations, explaining “that it is appropriate to use these data because it includes plywood used to produce subject merchandise.” *Id.* at 14–15.

Following the release of the preliminary results, petitioner, the GOC, Baroque Timber and Jiangsu Guyu submitted case briefs.⁴ IDM at 2; Def. Br. at 7. On November 27, 2020, Commerce published the Final Determination and continued to apply AFA. Final Determination, 85 Fed. Reg. at 76,011; IDM at 7. Commerce calculated a subsidy rate of 14.09 percent for Baroque Timber and 122.92 percent for Jiangsu Guyu as well as a rate of 20.75 percent for non-selected companies. Final Determination, 85 Fed. Reg. at 76,012.

STANDARD OF REVIEW

The court exercises jurisdiction under 28 U.S.C. § 1581(c). The court will sustain a determination by Commerce unless it is “unsupported by substantial evidence on the record, or otherwise not in accordance with law.” 19 U.S.C. § 1516a(b)(1)(B)(i).⁵

DISCUSSION

I. Commerce’s selection of mandatory respondents

A. Background

This review covered 170 exporters/producers of subject merchandise. Mem. From S. Lam through K. Marksberry to I. Darzenta Tzafolias, re: Countervailing Duty Administrative Review of Multi-

⁴ Commerce also received a case brief from Fine Furniture and letters from other interested parties in support of arguments made by mandatory company respondents and the GOC. Def. Br. at 7.

⁵ Further citations to the Tariff Act of 1930, as amended, are to the relevant portions of Title 19 of the U.S. Code, and references to the U.S. Code are to the 2018 edition.

layered Wood Flooring from the People’s Republic of China: Respondent Selection (May 21, 2019) (“Respondent Selection Mem.”) at 2, CR 6, PR 57. In its Initiation Notice, Commerce explained that “[i]n the event Commerce limits the number of respondents for individual examination for administrative reviews . . . Commerce intends to select respondents based on [Customs] data for U.S. imports during the period of review [(“POR”)].”⁶ Initiation Notice at 9,297. On March 14, 2019, Commerce issued a memorandum to interested parties in which it confirmed its intention to rely on Customs data to select respondents. Mem. From B. Palmer to All Interested Parties, re: Administrative Review of the Countervailing Duty Order of Multilayered Wood Flooring from the People’s Republic of China: Customs and Border Protection Data for Respondent Selection (Mar. 14, 2019) (“Commerce Mem. to Interested Parties”), CR 1, PR 23. Commerce released the Customs data to parties and requested that interested parties submit comments on the Customs data and respondent selection by March 21, 2019. *Id.*

On March 21, 2019, Commerce received timely comments on the Customs data from AMMWF, Jiaxing Hengtong Wood Co., Ltd. (“Hengtong”) and Senmao. Respondent Selection Mem. at 2. AMMWF, Hengtong and Senmao all raised concerns about errors in the Customs data. Letter from Jeffrey S. Neeley, Husch Blackwell LLP, to Hon. Wilbur Ross, Sec’y of Commerce, re: Multilayered Wood Flooring from the People’s Republic of China: Comments on CBP Data and Request for Issuance Q&V Questionnaires (Mar. 21, 2019) (“Senmao Comments on CBP Data”), CR 3, PR 39; Letter from Gregory S. Menegaz, deKieffer & Horgan, PLLC, to Sec’y of Commerce, re: Multilayered Wood Flooring from the People’s Republic of China: Comments on CBP Data and Respondent Selection (Mar. 21, 2019) (“Hengtong Comments on CBP Data”), CR 4, PR 40; Letter from Wiley Rein LLP to Sec’y of Commerce, re: Multilayered Wood Flooring from the People’s Republic of China: Comments on CBP Data and Respondent Selection (Mar. 21, 2019) (“AMMWF Comments on CBP Data”), CR 5, PR 44. Specifically, interested parties noted “very large entries” of the subject merchandise. Senmao Comments on CBP Data; *see* Hengtong Comments on CBP Data at 3. Interested parties explained that “the average 40-foot container has a capacity of 67.7

⁶ Commerce explained:

Ideally, in an administrative review, Commerce would examine all known exporters and producers. However, in instances where Commerce must limit its examination due to the large number of potential respondents relative to its resource constraints, Commerce will examine as many exporters and producers as is practicable, consistent with its statutory obligation.

Respondent Selection Mem. at 2.

cubic meters and the number of containers it would take to transport all of this merchandise is not realistic,” Senmao Comments on CBP Data, and, as such, interested parties maintained that the Customs data indicated “inaccurate reporting.” AMMWF Comments on CBP Data at 4; *see* Hengtong Comments on CBP Data at 3–4.

Interested parties pointed to other errors in the Customs data, including “inconsistent units of measurement,” among others. AMMWF Comments on CBP Data at 3. Hengtong provided its quantity and value (“Q&V”) data, and Hengtong and Senmao each provided an exhibit to support their comments regarding the shipping container capacity. Senmao Comments on CBP Data, Ex. 1; Hengtong Comments on CBP Data (Mar. 21, 2019) at Attachment 1, bar code 3808179–01. Interested parties argued that, based on the cited errors, Commerce should not rely on “flawed” Customs data for respondent selection. Hengtong Comments on CBP Data at 4; *see* Senmao Comments on CBP Data. Accordingly, interested parties requested that Commerce issue Q&V questionnaires to interested parties and “use the [c]ompanies’ own shipment information for respondent selection.” *Id.* at 4; *see* AMMWF Comments on CBP Data at 4–5;⁷ Senmao Comments on CBP Data.

On May 28, 2019, Commerce received a submission of comments on respondent selection from Jiangsu Guyu. Letter from Katie Marksberry, Program Manager, AD/CVD Operations, Office VIII, to Jiangsu Guyu (May 30, 2019) (“Rejection of Untimely Respondent Selection Comments”), PR 65. Pursuant to 19 C.F.R. § 351.302(d)(1)(i), Commerce rejected as untimely Jiangsu Guyu’s submission and removed it from the record. *Id.* As a result, Commerce did not consider Jiangsu Guyu’s submission in the administrative review. *Id.*

B. Legal framework

19 U.S.C. § 1677f-1(e)(1) provides that Commerce “shall determine an individual countervailable subsidy rate for each known exporter or producer of the subject merchandise.” The statute provides an exception to the general requirement to determine individual subsidy rates. The statute states:

⁷ AMMWF argued:

[D]ue to the deficiencies in the [Customs] data highlighted [in its comments] it is critical that the [Commerce] issue Q&V questionnaires to *all* companies listed in the [Customs] data. Since the [] cannot be relied upon to provide a reasonable estimate of the largest producers and exporters of subject merchandise, [Commerce] should not limit its issuance of Q&V questionnaires to only the largest companies by volume in the [Customs] data. Rather . . . the [Commerce] should issue a Q&V questionnaire to each company listed in [sic] Customs data.

AMMWF Comments on CBP Data at 4–5.

If [Commerce] determines that it is not practicable to determine individual countervailable subsidy rates under paragraph (1) because of the large number of exporters or producers involved in the investigation or review, [Commerce] may—

(A) determine individual countervailable subsidy rates for a reasonable number of exporters or producers by limiting its examination to—

...

(ii) exporters and producers accounting for the largest volume of the subject merchandise from the exporting country that the administering authority determines can be reasonably examined[.]

19 U.S.C. § 1677f-1(e)(2)(A)(ii).

C. Positions of the parties

The moving parties argue that Commerce’s respondent selection is not supported by substantial evidence and is not in accordance with law because Commerce: (1) relied on flawed Customs data, (2) ignored the requests by interested parties to issue Q&V questionnaires and (3) failed to account adequately for the issues raised by interested parties in their comments on the Customs data. *See* Mem. Supp. Pls.’ Rule 56.2 Mot. for J. on Agency R. (“Pls. Br.”) at 9–14, ECF No. 42; Mem. P. & A. Supp. Rule 56.2 Mot. for J. Upon Agency R. of Consol. Pls. and Pls.-Intervenors Fine Furniture (Shanghai) Ltd. and Double F Ltd. (“Fine Furniture Br.”) at 8–15, ECF No. 49; Pl.-Intervenors’ Rule 56.2 Mot. for J. on the Agency R., (“Pl.-Intervenors Br.”) at 18–25, ECF No. 52. As a result, the moving parties argue that Commerce did not select the mandatory respondents that accounted for the largest volume of subject merchandise as required by the statute. *See* Pls. Br. at 9–14; Fine Furniture Br. at 11–12.

The moving parties do not challenge Commerce’s practice of relying on Customs data to select respondents for individual examination. Rather, the moving parties’ first argument is that where interested parties have presented evidence to demonstrate that the Customs data are unreliable, the data should be supplemented with Q&V questionnaires. *See* Fine Furniture Br. at 13–14; Pls. Br. at 11–12. Specifically, plaintiff-intervenors assert that Commerce “regularly issues” Q&V questionnaires during its respondent selection process “both in conjunction with and instead of [Customs] data.” Pl.-Intervenors Br. at 20–21 (citing *Multilayered Wood Flooring From the People’s Republic of China: Final Results and Partial Rescission of*

Countervailing Duty Administrative Review; 2014, 82 Fed. Reg. 22,311 (Dep't of Commerce May 15, 2017) and Mem. From M. Kolberg through D. S. Mermelstein to J. Maeder, re: Countervailing Duty Administrative Review: Multilayered Wood Flooring from the People's Republic of China: Respondent Selection: 2014 (Aug. 5, 2016) ("2014 Respondent Selection Mem."), bar code 3495046-01).

The moving parties assert that the data demonstrate that Commerce failed to select an exporter that represented the largest volume of subject merchandise. *See* Pls. Br. at 10; Fine Furniture Br. at 11; Pl.-Intervenors Br. at 18. Plaintiffs note that interested parties submitted comments on the Customs data, noting errors. Pls. Br. at 11 (citing Senmao Comments on CBP Data). The cited errors include [] which could not be accurate." *Id.* (citing Senmao Comments on CBP Data). Plaintiffs maintain that such entries are "simply not realistic and demonstrated that there were errors in the [Customs] data, possibly resulting from misplaced decimals or reporting the incorrect unit of measure." *Id.* (citation omitted); *see* Pl.-Intervenors Br. at 20-21. The moving parties note further that even petitioner, AMMWF, in its comments on the Customs data recognized the errors in the data and requested that Commerce issue Q&V questionnaires. *See* Fine Furniture Br. at 9-10 (quoting AMMWF Comments on CBP Data at 3-4); Pl.-Intervenors Br. at 20 (quoting AMMWF Comments on CBP Data at 3-4).

The moving parties argue that the Court has held that the "accuracy [sic] [Customs] data is a rebuttable presumption, and its reliability should only be upheld in [the] 'absence of evidence to the contrary.'" Fine Furniture Br. at 13 (quoting *Pakfood Pub. Co. v. United States*, 35 CIT 60, 74, 753 F. Supp. 2d 1334, 1376 (2011)). Moreover, the moving parties note that the Court has held that Commerce is required to address evidence on the record that challenges the accuracy of Customs data, Pls. Br. at 6 (citing *Ad Hoc Shrimp Trade Action Comm. v. United States* ("Ad Hoc Shrimp II"), 36 CIT 419, 422, 828 F. Supp. 2d 1345, 1350 (2012)), and that in "Commerce's refusal to adequately consider the record evidence, Commerce ultimately failed to select exporters and producers accounting for the largest volume of the subject merchandise as directed by the statute." *Id.*

Plaintiffs also challenge Commerce's finding that "no party has provided evidence to support the claim' that [Jiangsu] Guyu should not be selected" or that the Customs data were "unreliable." *Id.* at 10. Plaintiffs argue that Commerce does not state "how the parties should have obtained this additional confidential information from

Jiangsu Guyu” and maintain that the only method to obtain such information required that Commerce take further investigative action. *Id.* at 12. The moving parties note that Commerce had “sufficient time” between the deadline for comments on the Customs data (March 21, 2019) and the date of Commerce’s Respondent Selection Memorandum (May 21, 2019) either to send out Q&V questionnaires or to seek further information from Customs regarding the entries of Jiangsu Guyu. *Id.* ; see *Fine Furniture Br.* at 10.

The moving parties’ second argument is that Jiangsu Guyu did, in fact, submit its Q&V data to Commerce “to inform Commerce of the vast disparity between its actual quantity and value information and the [Customs] data relied upon by Commerce.” *Pl.-Intervenors Br.* at 23. The moving parties note that Jiangsu Guyu initially provided the Q&V data to Commerce on May 28, 2019; however, Commerce rejected the comments as untimely. *Id.* Plaintiffs challenge Commerce’s rejection of Jiangsu Guyu’s comments as untimely, asserting that Commerce’s regulation, 19 C.F.R. § 351.301(c)(5), permits the submission of factual information up to 30 days before the preliminary determination. *Pls. Br.* at 12–13 (citing 19 C.F.R. § 351.301(c)(5)).

The moving parties note that Jiangsu Guyu also provided the same Q&V data to Commerce in its CVD questionnaire response. *Pls. Br.* at 13; *Pl.-Intervenors Br.* at 19. Accordingly, the moving parties maintain that the Q&V data provided by Jiangsu Guyu are “further proof” that the Customs data were not reliable, *Pl.-Intervenors Br.* at 19, and assert that Commerce “could have selected another mandatory [respondent] or selected Senmao as a voluntary respondent before the preliminary results were issued in February 2020.” *Pls. Br.* at 13.

Finally, the moving parties argue that Commerce’s calculation of the CVD rate for non-selected companies was based, in part, on the rate of Jiangsu Guyu, and, as such, the CVD rate for non-selected companies is unsupported by substantial evidence and not in accordance with law. *See Pls. Br.* at 14–16; *Fine Furniture Br.* at 14; *see also Pl.-Intervenors’ Reply Br.* (“*Pl.-Intervenors Reply Br.*”) at 6, ECF No. 68. The moving parties assert that Commerce needs either to select an additional mandatory respondent or re-calculate the margin for non-selected respondents using only the margin assigned to Baroque Timber. *Pls. Br.* at 16; *Fine Furniture Br.* at 14; *Pl.-Intervenors Reply Br.* at 6. The moving parties maintain that such a request is consistent with the decisions of this Court. *Fine Furniture Br.* at 14–15 (citing *Fine Furniture (Shanghai) Ltd. v. United States*, 45 CIT ___, ___, Slip Op. 21–27 at 2 (Mar. 3, 2021)).

Defendant asserts that Commerce addressed and considered the concerns about the Customs data alleged by the interested parties

during the respondent selection process and determined that evidence on the record during respondent selection did not demonstrate that the Customs data were unreliable. Def. Br. at 7. Defendant argues that 19 U.S.C. § 1677f-1(e)(2)(A) permits Commerce to “limit examination of exporters or producers to those accounting for the largest volume of subject merchandise exported during the [POR] that can reasonably be examined.” *Id.* at 11 (citing 19 U.S.C. § 1677f-1(e)(2)(A)). Defendant argues that “[b]ecause the statute is silent as to how Commerce must determine which producers or exporters account for the largest volume of subject merchandise, Commerce has discretion to choose which particular method to use.” *Id.* (citing IDM at 14). Defendant explains that “Commerce’s practice in administrative reviews is to rely upon [Customs] data of subject entries” to determine the largest producer or exporter. *Id.* (citing IDM at 15). Defendant argues that “Commerce’s reliance on [Customs] data and [information on the record] at the time of respondent selection to select Jiangsu Guyu as a mandatory respondent was supported by substantial evidence and otherwise in accordance with law.” *Id.* at 14. Accordingly, defendant maintains that the weighted-average margin calculation assigned to non-selected companies pursuant to 19 U.S.C. § 1673d(c)(5)(A) was also lawful. *Id.* at 14–15.

Similarly, defendant-intervenor argues that Commerce exercised its discretion properly in its use of Customs data to select mandatory respondents and asserts that the Court previously has upheld Commerce’s use of Customs data. *See* Resp. to Mot. for J. on Agency R. (“Def.-Intervenor Br.”) at 27–30, ECF No. 56.

D. Analysis

1. Commerce’s selection of mandatory respondents based on the Customs data

To determine whether Commerce’s selection of mandatory respondents is supported by substantial evidence, the court must examine the evidence that was on the record available to Commerce in making its determination. As such, the court addresses first the moving parties’ argument that Commerce should have considered in its respondent selection determination the Q&V data submitted by Jiangsu Guyu after the deadline for comments on the Customs data.

i. Commerce’s rejection of the Q&V data submitted by Jiangsu Guyu

The moving parties challenge Commerce’s rejection of the Q&V data submitted by Jiangsu Guyu in its submissions to Commerce after the deadline for comments on the Customs data. In particular,

plaintiffs assert that no law prevents Commerce from reconsidering its respondent selection and that 19 C.F.R. § 351.301(c)(5) “allow[s] the submission of factual information up to the date that is 30 days prior to the preliminary determination and Jiangsu Guyu’s submission was well within that deadline.” Pls. Br. at 12–13 (citing 19 C.F.R. § 351.301(c)(5)). The moving parties note further that, on July 15, 2019, Jiangsu Guyu filed its questionnaire response and included its “actual quantity and value of exports to the United States during the POR,” which were “materially the same” Q&V data that Jiangsu Guyu had attempted initially to provide to Commerce on May 28, 2019. Pl.-Intervenors Br. at 24. The moving parties argue that, after receiving the questionnaire response from Jiangsu Guyu, Commerce had “absolute confirmation” that Senmao was a larger exporter than Jiangsu Guyu during the POR; however, the moving parties assert that Commerce failed to reconsider the respondent selection data to account for the Q&V data. Pls. Br. at 13. Defendant maintains that Commerce’s rejection of Jiangsu Guyu’s submissions after the deadline was in accordance with 19 C.F.R. § 351.302(d)(1)(i). Def. Br. at 12–13.

In a memorandum to the interested parties, Commerce set the deadline for comments on the Customs data for March 21, 2019. Commerce Mem. to Interested Parties; *see* Initiation Notice, 84 Fed. Reg. at 9,297. AMMWF, Senmao and Hengtong submitted their comments, including Q&V data from Hengtong, by the deadline. *See* Senmao Comments on CBP Data; Hengtong Comments on CBP Data; AMMWF Comments on CBP Data. On May 21, 2019, Commerce selected Baroque Timber and Jiangsu Guyu as mandatory respondents, *see* Respondent Selection Mem. at 1, and on May 24, 2019, Commerce requested that Baroque Timber and Jiangsu Guyu complete CVD questionnaires. *See* 2017 Countervailing Duty Administrative Review of Multilayered Wood Flooring from the People’s Republic of China: Countervailing Duty Questionnaire (May 24, 2019) at 1, PR 61. On May 28, 2019 — more than two months after the deadline for comments on the Customs data — Jiangsu Guyu submitted comments regarding respondent selection, including Q&V data. *See* Rejection of Untimely Respondent Selection Comments. On May 30, 2019, pursuant to 19 C.F.R. § 351.302(d)(1)(i), Commerce rejected Jiangsu Guyu’s submission as “untimely” and explained that Commerce was “removing this untimely submission from the record and will not consider it in this administrative review.” *Id.*

19 C.F.R. § 351.302(d)(1)(i) directs Commerce to reject “untimely filed factual information, written argument, or other material.” 19 C.F.R. § 351.302(d)(1)(i). Consequently, Commerce was required by its

regulation to reject the untimely submissions by Jiangsu Guyu. The moving parties argue that 19 C.F.R. § 351.301(c)(5) allowed Jiangsu Guyu to submit information after the March 21, 2019 deadline, and up to 30 days before the preliminary determination; *see* Pls. Br. at 12–13; however, the regulation applies to submissions that “clearly explain why the information contained therein does not meet the definition of factual information described in § 351.102(b)(21)(i)-(iv), and . . . provide a detailed narrative of exactly what information is contained in the submission and why it should be considered.” 19 C.F.R. § 351.301(c)(5). The moving parties in their briefs fail to articulate to the court how, if at all, the submissions to Commerce on May 28, 2019, by Jiangsu Guyu, met the requirements of 19 C.F.R. § 351.301(c)(5). Accordingly, the court determines that Commerce’s rejection of the untimely factual information on May 30, 2019, was lawful.

Moreover, this Court has recognized that “the statute indicates that respondent selection is within Commerce’s discretion.” *Kyocera Solar, Inc. v. United States*, 41 CIT __, __, 253 F. Supp. 3d 1294, 1318 (2017) (citing 19 U.S.C. §§ 1677f-1(c)(2)(A)-(B)).⁸ As Commerce explained, “[its] intended respondent selection methodology was clearly stated

⁸ The court in *Kyocera Solar* examined 19 U.S.C. § 1677f-1 in the context of an antidumping proceeding. *Kyocera Solar, Inc. v. United States*, 41 CIT __, 253 F. Supp. 3d 1294 (2017). Here, the court notes that the language pertaining to the determination of the antidumping duty margin under 19 U.S.C. § 1677f-1(c)(2)(A)-(B) is analogous to the determination of the countervailing subsidy rate under 19 U.S.C. § 1677f-1(e)(2)(A)(i)-(ii). 19 U.S.C. § 1677f-1(c)(2) provides:

If it is not practicable to make individual weighted average dumping margin determinations under paragraph (1) because of the large number of exporters or producers involved in the investigation or review, the administering authority may determine the weighted average dumping margins for a reasonable number of exporters or producers by limiting its examination to—

- (A) a sample of exporters, producers, or types of products that is statistically valid based on the information available to the administering authority at the time of selection, or
- (B) exporters and producers accounting for the largest volume of the subject merchandise from the exporting country that can be reasonably examined.

19 U.S.C. § 1677f-1(c)(2)(A)-(B).

Similarly, 19 U.S.C. § 1677f-1(e)(2)(A) states:

If the administering authority determines that it is not practicable to determine individual countervailable subsidy rates under paragraph (1) because of the large number of exporters or producers involved in the investigation or review, the administering authority may—

- (A) determine individual countervailable subsidy rates for a reasonable number of exporters or producers by limiting its examination to—
 - (i) a sample of exporters or producers that the administering authority determines is statistically valid based on the information available to the administering authority at the time of selection, or
 - (ii) exporters and producers accounting for the largest volume of the subject merchandise from the exporting country that the administering authority determines can be reasonably examined[.]

19 U.S.C. § 1677f-1(e)(2)(A)(i)-(ii).

in the Initiation Notice.” IDM at 16 (emphasis removed). Jiangsu Guyu and other interested parties had the opportunity to comment on the Customs data prior to the deadline.

The moving parties argue further that Commerce should have reconsidered its respondent selection once Commerce accepted Q&V data from Jiangsu Guyu in Jiangsu Guyu’s CVD questionnaire response on July 15, 2019. *See* Pls. Br. at 13. Nevertheless, “there is no indication in the statute that the selection process is to evolve as the proceedings and scope evolve. The opposite is suggested by the limiting phrases ‘based on information available to [Commerce] at the time of selection’ and ‘that can be reasonably examined.’”⁹ *Kyocera Solar*, 41 CIT at __, 253 F. Supp. 3d at 1318 (citing 19 U.S.C. § 1677f-1(c)(2)(A)-(B)) (alteration in original) (internal citation omitted).

Accordingly, the court limits its assessment to the comments submitted to Commerce by the deadline. As such, the court will consider whether, based on the information that Commerce had at the time of respondent selection, the decision to select Jiangsu Guyu and Baroque Timber as respondents is supported by substantial evidence and in accordance with law.

ii. Commerce’s use of the Customs data for respondent selection

The moving parties argue that the Court has established that the reliability of Customs data is a “rebuttable presumption”, and Commerce is required to consider evidence on the record that challenges that accuracy of Customs data. *Fine Furniture Br.* at 13; *see* Pls. Br. at 6, 13 (citing *Ad Hoc Shrimp II*, 36 CIT at 422, 828 F. Supp. 2d at 1350); *see also* Pl.-Intervenors Br. at 22 (citing *Husteel Co., Ltd. v. United States*, 39 CIT __, __ n.8, 98 F. Supp. 3d 1315, 1327 n.8 (2015)). The moving parties argue that Commerce did not address the comments made by interested parties on the Customs data during the respondent selection process, including comments on several inconsistencies in the data and requests for Commerce to issue Q&V questionnaires to confirm the accuracy of the Customs data. *See* *Fine Furniture Br.* at 4; Pls. Br. at 6. The moving parties maintain that Commerce did not address the cited errors in the Customs data, and, therefore, Commerce failed to select respondents accounting for the largest volume of the subject merchandise as required by the statute. *See* Pls. Br. at 6.

Defendant and defendant-intervenor argue that the Court has upheld Commerce’s practice of using Customs data for respondent se-

⁹ *See supra* note 8.

lection. Def. Br. at 13 (citing *Pakfood*, 35 CIT at 72–73, 753 F. Supp. 2d at 1344–45; *Ad Hoc Shrimp II*, 36 CIT at 423–29, 828 F. Supp. 2d at 1351–55); Def.-Intervenor Br. at 27 (citing *Pakfood*, 35 CIT at 72–73, 753 F. Supp. 2d at 1344–45). Defendant maintains that Commerce addressed the cited errors in the Customs data, and, therefore, Commerce’s selection of mandatory respondents is lawful. Def. Br. at 7, 13.

The Court has recognized Commerce’s methodology of selecting respondents based on Customs data. *See, e.g., Ad Hoc Shrimp Trade Action Co. v. United States*, 35 CIT 1110, 1115, 791 F. Supp. 2d 1327, 1332 (2011) (“*Ad Hoc Shrimp I*”) (explaining that “because Customs officers have a duty to assure the accuracy of information submitted to that agency by penalizing negligent or fraudulent omissions and/or inaccurate submissions, [Customs] data are presumptively reliable as evidence of respondent-specific POR entry volumes.”) (citing *Pakfood*, 35 CIT at 73–74, 753 F. Supp. 2d. at 1345–46). Moreover, the Court has held consistently “that, in the absence of evidence to the contrary, the data obtained by Customs officials in their regular course of business is accurate.” *Pakfood*, 35 CIT at 74, 753 F. Supp. 2d at 1345–46; *see Ad Hoc Shrimp II*, 36 CIT at 422–23, 427, 828 F. Supp. 2d at 1350, 1354. Nevertheless, where information on the record “detracts from the weight of the data relied on,” Commerce must account for such information in its respondent selection determination. *Ad Hoc Shrimp I*, 35 CIT at 1115–17, 791 F. Supp. 2d at 1332–34.

In the comments on the Customs data, interested parties raised four main concerns regarding the Customs data. To determine whether Commerce’s respondent selection determination was supported by substantial evidence, the court will examine whether Commerce addressed adequately both the arguments made by interested parties and the evidence on the record detracting from the reliability of the Customs data.

I. Inconsistent units of measurement

In their comments on the Customs data, Hengtong and AMMWF noted that certain entries of the subject merchandise in the Customs data are recorded in square meters while other entries are recorded in cubic meters. Hengtong Comments on CBP Data at 2; AMMWF Comments on CBP Data at 3. AMMWF noted further that there are entries recorded in meters and asserted that this unit of measurement is “likely inaccurate” because measuring in meters is not typical for wood flooring. AMMWF Comments on CBP Data at 3. AMMWF argued further that as “there is no uniform way to convert meters,

square meters, and cubic meters into a single, comparable unit of measurement, it is not possible to identify, let alone compare, the entry volumes of specific companies listed in the [Customs] data.” *Id.*

Commerce acknowledged that the Customs data are reported in cubic meters and square meters. Commerce explained that:

To ensure a uniform unit of measure, we converted the [Customs] data reported in [square meters] to [cubic meters] by relying on a conversion methodology used in previous administrative reviews of wood flooring. Specifically, we multiplied the values reported in [square meters] by 0.015 mm, which is the midpoint of the range of the average thickness of wood flooring (between 0.012 mm and 0.018 mm), to calculate [cubic meters].

Respondent Selection Mem. at 5 (internal footnote omitted) (citation omitted); *see also* IDM at 15 (Commerce explained that “[t]o address this longstanding issue” of certain entries being reported in square meters and other entries in cubic meters, Commerce used the same conversion methodology that it used in previous administrative reviews of wood flooring.)

Commerce’s explanation for its conversion of square meters to cubic meters is reasonable because Commerce explained that its actions were consistent with its past practice of “relying on a conversion methodology that has been used in previous administrative reviews of wood flooring since the first administrative review.”¹⁰ IDM at 15 (citing Mem. From J. Saenz through K. Marksberry to I. Darzenta Tzafolias re: Countervailing Duty Administrative Review: Multilayered Wood Flooring From the People’s Republic of China: Respondent Selection: 2015 (“2015 Respondent Selection Mem.”) (Apr. 3, 2017), bar code 3559952–01)¹¹; *see* IDM at 15 n.38; *Association of American School Paper Suppliers v. United States*, 35 CIT 1046, 1054, 791 F. Supp. 2d 1292, 1301 (“A court may measure Commerce’s reasonableness by determining whether Commerce’s actions are consistent with a past practice or stated policy.”).

Commerce did not, however, address the comments made by interested parties noting the entry in the Customs data recorded in me-

¹⁰ In its 2015 administrative review, Commerce explained: “To convert square meters to cubic meters, we relied on a conversion methodology suggested by the petitioner in the 2011 administrative review, and which we have used in the three previous reviews.” Mem. From J. Saenz through K. Marksberry to I. Darzenta Tzafolias re: Countervailing Duty Administrative Review: Multilayered Wood Flooring From the People’s Republic of China: Respondent Selection: 2015 (Apr. 3, 2017) at 2, bar code 3559952–01.

¹¹ The court notes that Commerce cited the 2015 Respondent Selection Memorandum with the date of April 7, 2017. *See* Respondent Selection Mem. at 5 n.12. The date of the document is April 3, 2017.

ters. Line entry 6254 in the Customs data is recorded in meters. *See* Commerce Mem. to Interested Parties, Attachment; Respondent Selection Mem.; IDM at 14–16. Commerce failed to provide any explanation for this entry, despite the fact that during the respondent selection process AMMWF alerted Commerce of the apparent error in the Customs data by explaining that meters is not a “standard” unit of measurement for wood flooring. AMMWF Comments on CBP Data at 3.

Accordingly, the court concludes that Commerce addressed adequately the comments made by interested parties concerning the different entries recorded in square meters and cubic meters; however, Commerce failed to address the entry recorded in meters, and, therefore, Commerce did not account for a cited abnormality in the Customs data.

II. Names

Hengtong argues that the method by which Commerce sorted the Customs data by company name means that “no single total figure reflects a company’s total entries because slight variations in a company name, such as with or without commas and periods in writing “co., ltd.” and name abbreviations are not taken into consideration in the total import volume”. Hengtong Comments on CBP Data at 2. Commerce responded to Hengtong’s argument, explaining: “With respect to the parties’ arguments regarding the minor name variations in the [Customs] data, we found that combining the minor name variations did not alter the rank of the top ten exporters/producers that account for the largest volume of entries into the United States during the POR.” Respondent Selection Mem. at 5.

In their comments on the Customs data, the interested parties failed to state with any particularity how the variations in the company names compromised the reliability of the Customs data, and, therefore, the court concludes that Commerce’s explanation is reasonable.

III. Entries with no unit of measurement and volume of zero

In its comments, AMMWF noted that there were many entries in the Customs data that had “no unit of measurement and a volume of ‘0’”. AMMWF Comments on CBP Data at 4. Commerce in its IDM explained: “Our analysis indicates that less than 0.05 percent of the entries in the [Customs] data lacked quantity and/or unit of measure.” IDM at 15.

Again, interested parties in their comments to Commerce and the moving parties in their briefs failed to articulate how entries that lack a unit of measurement or have a volume of “0” affect the overall reliability of the Customs data.

IV. Large entries of subject merchandise

In each of their submissions, Senmao, Hengtong and AMMWF alerted Commerce that the Customs data contained large entries that were not realistic and suggested inaccurate reporting. Specifically, Senmao noted that “very large entries from four companies”,¹² including [[]], “range from [[]], “range from [[]] and are all far larger than any entry from any other Chinese company on a per-entry basis, and simply are not credible.” Senmao Comments on CBP Data; *see also* AMMWF Comments on CBP Data at 3–4.¹³ Moreover, Senmao and Hengtong noted that the average 40-foot container holds a capacity of 67.7 cubic meters of goods. Senmao Comments on CBP Data; Hengtong Comments on CBP Data at 3. Senmao noted that Senmao has been selected as one of two largest exporters in previous administrative reviews. Senmao Comments on CBP Data. Senmao stated further that [[]]

[[]]. This cannot be correct. Moreover . . . the number of containers it would take to transport all of this merchandise is not realistic, particularly in a single entry.” *Id.* As such, the interested parties argued that the unrealistic data could be explained only by “misplaced decimals or reporting [of] the incorrect unit of measure”, *id.*— *i.e.*, some entries were recorded in cubic meters but should have been reported in square meters or kilograms. *See* Hengtong Comments on CBP Data at 3; AMMWF Comments on CBP Data at 3.

In response to interested parties’ arguments, Commerce stated: “Although certain interested parties argue that the [Customs] data are unreliable, we find that no party has provided evidence to support this claim. Specifically, there is no record evidence that the [Customs]

¹² In its comments, Senmao points to four companies in the Customs data, including [[]]. Senmao Comments on CBP Data.

¹³ In its comments on the Customs data, AMMWF stated:

[[]] is reported as having entered shipments of [[]] and [[]] cubic meters of flooring; and, [[]] is reported as having entered shipments of [[]] cubic meters of flooring. Critically, these shipments—and they are not the only ones—have [[]]. Such a severe difference suggests that these entries have not been accurately reported.

AMMWF Comments on CBP Data at 3–4 (internal footnotes omitted).

data contain unusual entry quantities such that the entire [Customs] dataset is called into question.” Respondent Selection Mem. at 5. Moreover, in its IDM, Commerce acknowledged the argument made by interested parties that the Customs data “demonstrate that entries made by certain companies far exceed a reasonable quantity for a single entry.” IDM at 15. Nevertheless, Commerce maintained that “no evidence (*e.g.*, Q&V data, Infodrive data, *etc.*) was placed on the record at the time of respondent selection which contradicted the [Customs] data or otherwise demonstrated that the [Customs] dataset was unreliable in its entirety.” *Id.*

Commerce did not address directly the arguments made by interested parties or the evidence provided in their comments that pointed to unrealistic shipment entries that contradicted and, thereby, undermined the reliability of the Customs data. In their comments on the Customs data, Senmao and Hengtong included an exhibit providing information about shipping containers that noted the maximum capacity of 67.7 cubic meters for 40-foot containers. *See* Senmao Comments on CBP Data, Ex. 1; Hengtong Comments on CBP Data (Mar. 21, 2019) at Attachment 1, bar code 3808325–01. As noted by the moving parties during the oral argument, Commerce “know[s] . . . [or] should know . . . what typical shipment volumes are. . . . [C]ommon sense alone says that [[]] . . . is simply . . . not only out of the norm, but it’s totally unreasonable to think that’s true.” Confidential Oral Arg. Tr. at 22:21–23:2, ECF No. 78. Moreover, during the respondent selection process, Hengtong provided Q&V data that directly contradicted Customs data. In its comments on the Customs data, Hengtong stated that the Customs data contained [[]] and a “quantity of [[]] [cubic meters] for each for a total of [[]] [cubic meters].” Hengtong Comments on CBP Data at 3. In contrast, the actual quantity and value of the subject merchandise that Hengtong submitted to Commerce was [[]] square meters and [[]] cubic meters. *Id.*

Commerce accepted the Q&V data submitted by Hengtong and explained that the agency “substituted those amounts for the [Customs] data for Hengtong in our ranking.” Respondent Selection Mem. at 5. Nonetheless, Commerce continued to find that “there is *no compelling evidence* on the record of this administrative review that the *remaining entries* in the [Customs] data are incorrect and ought not, therefore, to be used to select respondents.” *Id.* at 5–6 (emphasis supplied). Commerce stated further that there is no information on the record that the Customs data “contain unusual entry quantities.” *Id.* at 5.

Commerce’s explanation disregards the stark contrast between the entries presented in the Q&V data provided by Hengtong and the Customs data and disregards as well Commerce’s own experience in previous administrative reviews under the 2011 CVD Order.¹⁴ See Senmao Comments on CBP Data. Indeed, in previous administrative reviews under the 2011 CVD Order, Commerce requested Q&V data from certain interested parties based on comments on the Customs data “concerning the reliability of the . . . data.” Mem. From J. Saenz through K. Marksberry to I. Darzenta Tzafolias re: Countervailing Duty Administrative Review: Multilayered Wood Flooring From the People’s Republic of China: Respondent Selection: 2016 (June 4, 2018) (“2016 Respondent Selection Mem.”) at 2, bar code 3714517–01; see 2015 Respondent Selection Mem.; 2014 Respondent Selection Mem.; see also Mem. From D. McClure to The File, Countervailing Duty Administrative Review of Multilayered Wood Flooring From the People’s Republic of China; 2015 re: Phone Call Regarding Submission of Quantity and Value Data by Dalian Penghong Floor Products Co., Ltd. (Mar. 9, 2017), bar code 3549920–01. Moreover, Senmao in its comments reminded Commerce that in the two most recent administrative reviews, Commerce selected Senmao as one of the two largest exporters. Senmao Comments on CBP Data; see 2016 Respondent Selection Mem.; 2015 Respondent Selection Mem. With this fact in mind, Senmao explained that the Customs data provide that a single entry by [[

]] is “larger than the total volume imported from [[]] during the entire POR, which amounted to [[]] cubic meters.” Senmao Comments on CBP Data.

In *Pakfood*, the court upheld Commerce’s decision to rely on Customs data for respondent selection, noting that on remand Commerce explained that the agency would use Q&V questionnaires in circumstances in which the Customs data are “unreliable, inconsistent, or fail[] to provide ‘adequate relevant information for determining the relative volume of imports.’” *Pakfood*, 35 CIT at 71, 753 F. Supp. 2d at 1343–44. Commerce’s explanation fails to account for the standard set for Q&V questionnaires in *Pakfood* and fails to address Commerce’s actions in previous administrative reviews of requesting Q&V data from a select number of interested parties to supplement Customs data where interested parties have raised concerns about the

¹⁴ The cited concerns regarding the reliability of Customs data in previous reviews also “detracts from the weight” of the Customs data in this review. *Ad Hoc Shrimp I*, 35 CIT at 1115–16, 791 F. Supp. 2d at 1332–33 (“The fact that, in the immediately preceding review, Commerce discovered significant inaccuracies, undetected by Customs, in the [Customs] entry volume data for subject merchandise from the very same respondents as those covered in this review casts sufficient doubt on the presumption that Customs has assured the accuracy of such data for this POR.”) (internal footnote omitted).

reliability of the data. *See* Respondent Selection Mem. at 4–5; IDM at 14–16.

The parties' comments on the Customs data and the evidence on the record at the time of respondent selection, including the Q&V data submitted by Hengtong and the exhibits submitted by Senmao and Hengtong concerning container capacity, indicated that there were inconsistencies in the Customs data. Commerce failed to consider evidence that challenged the reliability of the Customs data and failed to seek such information by issuing Q&V questionnaires or requesting such data from Jiangsu Guyu. Accordingly, Commerce's selection of Jiangsu Guyu and Baroque Timber as mandatory respondents is not supported by substantial evidence and the court remands the respondent selection determination to Commerce for reconsideration.

2. Commerce's margin for non-selected companies

The moving parties argue that the margin that Commerce used for non-examined companies was based on an average of margins assigned to Baroque Timber and Jiangsu Guyu, and, therefore, the CVD rate for non-selected companies is unsupported by substantial evidence and not in accordance with law. *See* Pls. Br. at 14–16; Fine Furniture Br. at 14–15; *see also* Pl.-Intervenors Reply Br. at 6. Defendant maintains that the selection of mandatory respondents is supported by substantial evidence, and, therefore, the resulting margin assigned to non-selected companies is lawful. Def. Br. at 14–15.

The Court has held that 19 U.S.C. § 1677f-1 grants Commerce the authority to calculate the rate for non-examined companies based on the individual margins of the largest exporters because under § 1677f-1(c)(2)(B) “the examined respondents are treated as representative of other respondents by virtue of being the largest exporters.” *Qingdao Qihang Tyre Co., Ltd. v. United States*, 42 CIT __, __, 308 F. Supp. 3d 1329, 1362. The court in *Qingdao* examined the calculation of the rate for non-selected companies in an antidumping case; however, the same principle applies in the countervailing duty context.¹⁵ Accordingly, where there is a question of whether the selected respondents were the largest exporters during the POR, the respondents can neither be treated as representative nor can they be relied upon by Commerce to calculate the rate for non-examined companies. As Commerce's selection of mandatory respondents is not supported by substantial evidence, the calculation of the rate for non-selected companies using the individual margins assigned to Jiangsu Guyu and

¹⁵ *See supra* note 8 for an explanation of the similarity in the applicable language under 19 U.S.C. § 1677f-1 for countervailing duty proceedings and antidumping proceedings.

Baroque Timber was not reasonable, and, therefore, the court remands to Commerce for reconsideration the calculation of the rate for non-selected companies.

II. Remaining issues challenging the Final Determination

The court has determined that Commerce’s selection of mandatory respondents is unsupported by substantial evidence. Accordingly, the court will reserve the examination of the remaining issues raised by the moving parties and related arguments challenging the Final Determination until Commerce reconsiders, consistent with this decision, Commerce’s respondent selection on remand.

CONCLUSION

NBC’s sitcom *Parks and Recreation* ran for seven seasons following the everyday adventures of a group of local government employees working in the Parks and Recreation Department of Pawnee, a fictional town in Indiana. In one episode, Leslie Knope (portrayed by Amy Poehler) is working to open the smallest park in Indiana with her co-worker, friend and later husband, Ben Wyatt (portrayed by Adam Scott). Ben informs Leslie that this project will be the last one they work on together. Leslie, wanting to spend more time with Ben, attempts to delay the opening of the park. Ben sees through Leslie’s actions and claims that she “steamrolls” her colleagues. Upset by the circumstances, Leslie decides to seek counsel from her best friend, Ann Perkins (portrayed by Rashida Jones).

Leslie: “Whose fault is this? I demand to know!”

Ann: “Actually”

Leslie: “Ben thinks that I’m a steamroller. That’s unbelievable. How dare he think that I’m a steamroller.”

(Ann attempts to interject, and Leslie speaks over her.)

Leslie: “I know. He’s going through a phase right now and eventually we’re going to be friends again.”

Ann: “No, what I was going to say is that you really are —”

Leslie: (Interrupting again) “Working too hard. I know. Ann, you keep starting all of these sentences and not finish —”

Ann: “You’re a steamroller! You are a massive, enormous runaway steamroller with no brakes and a cement brick on the gas pedal. You

made me watch all eight *Harry Potter* movies. I don't even like *Harry Potter* !”

Leslie: “That’s insane! You love *Harry Potter*! You’ve seen all eight movies!”¹⁶

* * *

In conclusion, the court remands the Final Determination to Commerce to reconsider its selection of mandatory respondents for individual examination and address the comments made by interested parties concerning the reliability of the Customs data for respondent selection. In ordering this remand, the court notes for Commerce the key importance of deciding correctly foundational aspects in any investigation or review. Those foundational aspects include respondent selection. Commerce should be mindful that as it conducts an investigation or review, it is building an edifice and needs to take particular care to ensure that the foundations are strong. When, as in this case, they are not, it can result in a substantial use of resources — by the parties as well as the Court. Further, time is lost in ensuring a timely and definitive resolution of the matters for all parties concerned. Upon receiving the remand results, the court will address the remaining arguments — to the extent that they remain relevant — presented by the moving parties challenging the Final Determination.

Based on the foregoing reasons, it is hereby

ORDERED that the Final Determination is remanded to Commerce for reconsideration to make a finding consistent with this opinion to address interested parties’ comments on the use of Customs data for respondent selection; it is further

ORDERED that the court reserves decision on the remaining issues presented by the moving parties challenging the Final Determination until the results of the remand are before the court; it is further

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

ORDERED that, within 14 days of the date of filing of Commerce’s remand redetermination, Commerce must file an index and copies of any new administrative record documents; it is further

ORDERED that, if applicable, the parties shall file a proposed scheduling order with page limits for comments on the remand results no later than seven days after Commerce files its remand redetermination with the court.

¹⁶ *Parks and Recreation: Smallest Park* (NBC television broadcast Nov. 17, 2011).

Dated: August 11, 2022
New York, New York

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

Slip Op. 22–99

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-00133

[Sustaining Commerce’s remand redetermination results].

Dated: August 25, 2022

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

Claudia Burke and *In K. Cho*, Trial Attorneys, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC, for Defendant United States. With them on the brief were *Brian M. Boynton*, Principal Deputy Assistant Attorney General, *Jeanne E. Davidson*, Director, Commercial Litigation Branch, *Franklin E. White, Jr.*, Assistant Director, Commercial Litigation Branch, and *Jon Zachary Forbes*, Office of Chief Counsel for Trade Enforcement and Compliance, U.S. Department of Commerce.

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

OPINION**Vaden, Judge:**

Before the Court is the U.S. Department of Commerce’s (Commerce) remand redetermination in the scope inquiry examining the 1986 antidumping duty order (Thailand Order). The Thailand Order concerns circular welded carbon steel pipes and tubes (CWP) imported from Thailand (Case No. A-549502), filed pursuant to the Court’s remand order in *Saha Thai Steel Pipe Pub. Co., Ltd. v. United States*, 547 F. Supp. 3d 1278 (CIT 2021) (*Saha Thai I*). See Final Results of Redetermination Pursuant to Ct. Remand, Oct. 16, 2021, ECF No. 58 (Remand Results). For the following reasons, the Court sustains Commerce’s remand redetermination.

BACKGROUND

The Court presumes familiarity with the facts of this case as set out in its previous opinion ordering a remand of this scope inquiry to Commerce and now recounts those facts relevant to the review of the Remand Results.

The order underlying the scope inquiry in this case traces its roots to 1985, when the domestic industry filed a petition requesting that Commerce examine the injury caused by steel pipe imports from Thailand. J.A. at 1,090, ECF No. 42. In the initial investigation leading to those final determinations, petitioners requested the im-

position of antidumping duties on standard and line pipes but later submitted a letter withdrawing their petition “insofar as [it] concern[ed] line pipe, TSUS numbers 610.3208 and 3209.” *Saha Thai I*, 547 F. Supp. 3d at 1282; *Letter Dated March 14, 1985, from Petitioner Regarding Partial Withdrawal of Petition*, J.A. at 1,781, ECF No. 42. The original petitioners, which included Wheatland Tube, acknowledged that no line pipe — mono or dual-stenciled — was being produced in Thailand at the time. J.A. at 1,781; *see also* Tr. of Oral Argument (First Tr.) 6:2–7:3 (July 15, 2021), ECF No. 53. Thus, the petitioners had no information to submit in response to Commerce’s questions regarding Thai line pipe’s potential to harm domestic manufacturing. *See* AD & CVD Investigations of Pipes and Tubes from Thailand & Venezuela, J.A. at 1,753 (requesting that petitioners provide “[d]ocumentation which demonstrates that line pipe is manufactured in Thailand” and “[d]ocumentation which supports the allegation that line pipe from Thailand is being sold at less than fair value.”).

In January 1986, Commerce issued a final determination that standard pipe from Thailand was being, or was likely to be, sold in the United States at less than fair value. *Antidumping: Circular Welded Carbon Steel Pipes and Tubes from Thailand; Final Determination of Sales at Less Than Fair Value*, 51 Fed. Reg. 3,384 (Jan. 27, 1986), J.A. at 1,216. The International Trade Commission (ITC) released its final material injury determination and report the next month. *See Certain Welded Carbon Steel Pipes and Tubes from Turkey and Thailand*, Inv. Nos. 701-TA253 and 731-TA-252, USITC Pub. 1810 (Feb. 1986) (ITC Final Determination), J.A. at 1,221. In its report, the ITC distinguished the injury caused by standard pipe from Thailand from the injury caused by standard and line pipe from Turkey, making no material injury determination for line pipe, dual-stenciled or otherwise, from Thailand. *Id.*

The contents and scope described by these final determinations are discussed at length in *Saha Thai I*. In this subsequent adjudication, it suffices to say that dual-stenciled line pipe was never explicitly included in the scope language of either the antidumping determination or material injury determination. *Saha Thai I*, 547 F. Supp. 3d at 1282–84. After Defendant-Intervenor Wheatland Tube and other petitioners requested a determination of whether Saha Thai’s sales of dual-stenciled pipe constituted a “minor alteration” of the original product, Commerce instead self-initiated a scope inquiry. *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, J.A. at 1,800; see 19 U.S.C. § 1677j(c) (providing that merchandise “altered in form or appearance in minor respects” should still be considered within the scope of the relevant antidumping order). It ultimately issued a Final Scope Ruling finding that dual-stenciled line pipe is within the scope of the Thailand Order on June 30, 2020. See Final Scope Ruling, J.A. at 2,041. On July 17, 2020, Saha Thai sued Commerce, challenging the scope decision. ECF No. 6.

The Court issued a decision in *Saha Thai I* on October 6, 2021. *Saha Thai I*, 547 F. Supp. 3d 1278. In that opinion, the Court found that “Commerce’s determination that dual-stenciled pipe is covered by the Thailand Order [wa]s not supported by substantial evidence . . . [and] that Commerce’s Final Scope Ruling constitute[d] an unlawful expansion of the scope of the underlying order.” *Id.* The Court’s decision was based on the undisputed facts that (1) Wheatland Tube explicitly withdrew line pipe from Commerce’s consideration because Thailand did not manufacture line or dual-stenciled pipe in 1985–86 when the Thailand Order was finalized and (2) the ITC made no material injury determination for line pipe from Thailand. *Id.* at 1299. As a result, the Court remanded the Final Scope Ruling back to Commerce, instructing Commerce to render a redetermination consistent with the Court’s opinion. *Id.* at 1281.

Commerce has now undertaken a redetermination following the instructions provided by the Court and brought forward a renewed statement of its position. To assist the parties, the Court will briefly summarize both the process undertaken by Commerce and the arguments it has articulated. Commerce filed its Remand Results on January 4, 2022. ECF No. 58. Commerce reconsidered record sources “in light of the reasoning, analysis, and conclusions of the Court,” and determined, under respectful protest,¹ that “dual-stenciled standard pipe and line pipe are **not** covered by the scope of the *Thailand Order*.” Remand Results at 1–2, ECF No. 58 (emphasis added). In the original Remand Results, Commerce raised four concerns with the decision it felt it must return based on the Court’s opinion. *Id.* at 13–20. First, Commerce takes issue with the Court’s reliance on what Commerce asserts are “[e]xtra-[r]ecord [s]ources.” *Id.* at 14–15. The disputed sources are the *ITC First Sunset Final Report (First Sunset Review)*; the *ITC Second Sunset Final Report (Second Sunset Review)*; and an executive order, *Presidential Proclamation 7274*, discussed in those reports. *Id.* at 14–15. Second, Commerce claims that the Court misunderstood Commerce’s interpretation of 19 C.F.R. § 351.225(k)(1)

¹ See *Viraj Group, Ltd. v. United States*, 343 F.3d 1371, 1376–77 (Fed. Cir. 2003) (holding that, when Commerce takes a position “under protest,” it preserves its right to appeal).

and the extent to which Commerce “may (and frequently does)” find the text and materials of other petitions or orders informative in its scope analysis, as long as those materials are placed on the record. *Id.* at 16. Third, Commerce believes that the Court is mistaken about the ITC’s findings. *Id.* at 16. It adduces this conclusion by noting, once again, that the Commission did make an injury determination for standard pipe, that dual-stenciled pipe is certified as standard pipe, and that Commerce understands Federal Circuit precedent to impose no requirement that the ITC analyze a particular product for that product to be covered by the scope of the order. *Id.* at 16–18. Fourth and finally, Commerce argues that the Court failed to give proper weight to some of the limiting context surrounding statements in the *ITC Third Sunset Final Report (Third Sunset Review)* and *ITC Fourth Sunset Final Report (Fourth Sunset Review)*. *Id.* at 18–20. Commerce later amended the Remand Results to exclude the “extraneous legal argument[s]” detailing those four concerns but left the scope decision in the Remand Results unchanged. Amended Remand Results, ECF No. 69.

The parties disagree stridently regarding Commerce’s Remand Results. On February 3, 2022, Saha Thai filed comments encouraging the Court to sustain the new outcome. Pl.’s Comments in Support of Remand Redetermination Results, ECF No. 61. On February 18, 2022, the Government invited the Court to sustain the Remand Results because the Results complied with the Court’s remand order, fulfilling Commerce’s legal obligations in every respect. Def.’s Resp. to Comments on Remand Redetermination, ECF No. 63. Wheatland Tube, however, objected to the logic and outcome of the Remand Results. *See* Def.-Int.’s Comments on Remand Redetermination (Def.-Int.’s Comments), ECF No. 62. It cited four reasons that largely mirror the concerns expressed by Commerce: (1) the Remand Results are not supported by evidence on the record, instead impermissibly relying on information outside the record; (2) the Remand Results ignore relevant information on the record; (3) the Remand Results are based on a misunderstanding of the ITC’s final determination in the original investigation; and (4) the Remand Results fail to properly account for all of the ITC’s statements in the *Third* and *Fourth Sunset Reviews*. *See id.* For those reasons, Wheatland Tube again asks this Court to remand the scope inquiry for Commerce to reconsider its determination and find that dual-stenciled pipe is covered by the scope of the order. *Id.* at 9.

The Court held oral argument on May 17, 2022. ECF No. 72. At oral argument, both Commerce and Wheatland Tube insisted that, regardless of whether a party failed to object to the mention of extra-record evidence before the Court, Commerce and the Court would still

be barred from considering such evidence. *See* Transcript of Second Oral Argument (Second Tr.) 48:22–24, 49:20–21, ECF No. 73 (Commerce counsel stating that “just because you talk about something in a proceeding doesn’t mean that . . . the actual document is on the record.” Commerce counsel elaborated, “I don’t’ [*sic*] think [Wheatland Tube] can waive the question of what’s on the record.”); Second Tr. 43:15–16 (counsel for Wheatland Tube arguing that “just because we failed at that time to object does not expand the universe of the record”). Ultimately, Commerce asserted that the discussion of what was or was not before the Court on the record initially was largely academic, as the issue was “overtaken by events” and Commerce’s subsequent Remand Results. Second Tr. 74:18.

JURISDICTION AND STANDARD OF REVIEW

As in *Saha Thai I*, 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 will sustain Commerce’s remand redetermination unless it is “unsupported by substantial evidence on the record, or otherwise not in accordance with law.” 19 U.S.C. § 1516a(b)(1)(B)(i). “[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 Am. Keg v. United States*, No. 20–00008, 2021 WL 1206153, at *6 (CIT Mar. 23, 2021). Additionally, “[t]he results of a redetermination pursuant to court remand are also reviewed ‘for compliance with the court’s remand order.’” *Xinjiamei Furniture (Zhangzhou) Co. v. United States*, 968 F. Supp. 2d 1255, 1259 (CIT 2014) (quoting *Nakornthai Mill Pub. Co. v. United States*, 587 F. Supp. 2d 1303, 1306 (CIT 2008)).

DISCUSSION

I. Summary

The facts support Commerce’s Remand Results. No line pipe was manufactured in Thailand when Commerce undertook its initial investigation almost forty years ago, and the ITC’s report made no harm finding for line or dual-stenciled pipe from Thailand. Moreover, petitioners explicitly withdrew their petition as it pertained to line pipe and have admitted that their withdrawal letter specifically covered the categories under which *all* dual-stenciled line pipe would have been imported. First Tr. 7:8–22. These facts lead to the conclusion that the scope of the Thailand Order cannot now be read to include dual-stenciled line pipe. Despite these facts, Commerce (in its

respectful protest) and Wheatland Tube argue that the procedural record in other cases involving other countries overcomes the procedural record in this case; they object that Commerce's new results both rely on evidence outside the record and ignore evidence on the record. Remand Results at 14–16, ECF No. 58; Def.-Int.'s Comments at 2, 4, ECF No. 62. The record does not support these contentions, and the objections to Commerce's and the Court's evaluation of sources are unavailing.

The following facts are not in dispute. First, the scope inquiry at issue began as a circumvention ruling request in which Wheatland Tube alleged that Saha Thai "was circumventing the Thailand Order through minor alterations to Saha's merchandise." *Saha Thai I*, 547 F. Supp. 3d at 1287; *Circumvention Ruling Request*, J.A. at 1,807. Second, instead of undertaking the circumvention process, Commerce self-initiated a scope inquiry. *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 1,800. Third, in that scope ruling, Commerce found that the scope of the Thailand Order included a product that was explicitly withdrawn from consideration in 1985 without citing to any change in the record of the Thailand Order but by instead citing to orders governing the same product in other countries. *See generally 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* (June 30, 2020), J.A. at 2,041.

The record simply does not support Commerce's original scope results. "[W]hile Commerce has 'substantial freedom to interpret and clarify its antidumping [and countervailing duty] orders,' it may not do so in a way that changes them." *Sunprime Inc. v. United States*, 946 F.3d 1300, 1309 (Fed. Cir. 2020) (internal citations omitted) (alteration in original). However, the record does support Commerce's new results. The concerns raised by Commerce and Wheatland Tube are ultimately unpersuasive. Commerce's new results are sustained.

II. Forfeiture

Wheatland Tube objects to three documents the Court and Commerce consulted in the Remand Order and Remand Results: the *First Sunset Review*, the *Second Sunset Review*, and *Presidential Proclamation 7274*. Def.-Int.'s Comments at 2–4, ECF No. 62. Wheatland Tube's objections, however, are forfeited. Saha Thai referenced the documents in question in both its briefing before the agency and the Court, yet Wheatland Tube and Commerce failed to object during any

stage of the prior proceedings. They have therefore forfeited their ability to contest Saha Thai's citation to those documents.

Like the Supreme Court and the Federal Circuit, this Court distinguishes waiver and forfeiture. Forfeiture is “the failure to make the timely assertion of a right,” whereas waiver is the “intentional relinquishment or abandonment of a known right.” *United States v. Olano*, 507 U.S. 725, 733 (1993) (quoting *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938)); *In re Google Tech. Holdings*, 980 F.3d 858, 862 (Fed. Cir. 2020). When a case is appealed from a previous proceeding, each party has a responsibility to assert all its relevant arguments; if the case returns to an appellate court after remand, any issues not raised previously are foreclosed, as demonstrated in *Vivint v. Alarm.com Inc.*, 856 F. App'x 300 (Fed. Cir. 2021). In *Vivint*, a home security company appealed initial unpatentability determinations from the Patent Board. *Id.* at 302. The Federal Circuit remanded the determination on various grounds; and the Board rendered a new decision, which Vivint likewise appealed. *Id.* Six weeks after Vivint filed its second appeal, the Federal Circuit issued a decision in another case, finding that the appointment of certain Administrative Patent Judges was unconstitutional. *Id.* at 302–03. Vivint then moved to vacate the Board's remand decision, arguing that the judges who decided the remand results had been unconstitutionally appointed. *Id.* However, the Federal Circuit “found that Vivint had forfeited its constitutional argument by failing to raise an Appointments Clause challenge in its first appeal.” *Id.* at 303. The court explained that “it was Vivint's obligation to raise its Appointments Clause challenge before the first court who could have provided it relief” and that “[o]nce its first appeal was decided, all matters which could have been raised then—but were not—were foreclosed. The remand after that first appeal was on one very narrow ground, and that ground is all that remains to be litigated in this subsequent appeal.” *Id.* at 304; *accord Custome-media Techs., LLC v. Dish Network Corp.*, 941 F.3d 1174 (Fed. Cir. 2019); *NEXTEEL Co., Ltd. v. United States*, 461 F. Supp. 3d 1336, 1343–46 (CIT 2020) (holding arguments that could have been raised during proceedings in front of Commerce, but were not, waived and refusing to consider them on appeal); *see also United States v. Great Am. Ins. Co.*, 738 F.3d 1320, 1328, 1336 (Fed. Cir. 2013) (affirming a CIT decision that denied a party's post-judgment attempt to add an argument not raised in initial briefing because the argument was forfeited). Failing to raise an argument in a previous proceeding thus forfeits the argument after the matter has been remanded and is back on appeal.

This is precisely what occurred here. In Saha Thai’s opening Motion for Judgment on the Agency Record, it repeatedly refers to “the ITC’s four sunset reviews” collectively. Pl.’s Mot. for J. on the Agency R. at 36, ECF No. 26 (Pl.’s Mot.); *id.* at 2 (“the ITC has repeatedly confirmed in sunset reviews”); *id.* at 39 (“the ITC’s determination in the underlying investigation, and the following sunset reviews”). It was not a new argument. Saha Thai had done the same in its briefing before Commerce. *See, e.g.*, Saha Thai Steel’s Comments on Scope Inquiry, J.A. at 1,930 (discussing the “determinations in the original investigation in 1985 and in *all subsequent sunset reviews*”) (emphasis added); Saha Thai Steel’s Scope Inquiry Case Brief, J.A. at 1,992–93 (stating in a bolded section heading that “ITC Sunset Reviews of The Very CWP from Thailand AD Order Confirm That All Line Pipe – Including Dual-Stencil Pipe – Is Excluded From The Scope Without Qualification”; stating separately in text that “[t]he ITC’s explanation in the most recent sunset review (i.e., the fourth review) is unsurprising as it is *consistent with the previous sunset reviews.*”) (emphasis added); Wheatland Tube’s Rebuttal Brief, J.A. at 2,015 (referring to the first sunset review as “the 2000 sunset review” and citing to sections of Saha Thai’s briefing before the agency that refer to all four sunset reviews). Neither the Government nor Wheatland Tube objected to Saha Thai’s references to and reliance on all four sunset reviews. *See* Def.’s Resp. to Pl.’s Mot., ECF No. 37 (Def.’s Resp.); Def.-Int.’s Resp. in Opposition to Pl.’s Mot., ECF No. 34 (Wheatland Tube Resp.). Instead, they engaged with the argument on the merits and argued that the sunset reviews supported their position. Wheatland Tube Resp. at 16, ECF No. 34 (“The records of the initial investigation and five-year sunset reviews before the Commission further support Commerce’s conclusion that standard pipe which is dual-stenciled as line pipe is included within the scope of the order.”); Def.’s Resp. at 20–23, ECF No. 37 (discussing in detail Saha Thai’s arguments regarding the sunset reviews and advancing opposing arguments, but not objecting to Saha Thai’s references to all the sunset reviews collectively). Neither the Government nor Wheatland Tube made any distinction about the applicability of the first and

second reviews as opposed to the third and fourth.² See Def.'s Resp., ECF No. 37 (silent on the issue); Wheatland Tube Resp., ECF No. 34 (same).

Saha Thai's arguments were fully briefed and debated before the Court, including with oral argument,³ when the Court issued its remand opinion in *Saha Thai I*. 547 F. Supp. 3d 1278 (CIT 2021). Like Vivint, Wheatland Tube had an opportunity during the Court's initial review to raise the argument it now propounds — that the *First* and *Second Sunset Reviews* are not on the record. Despite Saha Thai's referring repeatedly to all “four sunset reviews,” Wheatland Tube made no such objection. See Wheatland Tube Resp., ECF No. 34. As with Vivint, “[o]nce its first appeal was decided, all matters which could have been raised then—but were not—[a]re foreclosed.” 856 F. App'x at 304. The case is now before the CIT after a remand decision, and Wheatland Tube's challenge to the record is forfeited because of its failure to raise the challenge during the Court's first consideration of this case.

III. Record Evidence

Even if Commerce and Wheatland Tube did not forfeit these objections, the first two *Sunset Reviews* and *Presidential Proclamation 7274* were fairly construed as part of the administrative record.

To dispense with *Presidential Proclamation 7274* : The Court must take judicial notice of it, and its inclusion in the record is therefore proper. 44 U.S.C. § 1507 (“The contents of the Federal Register shall be judicially noticed.”) (emphasis added); *To Facilitate Positive Adjustment to Competition from Imports of Certain Circular Welded Carbon Quality Line Pipe*, 65 Fed. Reg. 9,193 (Feb. 23, 2000) (*Presi-*

² Furthermore, Saha Thai specifically cites to a prehearing brief filed by Wheatland Tube in the *First Sunset Review* proceedings, yet another connection with and reference to the *First Sunset Review*. Pl.'s Mot. at 18–19, ECF No. 26 (“Petitioner Wheatland Tube itself in a subsequent sunset review of the AD order . . .”). All agree that the brief is part of the record, but Saha Thai's references to it also indicate the importance of the *First Sunset Review*. When responding to Saha Thai's characterization of Wheatland Tube's brief in the *First Sunset Review*, neither Wheatland Tube nor Commerce objected. Wheatland Tube Resp. at 19–20, ECF No. 34; Def.'s Resp. at 23, ECF No. 37. Instead, both Commerce and Wheatland Tube simply respond to Saha Thai's arguments and advance opposing points. *Id.*

³ At the first oral argument, the Court repeatedly discussed language from the *First Sunset Review*, *Second Sunset Review*, and *Presidential Proclamation 7274*. Neither Wheatland Tube nor Commerce objected to those materials as constituting extra-record evidence. See First Tr. 34:2–4 (mentioning that “in that first sunset review . . . the International Trade Commission discussed the different products” and then going on to cite specific page numbers in the *First Sunset Review*); *id.* at 34:22–23 (“Fast-forward to the second review, which took place and was issued in July of 2006”); *id.* at 34:17– 18 (“President Clinton's proclamation”).

dential Proclamation 7274); see also *Borlem S.A.-Empredimentos Industriais v. United States*, 913 F.2d 933, 940 (Fed. Cir. 1990) (“The short answer . . . is that [the document] is on the record, having been published in the Federal Register.”); *Mobility Workx, LLC v. Unified Patents, LLC*, 15 F.4th 1146, 1151 (Fed. Cir. 2021) (citing various authorities for the proposition that judicial notice of “government documents . . . ‘whose accuracy cannot reasonably be questioned’” is appropriate and granting a motion to take judicial notice of documents not on the agency record and consider constitutional challenges raised relating to them). *Presidential Proclamation 7274* is also cited and discussed in the *First* and *Second Sunset Reviews*. *First Sunset Review* at 30 n.186; *Second Sunset Review* at Overview-5 n.16. Although the first two *Sunset Reviews* are not published in the Federal Register, they are “government documents . . . ‘whose accuracy cannot reasonably be questioned’” so that the Court may take judicial notice of them. *Compare* 44 U.S.C. § 1507 (“The contents of the Federal Register shall be judicially noticed.”), with *Mobility Workx*, 15 F.4th at 1151 n.1 (noting that “this court could take judicial notice of the existence of a trademark”) (emphasis added).

The first two *Sunset Reviews* and their discussion of *Presidential Proclamation 7274* are also included in the record because “the record is not limited to documents ‘relied on or used’ by the agency . . . the agency cannot ignore relevant information which is before it, and the reviewing court must be in a position to determine if it ha[s] done so.” *Floral Trade Council v. United States*, 709 F. Supp. 229, 230 (CIT 1989). Contrary to Commerce’s and Wheatland Tube’s protestations, here “the dispute may be resolved by applying some common sense.” *Id.* The Court need only ask “whether the decision can be reviewed properly without” the first two *Sunset Reviews*. *Id.* It cannot. Those two documents are so integral to Commerce’s analysis that not only are they “sufficiently intertwined with the relevant inquiry,” *id.*, but also “[a]ll of the information in [them] was in front of Commerce during the investigation, regardless of whether or not Commerce chose to ignore it.” *F. Lli De Cecco Di Filippo Fara San Martino S.P.A. v. United States*, 980 F. Supp. 485, 487 (CIT 1997).

Because the later reviews constantly reference the earlier reviews, their inclusion in the record is necessary for judicial review. Here, no party disputes that the *Third* and *Fourth Sunset Reviews* are part of even the most restrictive “four-corners” understanding of the administrative record. See *Second Tr.* 17:11–13 (The Court: “So everyone agrees that -- I assume, if anyone doesn’t, please speak now -- that the third and fourth reviews are on the administrative record.” No party objected, and counsel for Saha Thai and Wheatland Tube answered in

the affirmative. *See id.* at 17:15, 54:13–14.). The *Third Review* cites the *First Review* forty-three times; the *Second Review* fifty times. *See Third Sunset Review*. The *Fourth Review* cites the *First Review* forty times; the *Second Review* forty-four times. *See Fourth Sunset Review*. In total, the latter two *Reviews* cite the former two *Reviews* an astounding one hundred seventy-seven times. Additionally, the specific portions of the *First Review* and the *Second Review* this Court cited in *Saha Thai I* are all cited by the *Third* and *Fourth Review*. *See Saha Thai I*, 547 F. Supp. 3d at 1285–87 (citing to portions of the *First Review* cited in footnotes 49 and 77 of the *Third Review*, portions of the *Second Review* cited to in footnote 81 of the *Third Review* and footnote 54 of the *Fourth Review*).⁴

The Court here is on solid ground to consider such pervasively referenced documents from prior investigations of the same order as part of the administrative record. *See Floral Trade Council*, 709 F. Supp. at 230–31; *see also, e.g., Zhejiang Native Produce & Animal By-Prod. Imp. & Exp. Corp. v. United States*, 27 C.I.T. 1827, 1854 n.40 (2003) (citing *Floral Trade Council* for the proposition that a document that “was before Commerce” during an investigation “may fairly be considered part of the record,” especially when the “the issue was argued before this court in the parties’ briefs”); *China Steel Corp. v. United States*, 264 F. Supp. 2d 1339, 1352 n.11 (CIT 2003) (permitting Commerce’s use of evidence a party decried as not in the record and noting three compelling reasons: (1) the disputed document was in front of Commerce during the investigation, (2) it was cited by a document Commerce created during the investigation, and (3) the disputed document was in the public record); *AG der Dillinger Huttenwerke v. United States*, 193 F. Supp. 2d 1339, 1350 (CIT 2002) (declaring a document from a prior sunset review part of the record, despite Commerce having rejected its submission as untimely); *Intrepid v. Int’l Trade Admin.*, 787 F. Supp. 227, 229 (CIT 1992) (applying the same “sufficiently intertwined” standard to Commerce’s concurrent reviews of AD and CVD scopes).

Separate from the frequent references that the *Third* and *Fourth Sunset Reviews* make to the *First* and *Second Reviews*, *Saha Thai* referred to them repeatedly in its briefing to Commerce. *See, e.g., AG der Dillinger Huttenwerke*, 193 F. Supp. 2d at 1350 (finding that a document was part of the record where “the issue [it presented] was raised with sufficient clarity to put Commerce reasonably on notice in

⁴ The Court additionally notes that the *Third Review* cites the entirety of the *Second Review* twice, in footnotes 12 and 31. Although the *Second Review’s* Overview is not directly cited, it is obviously included in the *Third Review’s* citation of the entire *Second Review*.

a timely manner”). For example, Saha Thai wrote that “based on the Commission’s determinations in the original investigation in 1985 and in *all subsequent sunset reviews*, it is clear that the Commission’s position is that line pipe and dual stenciled pipe are not included within the scope of the Order.” J.A. at 1,930 (emphasis added). All the parties discuss and quote language from a brief that Wheatland Tube filed in the *First Sunset Review* proceeding, demonstrating a familiarity with that proceeding. See J.A. at 1,913–14, 1,920, 2,015. The relevance of the first two *Sunset Reviews* to the scope inquiry hardly comes as a surprise. Moreover, those reviews specifically analyze the language and scope of the antidumping orders: The *First Sunset Review* discusses “the express exclusion of line and dual-stenciled pipe from relevant antidumping orders,” and the *Second Sunset Review* likewise analyzes those distinctions. *Saha Thai I*, 547 F. Supp. 3d at 1285–86 (citing *First Sunset Review* at 13 n.53; *Second Sunset Review* at 11 n.55). Because Saha Thai repeatedly referenced all four sunset reviews and because the reviews themselves cross-reference each other nearly two hundred times, all four *Reviews* are “sufficiently intertwined with the relevant inquiry” so that “the decision can[not] be reviewed [properly] without” them. *Floral Trade Council*, 709 F. Supp. at 230. They are fairly included in the record, and Commerce may not choose to ignore them.⁵ *Id.*

In fact, because “Commerce chose to ignore” them, *F. Lli De Cecco*, 980 F. Supp. at 487, it was in dereliction of its duty to review all of the materials listed under 19 C.F.R. § 351.225(k)(1) (June 17, 2020).⁶ Counsel for Saha Thai and Wheatland Tube agree that sunset reviews are (k)(1) materials, meaning Commerce was obligated, by regulation, to review them. See Second Tr. 14:21–23, 59:20–25; *Quiedan Co. v. United States*, 294 F. Supp. 3d 1345 (CIT 2018) (including sunset reviews among the (k)(1) materials), *aff’d*, 927 F.3d 1328 (Fed. Cir. 2019). The argument Wheatland Tube is forced to advance here is that the same documents Commerce is required by regulation to have considered in making its determination cannot be

⁵ This is a position with which Commerce may now appear to agree, given its statement at the most recent oral argument that “Commerce had reconsidered the issue and reconsidered these documents. They are all on the record.” Second Tr. 74:19–20.

⁶ 19 C.F.R. § 351.225(k)(1)(i) currently says that certain sources “may be taken into account” by the Secretary. At the time of the agency’s scope determination, however, the applicable regulation said the sources “will be taken into account.” See 19 C.F.R. § 351.225(k)(1)(i) (June 17, 2020) (emphasis added); *Saha Thai I*, 547 F. Supp. 3d at 1289–91.

referenced by the Court in deciding if substantial evidence supports Commerce's determination.⁷

Saha Thai cited all four sunset reviews to Commerce. Commerce chose to rely only on the final two reviews. However, those two reviews pervasively cite the *First* and *Second Review* as well as *Presidential Proclamation 7274*. Commerce cannot choose to ignore information that is (1) cited to it, (2) part of the (k)(1) materials, and (3) "sufficiently intertwined with the relevant inquiry." See *Floral Trade Council*, 709 F. Supp. at 230–31 (holding documents from earlier investigations that become "sufficiently connected to the current investigation [are] to be considered to be before the agency for purposes of the decision at issue"); accord *Zhejiang Native Produce*, 27 C.I.T. at 1854 n.40. Cf. 19 C.F.R. § 351.104(a) ("The Secretary will maintain an official record of each antidumping and countervailing duty proceeding. The Secretary will include in the official record all factual information, written argument, or other material developed by, presented to, or obtained by the Secretary during the course of a proceeding that pertains to the proceeding.") (emphasis added). Commerce therefore properly considered these documents in its remand redetermination.

IV. ITC Statements

Commerce and Wheatland Tube finally dispute the Court's characterization of the ITC's final determination in the original investigation, as well as the Court's characterization of the ITC's statements in the *Third* and *Fourth Sunset Reviews*. Def-Int.'s Comments at 5, ECF No. 62; Remand Results at 18–20. But their arguments are based on one central conceit: that the ITC does not understand the scope of the orders it reviews. The ITC has spoken with one consistent voice, repeatedly emphasizing that dual-stenciled line pipe is not within the scope of the Thailand Order. The primary problem in this case is not a tricky comparison between the product characteristics of

⁷ Commerce appears to disagree with Wheatland Tube and agree with the Court on this issue, as it states in the Final Scope Ruling. See J.A. at 2,046, ECF No. 42 ("Importantly, the Court of International Trade (CIT) has stated that 'when a respondent cites (k)(1) sources as supporting a product's exclusion from the scope of an order, the court cannot consider the language of a scope order in isolation, but *must consider those sources.*'") (emphasis added). Commerce further quoted the CIT, noting that "[w]hether the order is ambiguous or not, Commerce's regulations are unambiguous—it *will* take into account' the (k)(1) criteria in conducting a scope determination. No case has invalidated this regulatory requirement." *Id.* (alteration and emphasis in original).

standard and dual or mono-stenciled line pipe;⁸ rather, the primary problem presented by this case is that Commerce wishes to blind itself to the ITC's repeated pronouncements. Because the Court must "hold unlawful any determination, finding, or conclusion . . . unsupported by substantial evidence on the record," 19 U.S.C. § 1516a(b)(1)(B)(i), and because that includes evidence that "fairly detracts" from Commerce's conclusions, the Court cannot allow Commerce to do so. *Nippon Steel Corp. v. United States*, 337 F.3d 1373, 1379 (Fed. Cir. 2003).

A reference to the language in the *First* and *Second Sunset Reviews* demonstrates why Wheatland Tube and Commerce are fighting so vigorously to keep those statements out of the record. In those reviews, the ITC consistently identifies dual-stenciled pipe as line pipe, not standard pipe. The *First Sunset Review* describes "dual-stenciled line pipe" as "pipe that meets both line pipe and CWP specifications but enters as line pipe for customs purposes." See *Certain Pipe and Tube from Argentina, Brazil, Canada, India, Korea, Mexico, Singapore, Taiwan, Thailand, Turkey, and Venezuela*, Inv. Nos. 701-TA-253, 731-TA-132, 252, 271, 273, 276, 277, 296, 409, 410, 532-534, 536, and 537 (*First Sunset Review*), USITC Pub. 3316 at 6 (July 2000); see also *Saha Thai I*, 547 F. Supp. 3d at 1285. The *First Sunset Review* explains that, when President Clinton imposed temporary safeguard duties on line pipe, dual-stenciled line pipe was included in the safeguard duties, *but standard pipe was not*. *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"); see also *Saha Thai I*, 547 F. Supp. 3d at 1297. The *Second Sunset Review* similarly stated that President Clinton's safeguard duties were imposed on "line pipe imports . . . including 'dual-stenciled' pipe." See *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,

⁸ Wheatland Tube argues that whether or not line pipe was produced in Thailand when the ITC issued its initial injury determination is immaterial because 19 U.S.C. § 1677j provides a separate avenue to cover dual-stenciled line pipe. Def.-Int.'s Comments at 7, ECF No. 62. But neither 19 U.S.C. § 1677j(c) nor § 1677j(d) change the analysis. Commerce had the opportunity to investigate Saha Thai's products for minor alterations under § 1677j(c) and declined to do so. *Saha Thai I*, 547 F. Supp. 3d at 1286-87. Wheatland Tube did not appeal Commerce's denial of its petition to conduct a minor alteration analysis. Section (d) is also inapplicable; dual-stenciled and line pipe are not "later-developed" merchandise. Rather, line pipe was initially included in the original petition and was voluntarily withdrawn by petitioners after they determined that it was not being produced in Thailand at the time. *Letter Dated March 14, 1985, from Petitioner Regarding Partial Withdrawal of Petition*, J.A. at 1,781-82. Wheatland Tube also did not argue before Commerce that dual-stenciled line pipe constituted later developed merchandise. See *Wheatland Tube's Scope Comments*, J.A. at 1,002 (no discussion of line pipe as later developed merchandise); *Wheatland Tube's Case Br.*, J.A. at 1,962 (same); *Wheatland Tube's Rebuttal Br.* at 10, J.A. at 2,036 (same).

409, 410, 532–534, and 536 (*Second Sunset Review*), USITC Pub. 3867 at 4–5 (July 2006) at Overview-5 n.16; see also *Saha Thai I*, 547 F. Supp. 3d at 1286, 1297 (elaborating that “dual-stenciled pipe was treated as falling under the safeguard duties imposed by President Clinton, even though the proclamation only mentions ‘line pipe.’”) (emphasis in original). If dual-stenciled line pipe were standard pipe, as Wheatland Tube claims, then it would not have been subject to President Clinton’s safeguard tariffs, which solely applied to “line pipe.” For Wheatland Tube to be right, one must find that the ITC and President Clinton were wrong.

It is the same story regarding the later sunset reviews. Wheatland Tube and Commerce’s original determination would have us believe that the ITC misspoke. In collectively describing the scopes of all the orders at issue in the *Fourth Sunset Review*, the ITC found 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.” See *Certain Circular Welded Pipe and Tube from Brazil, India, Korea, Mexico, Taiwan, Thailand, and Turkey (Final)*, Inv. Nos. 701-TA-253 and 731-TA-132, 252, 271, 273, 532–534, and 536 (*Fourth Sunset Review*), USITC Pub. 4754 (Jan. 2018) at 4. Commerce and Wheatland Tube were left to argue that “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); see also *Saha Thai I*, 547 F. Supp. 3d at 1294–95. Commerce and Wheatland Tube claim this despite the ITC’s having made the very same statement in the *Third Sunset Review*: “[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.” *Certain Circular Welded Pipe and Tube from Brazil, India, Korea, Mexico, Taiwan, Thailand, and Turkey*, Inv. Nos. 701-TA-253 and 731-TA132, 252, 271, 273, 532–534 and 536 (*Third Sunset Review*) at 6, USITC Pub. 4333 (June 2012).

Whether one examines all four sunset reviews or only the *Third* and *Fourth Reviews*, the ITC spoke with one consistent voice: Dual-stenciled pipe is line pipe, not standard pipe, and is not covered by the scope of any relevant order it reviewed over nearly four decades. Commerce and Wheatland Tube wish to say that the ITC does not speak with specificity and does not know what it is talking about. The record reveals otherwise because the ITC’s position never wavered

from 1985 to the present. Indeed, the only ITC statement equating line pipe, dual-stenciled or otherwise, with standard pipe was the original 1986 *dissent*. See ITC Final Determination, J.A. at 1,277–83 (dissenting Commissioner’s views). Just as Commerce may not use a scope determination to rewrite the scope under review, it may also not use a scope determination to rewrite the history of the ITC’s underlying determinations. The Remand Results properly find that dual-stenciled line pipe is not covered within the Thailand Order’s scope. The record before the agency — from Wheatland Tube’s decision to withdraw line pipe from consideration in the original investigation to the most recent ITC sunset review — support that determination.

CONCLUSION

Commerce and Wheatland Tube have tried to argue that the full record of this proceeding should not be considered while the record in other proceedings is outcome determinative. Focusing on the record of the Thailand Order reveals that not to be the case. Commerce has returned a decision that adequately complies with the Court’s Remand Order, finding on reconsideration that dual-stenciled pipe is not included in the scope of the Thailand Order. The Court’s rationale in the Remand Order remain sound, and Commerce’s Remand Results are supported by substantial evidence on the record. Accordingly, it is hereby:

ORDERED that the Remand Results are **SUSTAINED**.

Judgment shall be entered accordingly. A separate order will issue to reflect that the contested documents are properly considered part of the administrative record in this matter.

Dated: August 25, 2022

New York, New York

/s/ Stephen Alexander Vaden

STEPHEN ALEXANDER VADEN, JUDGE

Slip Op. 22–100

SEAH STEEL CORPORATION, Plaintiff, HUSTEEL Co., LTD., NEXTEEL Co., LTD., AJU BESTEEL Co., LTD., AND ILJIN STEEL CORPORATION, Consolidated Plaintiffs, and HYUNDAI STEEL COMPANY AND ILJIN STEEL CORPORATION, Plaintiff-Intervenors, v. UNITED STATES, Defendant, and UNITED STATES STEEL CORPORATION, MAVERICK TUBE CORPORATION, TENARIS BAY CITY, INC., IPSCO TUBULARS INC., VALLOUREC STAR, L.P., AND WELDED TUBE USA INC., Defendant-Intervenors.

Before: Jennifer Choe-Groves, Judge
 Consol. Court No. 19–00086

[Sustaining the U.S. Department of Commerce’s remand results in the 2016–2017 administrative review of the antidumping duty order on oil country tubular goods from the Republic of Korea.]

Dated: August 26, 2022

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Hardeep K. Josan, Trial Attorney, International Trade Field Office, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of New York, N.Y., for Defendant United States. Also 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 *Mykhaylo Gryzlov*, Senior Counsel, Office of the Chief Counsel for Trade Enforcement and Compliance, U.S. Department of Commerce, of Washington, D.C.

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OPINION**Choe-Groves, Judge:**

Plaintiff SeAH Steel Corporation (“SeAH”), Consolidated Plaintiffs Husteel Co., Ltd. (“Husteel”), NEXTEEL Co., Ltd. (“NEXTEEL”),

AJU Besteel Co., Ltd. (“AJU”), and ILJIN Steel Corporation (“ILJIN”), and Plaintiff-Intervenors Hyundai Steel Company (“Hyundai”) and ILJIN, (collectively, “Plaintiffs”), brought this consolidated action challenging the final results published by the U.S. Department of Commerce (“Commerce”) in the 2016–2017 administrative review of the antidumping duty order on oil country tubular goods (“OCTG”) from the Republic of Korea (“Korea”). See *Certain Oil Country Tubular Goods From the Republic of Korea* (“Final Results”), 84 Fed. Reg. 24,085 (Dep’t of Commerce May 24, 2019) (final results of antidumping duty admin. review; 2016–2017); see also Issues and Decision Mem. for the Final Results of the 2016–2017 Admin. Review of the Antidumping Duty Order on Certain Oil Country Tubular Goods from the Republic of Korea (May 17, 2019), ECF No. 20–5 (“OCTG III Final Issues & Decision Memorandum” or “Final IDM”).¹

Before the Court is Commerce’s remand redetermination on 2016–2017 OCTG from Korea (“OCTG III”), filed pursuant to the Court’s remand order in *SeAH Steel Corp. v. United States*, 45 CIT ___, 513 F. Supp. 3d 1367 (2021) (“*SeAH Steel*” or “Remand Order”). See Final Results of Redetermination Pursuant to Court Remand, as amended,² ECF No. 118–1 (“*Remand Results*”). This opinion presumes familiarity with the facts of this administrative review as outlined in *SeAH Steel*, in which the Court sustained Commerce’s: (1) application of its differential pricing analysis in calculating SeAH’s dumping margin; (2) calculation of constructed value profit based on SeAH’s Canadian market sales during the prior period of review for 2014–2015; (3) exclusion of freight revenue profit in calculating SeAH’s constructed export price; and (4) inclusion of a penalty imposed by the Korean Fair Trade Commission related to bids for orders of line pipe in the Korean market between 2003 and 2013 in SeAH’s general and administrative (“G&A”) expense ratio, but remanded Commerce’s: (5) particular market situation determination; (6) reallocation of NEXTEEL’s reported costs for non-prime products for an allocation based on actual costs; (7) adjustment to NEXTEEL’s production line suspension costs; (8) calculation of SeAH’s affiliated seller’s further manufacturing cost; and (9) inclusion of SeAH’s inventory valuation losses in its G&A expense ratio. See *id.*

On remand, Commerce reversed the particular market situation finding and removed the adjustment from SeAH’s and NEXTEEL’s

¹ Citations to the administrative record reflect the public record (“PD”) document numbers.

² Amendment corrected inadvertent clerical errors in the dumping margins. ECF Nos. 112, 115 (consent motions to correct remand results); see ECF Nos. 113, 116 (orders granting consent motions).

margin calculation under protest. *See Remand Results* at 7–14, 36–45. Commerce also reversed its finding with respect to reallocation of NEXTEEL’s non-prime products, relying instead on the actual costs of prime and non-prime products as reported by NEXTEEL. *Id.* at 14–15, 48. Regarding the remaining issues, Commerce provided further analysis and explanation. *See generally id.* As a result, Commerce recalculated the weighted-average dumping margins for SeAH, NEXTEEL, and the non-examined companies, which changed from 16.73 percent to 5.28 percent, 32.24 percent to 9.77 percent, and 24.49 percent to 7.53 percent, respectively.

SeAH, Husteel, NEXTEEL, Hyundai, AJU, ILJIN, and Defendant-Intervenor United States Steel Corporation (“U.S. Steel”) filed comments on Commerce’s *Remand Results*. Cmts. of SeAH Steel Corp. on Redeterm., ECF No. 119;³ Remand Cmts. of Consol. Pl. NEXTEEL Co., Ltd., ECF No. 121;⁴ Consol. Pl. Husteel Co., Ltd.’s Cmts. on Redeterm., ECF No. 120;⁵ Remand Cmts. of Consol. Pl. Hyundai Steel Co., ECF No. 122;⁶ Remand Cmts. of Consol. Pl. AJU Besteel Co., Ltd. and Consol. Pl. ILJIN Steel Corp., ECF No. 125;⁷ U.S. Steel Corp.’s Cmts. in Partial Opp’n to Remand Redeterm., ECF No. 124.⁸ Various parties also filed comments in reply. Consol. Pl. Husteel Co., Ltd.’s Cmts. in Support of Redeterm., ECF No. 129; U.S. Steel Corp.’s Cmts. in Partial Support of Remand Redeterm., ECF No. 130; Cmts. of Def.-Intervs. Maverick Tube Corp., Tenaris Bay City, Inc., and IPSCO

³ SeAH continues to disagree with Commerce’s analysis on redetermination of the particular market situation issue but it supports the result, while arguing for further remand of the portion of the G&A expenses that Commerce originally allocated to its U.S. affiliate as part of the adjustment for further manufacturing costs but now allocates as selling expenses, as well as Commerce’s determination to continue to include inventory valuation losses as “actual” expenses because they are reflected in SeAH’s audited income statement and in the reconciliation between SeAH’s normal accounting system and its audited financial statements. SeAH Cmts. at 2–13.

⁴ NEXTEEL supports the results of Commerce’s redetermination of the particular market situation issue and its reversal of the adjustment in the *Final Results* to the costs of production reported for NEXTEEL’s non-prime pipe but argues for further remand of Commerce’s reclassification on remand of NEXTEEL’s costs for losses associated with suspended production as still inconsistent with the Court’s order of remand. NEXTEEL Cmts. at 2–8.

⁵ Husteel continues to disagree with Commerce’s redetermination of the particular market situation issue but supports the result and concurs with SeAH’s and NEXTEEL’s comments as to their respective issues. Husteel Cmts. at 1–2.

⁶ Hyundai supports the results of Commerce’s redetermination of the particular market situation issue and joins and supports SeAH’s and NEXTEEL’s comments as to their respective issues. Hyundai Cmts. at 1.

⁷ AJU and ILJIN also support the results of Commerce’s redetermination of the particular market situation issue and join and support SeAH’s and NEXTEEL’s comments as to their respective issues. AJU and ILJIN Cmts. at 1.

⁸ U.S. Steel opposes Commerce’s redetermination of the particular market situation issue and its reversal of the adjustment in the *Final Results* to the costs of production reported for NEXTEEL’s non-prime pipe. U.S. Steel Cmts. at 4–29.

Tubulars Inc. in Support of Remand Redeterm., ECF No. 131; Def.'s Resp. to Cmts. Regarding Remand Redeterm., ECF No. 132; Cmts. of SeAH Steel Corp. in Partial Support of Redeterm., ECF No. 133; Cmts. of Consol. Pl. NEXTEEL Co., Ltd. in Partial Support of Remand Results, ECF No. 134; Cmts. of Pl.-Interv. Hyundai Steel Co. in Partial Support of Remand Results, ECF No. 135; Consol. Pl. AJU Besteel Co., Ltd.'s and Consol. Pl. ILJIN Steel Corp.'s Cmts. in Partial Support of Remand Redeterm, ECF No. 136.⁹

For the following reasons, the Court sustains Commerce's *Remand Results*.

ISSUES PRESENTED

The Court reviews the following issues:

1. Whether Commerce's negative redetermination on the existence of a particular market situation in Korea is supported by substantial evidence;
2. Whether Commerce's reallocation of NEXTEEL's reported costs for non-prime products is supported by substantial evidence;
3. Whether Commerce's adjustment to NEXTEEL's production line suspension costs is supported by substantial evidence;
4. Whether Commerce's application of SeAH's affiliated seller's general and administrative expense ratio to both further manufactured and non-further manufactured products is in accordance with the law; and
5. Whether Commerce's inclusion of SeAH's inventory valuation losses in SeAH's general and administrative expense ratio is supported by substantial evidence.

⁹ See also Consol. Pl. Husteel Co., Ltd.'s Mot. J. Agency R., ECF No. 59; Mot. Pl. SeAH Steel Corporation J. Agency R., ECF Nos. 60, 61; Consol. Pl./Pl.-Interv. Rule 56.2 Mot. J. Agency R., ECF No. 62; Rule 56.2 Mot. J. Agency R. Consol. Pl. NEXTEEL Co., Ltd., ECF Nos. 63, 66; Rule 56.2 Mot. J. Agency R. Pl.-Interv. Hyundai Steel Company, ECF No. 64; Consol. Pl. AJU Besteel Co., Ltd.'s Rule 56.2 Mot. J. Agency R., ECF No. 65; see also Consol. Pl. Husteel Co., Ltd.'s Br. Supp. Its Mot. J. Agency R., ECF No. 59-2 ("Husteel Br."); Br. SeAH Steel Corporation Supp. Its Rule 56.2 Mot. J. Agency R., ECF Nos. 60-1, 61-1 ("SeAH Br."); Br. Consol. Pl./Pl.-Interv. ILJIN Steel Corporation Supp. Its Mot. J. Agency R., ECF No. 62-1 ("ILJIN Br."); Mem. Supp. Consol. Pl. NEXTEEL Co., Ltd.'s Rule 56.2 Mot. J. Agency R., ECF Nos. 63-2, 66-2 ("NEXTEEL Br."); Mem. Supp. Pl.-Interv. Hyundai Steel Company's Rule 56.2 Mot. J. Agency R., ECF No. 64-2 ("Hyundai Br."); Mem. Supp. Mot. Consol. Pl., AJU Besteel Co., Ltd., J. Agency R., ECF No. 65-1 ("AJU Br.").

BACKGROUND

Commerce initiated the third administrative review (“OCTG III”) of the antidumping duty order on OCTG from Korea for the period covering September 1, 2016, through August 31, 2017. *Initiation of Antidumping and Countervailing Duty Admin. Reviews (“Initiation Notice”)*, 82 Fed. Reg. 52,268, 52,271 (Dep’t of Commerce Nov. 13, 2017). Commerce selected NEXTEEL and SeAH as mandatory respondents for individual examination. *Certain Oil Country Tubular Goods From the Republic of Korea*, 83 Fed. Reg. 51,442, 51,442 (Dep’t of Commerce Oct. 11, 2018) (prelim. results of antidumping duty admin. review; 2016–2017).

In its *Final Results*, Commerce assigned weighted-average dumping margins of 32.24% for NEXTEEL, 16.73% for SeAH, and 24.49% for non-examined companies. *Final Results*, 84 Fed. Reg. at 24,086; see Final IDM at 5–6. Commerce based normal value on constructed value for NEXTEEL and SeAH because neither mandatory respondent had a viable home market or third-country market during the period of review. Final IDM at 49. Commerce also determined SeAH’s weighted-average duty margin by applying differential pricing analysis to average-to-transaction methodology. *Id.* at 60–71.

In addition, Commerce determined that a statutory “particular market situation” existed in Korea. The determination was based on a totality-of-the-circumstances assessment of the same four conditions that had been alleged in the first administrative review covering 2014–2015 (“OCTG I”) and the second administrative review covering 2015–2016 (“OCTG II”), namely: (1) subsidies from the Government of Korea to producers of hot-rolled coil; (2) the effect on Korean domestic hot-rolled coil prices of imports into Korea of Chinese hot-rolled products; (3) strategic alliances between Korean hot-rolled coil suppliers and Korean OCTG producers; and (4) the Government of Korea’s influence over the cost of electricity. See *id.* at 10.

As a result of determining the existence of a particular market situation in Korea, Commerce adjusted the respondents’ reported hot-rolled coil by increasing their costs of such coil by the revised AFA-based subsidy rate of 41.57% assigned such coil to POSCO. See *id.* at 41–42 (citing *POSCO v. United States*, 43 CIT ___, 378 F. Supp. 3d 1348 (2019)¹⁰ (remanding for further proceedings consistent with *POSCO v. United States*, 977 F.3d 1369 (Fed. Cir. 2020) (vacating and remanding for further proceedings regarding the final affirmative determination in the countervailing duty investigation of certain

¹⁰ Appeal filed, No. 19–2095 (Fed. Cir. Mar. 4, 2021).

cold-rolled steel flat products from Korea)); *see also Certain Hot-Rolled Steel Flat Products From the Republic of Korea*, 81 Fed. Reg. 53,439 (Dep't of Commerce Aug. 12, 2016) (countervailing duty investigation final affirmative determination), *amended by* 81 Fed. Reg. 67,960, 67,961 (Dep't of Commerce Oct. 3, 2016) (countervailing duty investigation amended final affirmative determination), *amended by* 84 Fed. Reg. 23,019 (Dep't of Commerce May 21, 2019) (notice of court decision not in harmony with amended final determination of the countervailing duty investigation) (reducing POSCO's total AFA subsidy rate from 58.68% to 41.57%); SeAH Final Calculations Mem. at 2, PD 358 (May 17, 2019); NEXTEEL Final Calculations Mem. at 4, PD 356 (May 17, 2019). Commerce applied the constructed value profit and selling expense ratios calculated for SeAH in OCTG I to determine SeAH's constructed value profit and selling expenses here in OCTG III. Final IDM at 48–49. Commerce adjusted NEXTEEL's reported costs for non-prime products, *id.* at 91–93; calculated as G&A expenses NEXTEEL's costs related to the suspension of two production lines, *id.* at 95–96; deducted SEAH's reported freight revenue up to actual freight cost, *id.* at 73–74; and included affiliate indirect selling expenses, a penalty, and inventory losses in SeAH's G&A expenses, *id.* at 77–80, 83–84, 82–83.

This opinion addresses Commerce's *Remand Results* and the parties' respective comments.

STANDARD OF REVIEW

The Court has jurisdiction pursuant to 28 U.S.C. § 1581(c) and 19 U.S.C. § 1516a(a)(2)(B)(iii). The Court will hold unlawful any determination found to be unsupported by substantial evidence on the record or otherwise not in accordance with the law. 19 U.S.C. § 1516a(b)(1)(B)(i). The Court also reviews determinations made on remand for compliance with the Court's Remand Order. *Ad Hoc Shrimp Trade Action Comm. v. United States*, 38 CIT 727, 730, 992 F. Supp. 2d 1285, 1290 (2014), *aff'd*, 802 F.3d 1339 (Fed. Cir. 2015).

DISCUSSION

I. Particular Market Situation Determination

Commerce determines antidumping duties by calculating the amount by which the normal value of subject merchandise exceeds the export price or the constructed export price for the merchandise. 19 U.S.C. § 1673. When reviewing antidumping duties in an administrative review, Commerce must determine: (1) the normal value and export price or constructed export price of each entry of the subject

merchandise, and (2) the dumping margin for each such entry. *Id.* § 1675(a)(1)(B), (a)(2)(A).

The statute dictates the steps by which Commerce may calculate normal value “to achieve a fair comparison” with export price or constructed export price. *Id.* § 1677b(a). When Commerce looks to determine normal value in accordance with 19 U.S.C. § 1677b, if Commerce concludes that it must resort to using constructed value under 19 U.S.C. § 1677b(e), and that a “particular market situation” exists “such that the cost of materials and fabrication or other processing of any kind does not accurately reflect the cost of production in the ordinary course of trade,” the statute authorizes Commerce to use any other reasonable calculation methodology. 19 U.S.C. § 1677b(e). The origin in the statute of “particular market situation” is its inclusion in the framework of “normal value” when the Tariff Act of 1930 was amended by the Uruguay Round Agreements Act. *See* Pub. L. 103–465 § 224, 108 Stat. 4878 (1994);¹¹ *cf.* Trade Preferences Extension Act of 2015, Pub. L. No. 114–27, 129 Stat. 362 (2015) (adding the concept of a particular market situation in the definition of the term “ordinary course of trade” for purposes of constructed value and clarifying remedial action if Commerce finds the existence of a particular market situation). Congress did not, either in 1994 or 2015, define “particular market situation,” but as observed in *NEXTEEL Co. v. United States* (“*NEXTEEL*”), 28 F.4th 1226 (Fed. Cir. 2020), § 1677b(e) plainly “identifies the factual support Commerce must provide to invoke this provision.” 28 F.4th at 1234. Congress also provided examples in adopting the Statement of Administrative Action:

The [Antidumping] Agreement does not define “particular market situation,” but such a situation might exist where a single sale in the home market constitutes five percent of sales to the United States or where there is government control over pricing to such an extent that home market prices cannot be considered to be competitively set. It also may be the case that a particular market situation could arise from differing patterns of demand in the United States and in the foreign market. For example, if significant price changes are closely correlated with holidays

¹¹ *See also* Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994, Art. 2.2 (“[w]hen there are no sales of the like product in the ordinary course of trade in the domestic market of the exporting country or when, because of the particular market situation or the low volume of the sales in the domestic market of the exporting country[,], such sales do not permit a proper comparison, the margin of dumping shall be determined by comparison with a comparable price of the like product when exported to an appropriate third country, provided that this price is representative, or with the cost of production in the country of origin plus a reasonable amount for administrative, selling and general costs and for profits”) (footnote omitted).

which occur at different times of the year in the two markets, the prices in the foreign market may not be suitable for comparison to prices to the United States.

Statement of Administrative Action, H.R. Rep. No. 103–316, vol. 1, at 822 (1994), *as reprinted in* 1994 U.S.C.C.A.N. 4040, 4162. “These are all situations in which some circumstance distorts costs so that they are not set based on normal market forces or do not move with the rest of the market.” *NEXTEEL*, 28 F.4th at 1234.

For its *Final Results* in this administrative review, Commerce acknowledged that the petitioners had submitted evidence of four discrete factors to demonstrate a particular market situation in Korea: (1) subsidization of Korean hot-rolled coil products by the Korean Government; (2) distortive pricing of unfairly-traded Chinese hot-rolled coil; (3) “strategic alliances” between Korean hot-rolled coil suppliers and Korean OCTG producers; and (4) distortive government control over electricity prices in Korea. Final IDM at 23.

Considering the petitioners’ evidence, Commerce first determined that the Korean steel market was “heavily subsidized.” *See id.* at 23–24. However, because the evidence of record that is contemporaneous with the period of review evinced only arguable subsidies in the range of 2%, the Court concluded that Commerce’s determination with respect to the Korean steel market being heavily subsidized was not reasonable and supported by substantial evidence. *SeAH Steel*, 45 CIT at ___, 513 F. Supp. 3d at 1391–92.

The second factor considered by Commerce in the *Final Results* was the effect of excess global steel capacity on the Korean market. The Court found unreasonable Commerce’s determination that a particular market situation existed in Korea due to excess Chinese steel on the global markets. Specifically, this Court found unreasonable Commerce’s implicit conclusion that such excess Chinese-exported global capacity was a phenomenon “particular” to the Korean market and “that the global glut of Chinese hot-rolled coil imports caused price distortions specific to the Korean steel market.” *Id.* at ___, 513 F. Supp. 3d at 1393–94.

The third and fourth factors concerned “strategic alliances” and government control over electricity rates. Because none of the documents on which Commerce had relied appeared to pertain to the OCTG III period of review, this Court concluded that Commerce’s reasoning with respect to these factors was speculative and unsupported by substantial evidence. *Id.* at ___, 513 F. Supp. 3d at 1394–96.

In its redetermination, “under respectful protest,” Commerce concluded that “the record evidence is insufficient to sustain an affirma-

tive [particular market situation] finding” with respect to Korea, and that “any interplay of these factors also is insufficient” in this instance for Commerce to make an affirmative particular market situation determination with respect to Korea and a particular market situation adjustment. *Remand Results* at 44–45.

Despite reversing its prior determination and concluding on remand that the record did not support a particular market situation in Korea, Commerce noted its disagreement with the Court’s observations regarding the issue of overcapacity of Chinese steel inputs. *See SeAH Steel*, 45 CIT at ___, 513 F. Supp. 3d at 1393 (in which this Court held that “[t]he articles and statistics cited by Commerce do not support a determination that the influx of Chinese hot-rolled coil is particular to Korea because the record documents describe a global influx that affected many other countries in addition to Korea, rather than an effect that is unique or particular to Korea.”). Commerce contends that it has consistently recognized the presence of a “global” overcapacity of Chinese steel products and that the global impact can be experienced more acutely in a single market than in other countries. The Court makes two observations with respect to the global overcapacity issue. First, the Court notes that an “ongoing global phenomenon would not alone constitute a deviation from the ‘ordinary course of trade.’” *See NEXTEEL*, 28 F.4th at 1234. Second, in order to conclude that a single market experiences a global phenomenon “more acutely” than other markets, the evidence of record must not only be substantial and reasonable but clearly explained. Commerce has neither pointed to any evidence here, nor explained on remand or in its Final IDM how global excess steel capacity caused by China made the market in Korea a “particular” situation. Given the lack of record evidence or explanation from Commerce, the Court concludes that Commerce’s simple statement that “prices in Korea are . . . lower than they would be but for global excess steel capacity” is not supported by substantial evidence.

In addition, Commerce inaccurately characterizes the Court’s prior evaluation of the record as an improper “rejection” of the evidence of record. *See, e.g., Remand Results* at 4, 13, 36. The Court does not “reject” information of record, but examines whether the evidence is substantial enough to support the determinations claimed. The Court’s review necessarily involves “following the path” Commerce lays out, in an attempt to discern Commerce’s process of reasoning. *See, e.g., Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 43 (1983). That is not a “re-weighing” of evidence, but is an appropriate consideration of the reasonableness of the agency’s evaluation of the evidence. Similarly, Commerce in its remand results

misstates that the Court “found” the evidence of a particular market situation to be “insufficient in this proceeding.” The Court made no such finding, it only considered the logic of Commerce’s reasoning on the record. *See, e.g., SeAH Steel*, 45 CIT at ___, 513 F. Supp. 3d at 1394 (“The record documents cited by Commerce relate to findings of unfair corporate action that occurred in 2014 or earlier, and no evidence relates to unfair corporate action or other strategic alliances during the relevant period of review from 2016–2017 in this case. Because none of the evidence pertains to the relevant period of review, Commerce’s purely speculative conclusions that strategic alliances ‘may have created distortions’ and ‘may continue to impact [hot-rolled coil] pricing in a distortive manner during the [OCTG III] [period of review] and in the future’ are not supported by the record.”) (Court’s bracketing; citation omitted).

Nonetheless, the Court observes that on remand, “upon review of the evidence on the record of this proceeding,” Commerce found “that the additional¹² evidence on the record of this underlying proceeding, which the Court has not previously addressed and rejected [*sic*], as identified in the remand comments by the interested parties, is insufficient, on its own, to sustain a finding of a [particular market situation] within the analytical framework that the Court articulated in its opinion in this case.” The Court interprets this to mean that Commerce, pursuant to the Remand Order, reconsidered the entire record, in light of the Remand Order, and determined that the “additional” evidence “identified in the remand comments” was insufficient to support a particular market situation determination. Commerce then determined that, “consistent with the Court’s opinion and under respectful protest . . . that the record evidence is insufficient to sustain an affirmative [particular market situation] finding.” *Remand Results* at 44–45.

SeAH supports the result of remand of this issue. Although it “believe[s] that there were additional legal errors in Commerce’s analysis [on remand], those errors have now been rendered moot by Commerce’s determination that the evidence does not support its previous” particular market situation finding, and SeAH now argues that the Court should sustain Commerce’s determination. SeAH Cmts. at 2–3. NEXTEEL “submits that this determination is the only possible outcome on this issue that would be consistent with the Court’s order.” NEXTEEL Cmts. at 2.

U.S. Steel argues that in finding that a particular market situation does not exist in Korea, Commerce “misconstrued the Court’s Re-

¹² There is no indication in the remand results that Commerce re-opened the record and solicited “additional” information.

mand Order,” “violated the statutory framework by replacing the Court’s assessment of the facts for that of Commerce,” “failed to address the entirety of the administrative record,” and “ignored evidence that undermined certain conclusions.” U.S. Steel Cmts. at 2. The Court disagrees, as indicated above. In a lengthy part of the *Remand Results* (at pages 27–34), Commerce outlined in detail all of U.S. Steel’s comments, most of which Commerce found were an attempt to “reargue the issue of a [particular market situation] beyond addressing the merits of Commerce’s Draft Results of Redetermination.” *Remand Results* at 36. In ultimately reversing its finding of a particular market situation and removing the particular market situation adjustment from the margin calculations, Commerce explained that, while respectfully disagreeing with the Remand Order, upon review of the evidence on the record of this proceeding it found that the additional evidence on the record of this underlying proceeding, which the Court had not previously addressed and rejected, as identified in the remand comments by the interested parties, is insufficient, on its own, to sustain a finding of a particular market situation within the analytical framework that the Court articulated in its opinion in this case.

As Defendant contends, “contrary to U.S. Steel’s assertion, Commerce did not ignore record evidence or somehow limit the reconsideration to documents that were new to the period of review. Rather, Commerce reviewed the administrative record as a whole in light of the fact that the Court has already found much of the evidence insufficient to establish a particular market situation.” Def.’s Resp. at 4 (citing *Remand Results* at 38). “Beyond this record evidence, as Commerce explained, interested parties did not identify further evidence that is sufficient to demonstrate the presence of a particular market situation.” *Id.* Thus, Commerce reversed the application of a particular market situation on remand.

Defendant likewise contends, contrary to U.S. Steel’s assertions, that

Commerce properly concluded that there is no further evidence beyond that already considered and rejected by the [c]ourt in the Remand Order to demonstrate that government restructuring and overcapacity impacted the Korean market. . . . Specifically, as Commerce explained, interested parties were unable to demonstrate that the evidence of overcapacity in the Korean market “led to a situation in which, ‘the cost of materials and fabrication or other processing of any kind does not accurately reflect the cost of production in the ordinary course of trade.’”

Further, although Commerce found that evidence regarding restructuring may contribute to a particular market situation, because the court found the record evidence insufficient, Commerce reasonably concluded that any interplay among all the factors (including restructuring) “also is not sufficient in this instance for Commerce to make an affirmative [particular market situation] determination” and adjustment.

Id. at 5 (citing or quoting *Remand Results* at 13–14, 39, 45).

A final comment on the *Remand Results* must also be observed at this point. In addressing U.S. Steel’s comments, Commerce states the following:

To the extent that U.S. Steel contends that the Court’s statement in the Remand Order that “none of the cited documents pertain to the relevant period of review in this case” regarding government control of the Korean electrical industry is factually incorrect, we find that U.S. Steel cited to certain record evidence that is contemporaneous with the POR.[] However, Commerce is not in a position to reverse the Court’s findings. If U.S. Steel believes that the Court made factual findings that are manifestly incorrect, then U.S. Steel is free to seek reconsideration from the Court, if appropriate, or pursue an appeal to an appellate court.

Remand Results at 37 (referencing U.S. Steel’s Draft Remand Comments at 4 (citing PMS Allegation at Ex. 4, Sub-Ex. 6)).

This comment seems disingenuous. The Court already noted the evidence of record to which Commerce refers on remand (*i.e.*, “PMS Allegation at Ex. 4, Sub-Ex. 6”), *see SeAH Steel*, 45 CIT at __ n.11, 513 F. Supp. 3d at 1394 n.11, which is a KEPCO (Korea Electric Power Corporation) Form 20-F dated April 30, 2016, as filed with the Securities Exchange Commission. *See Joint Public App’x*, ECF No. 93 at 403. Commerce’s *Remand Results* make no further attempt to explain why that retrospective document, mainly covering KEPCO’s annual financial results for 2011 through 2015 (albeit with certain information to April 2016), would be “contemporaneous” with the OCTG period of review covering September 1, 2016, through August 31, 2017.¹³ The Court therefore deems Commerce’s claim (if indeed it is one) waived and concludes that Commerce’s remand redetermination

¹³ For that matter, the administrative review was initiated on November 13, 2017. *Initiation Notice*, 82 Fed. Reg. at 52,271. Although not a matter on the administrative record, the Court takes judicial notice of the fact that on April 28, 2017, KEPCO filed with the SEC a Form 20-F which covers years 2012 to 2016.

reversing its earlier particular market situation determination and removing the adjustment is supported by substantial evidence on the record.

II. Reallocation of NEXTEEL's Reported Costs for Non-Prime Products

In the *Final Results*, Commerce adjusted NEXTEEL's reported costs by assigning to the downgraded non-prime products an amount equal to their sales price, while allocating the difference between the full production cost and sales price to the production costs of prime OCTG, based on the theory that non-prime pipe cannot be used for the same application as prime products. In light of *Dillinger*, in which the U.S. Court of Appeals for the Federal Circuit ("CAFC") remanded Commerce's adjustment of non-prime product costs based on recorded projected sales prices, this Court remanded Commerce's reallocation of the costs for NEXTEEL's non-prime merchandise. See *Dillinger France S.A. v. United States*, 981 F.3d 1318, 1324 (Fed. Cir. 2020). On remand, Commerce reversed the adjustment made in the *Final Results* and relied on the actual costs of prime and non-prime products as reported by NEXTEEL.

U.S. Steel contends that Commerce's reversal of the adjustment is inconsistent with both *Dillinger* and this Court's order, arguing that while the Remand Order instructed Commerce to use actual costs, it did not presuppose that it would involve reallocation of costs. U.S. Steel Cmts. at 30. The Court concludes that Commerce has not misinterpreted *Dillinger*. Commerce explained that in light of *Dillinger*, Commerce was required to determine the actual costs of prime and non-prime products, and that in this case NEXTEEL neither separately classifies prime and non-prime products, nor values these products differently for inventory purposes, because the costs incurred in manufacturing the products are the same. *Remand Results* at 48 (citing NEXTEEL's June 7, 2018, SQR at SD-5). Commerce determined that NEXTEEL calculates the cost for non-prime products in its normal books and records in the same manner as prime products. *Id.* (citing NEXTEEL's Cost Verification Report at 17). Consequently, Commerce determined that NEXTEEL's reported costs reflect the actual costs of producing its prime and non-prime products as required in the Remand Order. Therefore, for purposes of the redetermination and consistent with *Dillinger*, Commerce reversed the adjustment made in the *Final Results* and relied on the actual costs of prime and non-prime products as reported by NEXTEEL.

U.S. Steel argues that the key distinction of this case and *Dillinger* is that Commerce relied on the respondent's normal books and re-

cords in *Dillinger*, which the CAFC determined did not accurately reflect production costs, whereas in this case Commerce adjusted the reported costs from NEXTEEL's books and records for its *Final Results*, *i.e.*, deviated from those books and records. U.S. Steel Cmts. at 26. That, however, is a distinction without a difference. The allocation in *Dillinger*, which the CAFC rejected, was based on the respondent's normal books and records and was substantially similar to Commerce's *Final Results* adjustment in this case, which Commerce reversed on remand. *Remand Results* at 14. The Court also notes Commerce's disagreement that departing from NEXTEEL's normal books and records was justified in this instance. *See* Def.'s Reply at 6–7.

Anticipating such response, U.S. Steel argues that section 1677b(f)(1)(A) does not require Commerce to use NEXTEEL's normal books and records in all circumstances, but only provides that Commerce will normally do so. But, as Defendant also notes, while U.S. Steel's point may be true, on remand Commerce simply reversed an adjustment to the reported cost after the Court found that the adjustment, which U.S. Steel favors, did not reflect actual costs. *See id.* at 7; *see Remand Results* at 14.

U.S. Steel also advances several arguments that range from asserting that NEXTEEL's reported costs are inconsistent with Korean GAAP to contending that NEXTEEL's non-prime products are out of scope products that should be treated as scrap. U.S. Steel Cmts. at 26–29. But, as Defendant notes, these arguments do not provide a basis for adjusting NEXTEEL's reported costs of non-prime products equal to “the amount it is able to recoup through the sale of such non-prime product (*i.e.*, its market price).” *See* Def.'s Resp. at 7 (quoting U.S. Steel Cmts. at 29). In *Dillinger*, the CAFC followed its earlier decision in *IPSCO, Inc. v. United States*, 965 F.2d 1056 (Fed. Cir. 1992), which held a method that “calculate[ed] costs for both limited-service and prime products on the basis of their relative prices” to be “an unreasonable circular methodology” because it “contravened the express requirements of the statute which set forth the cost of production as an independent standard for fair value.” *See id.* (quoting *Dillinger*, 981 F.3d at 1322 (quoting *IPSCO*, 965 F.2d at 1061)). “Accordingly, *Dillinger*, as interpreted by this Court in the Remand Order, specifically precludes the adjustment of NEXTEEL's reported costs that U.S. Steel seeks, *i.e.*, assigning to non-prime products the cost that is equal to their market price.” *Id.* at 7–8.

The Court concludes that substantial evidence supports Commerce's determination on this issue.

III. Adjustment for NEXTEEL's Production Line Suspension Costs

Commerce's determination to include the cost of suspending (or idling) production at one of NEXTEEL's facilities as part of NEXTEEL's G&A expenses was remanded by this Court for clarification or reconsideration. *SeAH Steel*, 45 CIT at ___, 513 F. Supp. 3d at 1040. The Court explained in its prior opinion that Commerce's *Final Results* did not explain what was deficient about NEXTEEL's records that would warrant departing from the statutory preference for determining costs according to an exporter's or producer's own records. *Id.*

On remand, Commerce provided further explanation of why it believed reclassification of NEXTEEL's reported losses was reasonable and why NEXTEEL's allocation of labor and overhead costs relating suspended lines to the cost of goods sold in its records was distortive. *Remand Results* at 17. Commerce explained that NEXTEEL suspended production on slitting (*i.e.*, used for skelp production) and threading (*i.e.*, used for OCTG production) lines for limited periods during the period of review, and that the costs related to these suspended lines were not assigned to products but were transferred directly to cost-of-goods-sold in accordance with NEXTEEL's normal accounting treatment. However, NEXTEEL did not account for these costs in the reported costs of producing OCTG, as these costs are unrelated to production activities.

Commerce detailed that its normal practice is to include routine shutdown expenses, *e.g.*, maintenance shutdowns, in a respondent's reported costs, and to associate those costs with the products produced on those lines, *i.e.*, as part of cost of manufacturing. In the underlying review, Commerce determined that the suspended loss was not related to a routine shutdown but related to NEXTEEL's suspension of production on certain lines for an "extended period of time" throughout fiscal years 2016 and 2017. *See, e.g., Remand Results* at 5, 16, 18. Commerce reasoned that, unlike a routine maintenance shutdown, once a production line is suspended or idled, it no longer relates to ongoing production:

A company can suspend production lines for numerous reasons; for example, the company has low current sales and no necessity to inventory the product produced on those production lines, or a company may suspend a production line while it assesses whether it should permanently close the production line. Regardless of the reason for the suspension, in contrast to the routine maintenance shutdowns, there are no longer products produced on those production lines or current intentions to pro-

duce products on those lines that can bear the burden of the costs associated with those production lines.[] However, the suspended lines, akin to idled assets, remain available to the company pending resumption of production on those lines, and represent excess capacity held by the company. We consider the cost of holding idle assets a period cost that relates to the general operations of the company as a whole, and not to the manufacture of specific products. Our practice has been to include depreciation on idle assets as part of the calculation of the G&A expense ratio.

Id. at 16–17.

Regarding NEXTEEL in particular, Commerce determined that the company did not allocate the labor and overhead costs related to the suspended lines to its pipe products in its normal books and records but recorded the suspension loss directly to cost of goods sold. *Id.* at 17. Commerce considered that this had the effect of “inflating” the cost of goods sold figure used in the allocation of G&A expenses—in other words, “this suspended loss was excluded from the reported costs (*i.e.*, not included in either per-unit COM or in G&A expense).” *Id.* (citing NEXTEEL’s June 7, 2018, SQR at SD-8, and NEXTEEL’s Cost Verification Report at 2, 12–13). Commerce’s solution was to include (or re-allocate) these non-product costs as G&A expenses. *See id.*

NEXTEEL argues that Commerce’s reliance on *Certain Pasta from Italy: Final Results of Antidumping Duty Administrative Review; 2014–2015*, 81 Fed. Reg. 91,120 (Dep’t of Commerce Dec. 16, 2016) and *Certain Polyester Staple Fiber from Korea: Final Results of the 2005–2006 Antidumping Duty Administrative Review* (“*Fiber from Korea*”), 72 Fed. Reg. 69,663 (Dep’t of Commerce Dec. 10, 2007), is inapposite and not dispositive of the issue here. In those cases, NEXTEEL contends, the question was whether depreciation associated with “idled assets” should be included in G&A expenses or excluded altogether from respondents’ costs, and Commerce distinguished whether the asset or facility had been permanently shut down, in which instance Commerce indicated that excluding the costs would be appropriate. *See, e.g., Fiber from Korea*, 72 Fed. Reg. 69,663, and accompanying issues and decision memorandum at cmt. 8. NEXTEEL complains that in neither case did Commerce appear to address the question of whether costs that had been recorded directly as cost of goods sold consistent with GAAP were appropriately reclassified as G&A expenses. NEXTEEL also complains that Commerce makes inconsistent references to the suspension as having been “for

limited periods during the period of review” as well as having been “for an extended period of time” within the same paragraph but does not articulate a standard for differentiating between routine shutdowns (which, in Commerce’s view, do not warrant cost reclassification) and more prolonged shutdowns (a situation which Commerce views as appropriate to reclassify costs). NEXTEEL Cmts. at 3–4 (quoting *Remand Results* at 15, 54).

The Court concludes that Commerce’s explanation on remand of its adjustment is reasonable. In a recent case, the Court sustained substantially identical treatment by Commerce of NEXTEEL’s suspended losses. See *Husteel Co. Ltd. v. United States* (“*Husteel*”), 45 CIT __, __, 520 F. Supp. 3d 1296, 1301 (2021) (“The court cannot say that it is unreasonable for Commerce, in its expertise, to determine that a company’s attribution of costs relating to the extended suspension of certain non-subject product lines as costs of goods sold results in an inaccurate reflection of the general expenses incurred in the production of subject merchandise.”). In the present circumstance, as NEXTEEL acknowledges, it is sufficient for the purpose of this case that Commerce determined that “the shutdown started before the POR and continued after the POR.” *Remand Results* at 54.

Taken as a whole, Commerce’s explanation, as elucidated by Defendant, is reasonable and consistent with *Husteel Co. Ltd. v. United States*, 45 CIT __, 520 F. Supp. 3d 1296 (2021). Substantial evidence supports Commerce’s determination on this issue.

IV. SeAH’s Further Manufacturing Costs

The statute, 19 U.S.C. § 1677a(d)(2), requires the deduction of “the cost of any further manufacture or assembly” from constructed export price. During the period of review, SeAH’s U.S. affiliate Pusan Pipe America Inc. (“PPA”) imported OCTG pipe from SeAH, which PPA either subjected to further manufacture through third-party tolling or resold without further processing. In the *Final Results*, Commerce attributed PPA’s G&A expenses proportionally by applying PPA’s reported general expense ratio as follows: (1) for the further manufactured products, Commerce applied PPA’s general expense ratio to the total cost of the further manufacturing plus the cost of the imported OCTG that was further manufactured, and included these general expenses as “further manufacturing” cost under 19 U.S.C. § 1677a(d)(2); and (2) for products not further manufactured, Commerce applied PPA’s general expense ratio to the cost of producing the imported OCTG and included these expenses as “indirect selling” under 19 U.S.C. § 1677a(d)(1)(D) (*i.e.*, “any selling expenses not deducted under subparagraph (A), (B), or (C)”). See *Final IDM* at 79.

The Court sustained the application of PPA's general expense ratio to the cost of the imported OCTG that was not further manufactured. However, with regard to the imported OCTG that was further manufactured, the Court concluded that the cost of the imported OCTG itself was not a "cost incurred for further manufacture" under 19 U.S.C. 1677a(d)(2); therefore, Commerce's application of PPA's general expense ratio to the cost of the imported OCTG, and the deduction of these general expenses as further manufacturing costs under the statute, was not in accordance with the law. In other words, the application of PPA's G&A expense ratio to the cost of the imported OCTG pipe essentially, and impermissibly, treated the cost of importation as a "further manufacturing" cost, and the Court remanded to Commerce for recalculation. *SeAH Steel*, 45 CIT at ___, 513 F. Supp. 3d at 1043, 1046.

On remand, Commerce continued to determine, consistent with its normal practice, that general expenses relate to the entire activities of the company and therefore should be allocated proportionally to those activities. *Id.* (citing *Welded Line Pipe from the Republic of Korea: Final Determination of Sales at Less Than Fair Value*, 80 Fed. Reg. 61,366 (Dep't of Commerce Oct. 13, 2015) (*Line Pipe from Korea*), and accompanying IDM at cmt 20, and *Certain Hot-Rolled Steel Flat Products from Brazil: Final Determination of Sales at Less Than Fair Value and Final Affirmative Determination of Critical Circumstances, in Part*, 81 Fed. Reg. 53,424 (Dep't of Commerce Aug. 12, 2016) (*Hot-Rolled Steel from Brazil*), and accompanying IDM at cmt 5). Further, as Defendant notes, the Court has been clear that the statute requires deduction of both further manufacturing costs and selling expenses. Def.'s Resp. at 20–21 (citing *U.S. Steel Corp. v. United States*, 34 CIT 252, 256, 712 F. Supp. 2d 1330, 1336 (2010); *SeAH Steel*, 45 CIT at ___, 513 F. Supp. 3d at 1042 ("Commerce must deduct both the selling expenses and the cost of further manufacture from the price used to determine constructed export price.")). Bearing that in mind, Commerce adopted a revised approach that does not deduct the cost of PPA's imported OCTG pipe as a further manufacturing expense. *See Remand Results* at 20. For the further-manufactured OCTG, Commerce applied PPA's G&A expense ratio to the total cost of further manufacturing and included the amount as "further manufacturing" under 19 U.S.C. § 1677a(d)(2). *Id.* at 23. Commerce also applied PPA's G&A expense ratio to the cost of production of the imported OCTG, whether further manufactured or not, and included the amount as "indirect selling expenses" under 19 U.S.C. § 1677a(d)(1)(D). *Id.* Commerce explained that "[t]his revised classification both satisfies the requirements of the statute and allows for a

logical and full accounting of the company's general expenses. It also complies with the Court's remand instructions to recalculate SeAH's further manufacturing costs in accordance with the law." *Id.*; *see also id.* at 58–59.

SeAH contends that the statute does not permit deduction from the constructed export price of "any and all expenses" including "G&A expenses incurred by the U.S. affiliate among them." SeAH Cmts. at 5. The argument misses the mark.

G&A expenses are costs that support a company's overall operations. They are day-to-day costs that a business must incur to continue to exist or operate (e.g., property taxes, business licenses, insurance, accounting/auditing services and personnel costs, etc.). Consequently, these costs that enable a company to continue to operate are indirectly related to those operations. If a company only resells goods, then its G&A expenses are appropriately considered selling expenses. *See SeAH Steel*, 45 CIT at ___, 513 F. Supp. 3d at 1044. Likewise, if a company both resells and manufactures, those expenses logically support both activities. Here, PPA both resells purchased goods and provides for the further manufacture of purchased goods prior to reselling them. If PPA had only resold purchased goods, the G&A expenses would have been recognized as selling expenses, but because PPA arranges for the further manufacture of certain purchased goods, SeAH argues that Commerce cannot transform into purely "selling" expenses the G&A expenses that support the company's overall operations (which, for PPA, are both reselling and further manufacturing) and therefore Commerce should recognize in its calculations only the amounts allocated to PPA's further manufacturing as allowable deductions.

The language of 19 U.S.C. § 1677a(d)(1)(D), covering the adjustments to constructed export price, is broadly written to include "any selling expenses not deducted" under the other subparagraphs. The Statement of Administrative Action also confirms a broad view of 19 U.S.C. § 1677a(d)(1)(D) as providing for the deduction of any indirect selling expense from constructed export price. *See* Statement of Administrative Action, H.R. Doc. 103–316, vol. 1 (1994) ("SAA") at 824. The SAA defines "indirect selling expenses" as "expenses which do not meet the criteria of 'resulting from and bearing a direct relationship to' the sale of the subject merchandise, do not qualify as assumptions, and are not commissions." *Id.*

In calculating indirect selling expenses, Commerce "generally will include the G&A expenses incurred by the United States selling arm of a foreign producer," a practice that has been sustained by the court. *See Aramide Maatschappij V.o.F. v. United States*, 19 CIT 1094, 1101,

901 F. Supp. 353, 360 (1995); *see also* *NEXTEEL Co. v. United States*, 44 CIT __, __, 450 F. Supp. 3d 1333, 1346 (2020) (“Commerce’s explanation of its accounting treatment methodology for classifying PPA’s G&A expenses as indirect selling expenses and deducting the expenses when calculating constructed export price is reasonable and responsive to the court’s request for clarification.”). Here, in explaining its treatment of all of PPA’s G&A expenses as indirect selling expenses, Commerce found significant the fact

that PPA is not performing further manufacturing on its own and does not maintain any production facilities for further manufacturing. Rather, these processes are performed by tollers, and SeAH’s involvement in further manufacturing is perfunctory in nature and is limited to paying a processing fee, which we accounted for as a further manufacturing expense. Apart from paying the processing fee to the tollers, which we accounted for, SeAH is predominantly a selling entity and, thus, it is reasonable to treat *the portion* of its G&A expenses that are related to the cost of the imported products as selling expenses.

Remand Results at 58 (citing SeAH Feb. 27, 2018 EQR at 3–4) (emphasis added).

SeAH contends that Commerce’s decision is inconsistent with a recent determination in a review of *Heavy Walled Rectangular Pipe from Korea*, which SeAH claims constitutes an established practice of distinguishing between G&A expenses and selling expenses. SeAH Cmts. at 7. That proceeding concerned a respondent’s argument that the salary of the company’s CEO should be allocated between indirect selling expenses (“ISE”) and G&A expenses. In *Heavy Walled Rectangular Pipe from Korea*, Commerce rejected the proposal to allocate “equally” between ISE and G&A expenses because the CEO’s duties included overseeing production, investment, and general operations of the company, and concluded the salary was appropriately considered completely as a G&A expense. *See Heavy Walled Rectangular Welded Carbon Steel Pipes and Tubes from Korea*, 86 Fed. Reg. 35,060 (Dep’t of Commerce July 1, 2021), and accompanying Issues and Decision Mem. (“*CSP from Korea*”) at 46–47 (cmt. 6).

The situation in that proceeding is distinguishable from the present circumstance. The issue here is how to treat G&A expenses of a U.S. importer, which primarily serves as a selling arm of a foreign producer, concerning which Commerce “generally will include the G&A expenses incurred by the United States selling arm of a foreign

producer,” a practice long sustained by the court. *See, e.g., Aramide*, 19 CIT at 1101, 901 F. Supp. at 360.¹⁴ SeAH is essentially arguing that PPA should be treated the same as producers and/or companies performing further manufacturing (which have production facilities, factory overhead and other significant expenses associated with manufacturing), when PPA is not itself performing the further manufacturing. However, the Court’s role is to examine the record to evaluate whether Commerce’s determination is supported by substantial evidence. On this issue, the determination is supported.

SeAH has not identified any statutory language that prohibits Commerce from treating G&A expenses of PPA, a selling arm of SeAH in North America, as indirect selling expenses. PPA is a selling arm of SeAH without production facilities, and Commerce determined that its role in further manufacturing is “perfunctory in nature.” *Remand Results* at 58. The Court does not conclude that Commerce’s treatment on remand of the G&A expenses for SeAH’s U.S. affiliate was improper. In view of Commerce’s explication, the Court upholds Commerce’s determination as supported by substantial evidence on the record.

V. Inclusion in SeAH’s G&A Expense Ratio of Inventory Revaluation Losses

Considering Commerce’s determination in the *Final Results* of inventory valuation losses among SeAH’s financial statements, the Court previously found it “unclear from the record or from Commerce’s explanation whether the inventory valuation losses related to SeAH’s raw materials and work-in-progress were expenses.” *SeAH Steel*, 45 CIT at ___, 513 F. Supp. 3d at 1045. The Court held that Commerce failed to cite record evidence “demonstrating that the inventory valuation losses became realized costs, which it seems would occur only if the raw materials and work-in-process were sold” and, thus, remanded this issue for further explanation or reconsideration. *Id.* at ___, 513 F. Supp. 3d at 1045–46. On remand, Commerce provided further explanation for including SeAH’s raw material work in-process inventory valuation losses in its G&A expense ratio, with additional details and citations to record evidence that more clearly demonstrate that the inventory valuation losses are indeed recog-

¹⁴ Moreover, in *Heavy Walled Rectangular Pipe from Korea*, Commerce expressly rejected the argument that its determination was inconsistent with its determination in *OCTG from Korea*. *CSP from Korea* at 47. Commerce explained that “each administrative review is a separate segment of proceedings with its own unique facts” and that “although the facts in *OCTG from Korea* may differ from those in the instant case, in determining whether particular items may be included in G&A, Commerce followed its practice by reviewing the nature of the item and its relation to the general operations of the company.” *Id.*

nized as actual in SeAH's normal books and records. *Remand Results* at 24–27.

Commerce explained on remand that inventory valuation gains and losses “are recognized by companies, including SeAH, in their normal books and records in compliance with GAAP.” *Id.* at 25. GAAP “principles require the restatement of currently held inventory values to the lower of their cost or net realizable value.” *Id.* Commerce stated that the “purpose of this rule, which is also a part of U.S. GAAP and International Accounting Standards, as well as many other national accounting systems, is to comply with a basic tenet of accounting—the “matching” principle.” *Id.* “In the context of inventory valuation,” Commerce explained, “the matching principle requires that a loss of inventory value during a given accounting period be charged against the revenues of the period in which it occurs.” *Id.* at 25–26. Commerce examined SeAH's audited financial statements and concluded that “SeAH follows the lower of cost or net realizable value policy for its inventories and that any such losses in inventory value are recognized as a current expense on the income statement.” *Id.* at 26. Thus, Commerce determined that “the key record evidence that SeAH's inventory valuation losses are actual and not imputed expenses is found in SeAH's audited income statement and in its reported reconciliation of the total costs from the income statement to the total reported costs.” *Id.*

Although the inventory loss is not a separate line item in the financial statements, Commerce explained that it is included as a component of the company's total costs in the overall reconciliation worksheets and supporting documentation. *Id.* Commerce further explained how the inventory valuation loss can be traced from SeAH's normal books and records to its audited financial statement, and confirmed that “the inventory valuation losses were recognized as expenses on SeAH's 2017 audited income statement.” *Id.* Because the statute directs Commerce to rely on a company's GAAP-based normal books and records unless such books and records do not reasonably reflect the costs associated with the production and sale of the merchandise, it was reasonable for Commerce to account for these costs in its dumping calculations. 19 U.S.C. § 1677b(f)(1)(A).

Rather than refute this record evidence, SeAH contends that Commerce allegedly conceded “that the losses in question are not realized, and that its inclusion of the [l]osses in its cost calculation was based on a demonstrably false assumption.” SeAH Cmts. at 6. The Court disagrees. Commerce determined that “the inventory valuation losses are indeed recognized as actual expenses in SeAH's normal books and

records.” *Remand Results* at 26. Commerce explained that “GAAP seeks to ensure that a company’s balance sheet is not overstated and that the current period net profit or loss is appropriately charged for any significant changes in the value of the assets held by the company” and that, in Commerce’s view, an inventory revaluation of losses is “similar to a company’s recognition of bad debt expenses, translation gains or losses, or impairment losses, all of which reflect changes in the values of assets or liabilities held by a company at a period end.” *Id.* at 64. Thus, consistent with its home country GAAP, SeAH recognized various estimated valuations as actual costs in its own audited financial statements, which (for example) resulted in bad debt expenses, depreciation expenses, etc., including the inventory valuation losses that are in question, on its profit and loss statement. *See* Def.’s Resp. at 16–17 (citing SeAH’s supplemental section A response dated June 8, 2018, at Ex. SA-2-B, SeAH 2017 audited financial statements at note 4 (showing allowance for doubtful accounts), note 7 (showing loss on valuation on inventories), note 8 (showing accumulated depreciation), note 24 (showing depreciation expense, bad debt expense, etc.)).

To demonstrate an error in Commerce’s treatment of its inventory valuation losses, SeAH must demonstrate that its GAAP compliant audited financial statements do not reasonably reflect the costs associated with the production and sale of the merchandise. *See* 19 U.S.C. § 1677b(f)(1)(A). Because the costs at issue are reflected in SeAH’s own GAAP-based financial statements, SeAH essentially argues that its own books are unreasonable and must be set aside because they result in a double-counting of costs. *See* SeAH Cmts. at 9 (“Commerce also attempted to refute SeAH’s contention that the inclusion of inventory-valuation losses in the calculated costs resulted in a double-counting of SeAH’s actual cost of materials.”). To the contrary, however, the Court observes that Commerce does not appear to have double-counted. *See Remand Results* at 64 (“We also disagree that following a company’s GAAP-based normal books and records results in a double-counting of raw material and [work-in-progress] consumption costs.”).

Defendant explains that SeAH’s argument hinges on a faulty assumption that the total costs of manufacturing assigned to finished goods (which include the full value of raw material costs consumed during the production) include the same costs as SeAH’s G&A expenses (which include the net inventory valuation losses from the profit and loss statement that recognize the net change in the value

of inventories on hand, *i.e.*, the inventory that has not been consumed during the production). Defendant argues that “SeAH improperly conflates two distinct types of expenses: the loss associated with the inventory on hand (*i.e.*, inventory that has not been consumed in production) and the cost of the raw materials and semi-finished goods consumed during the production process.” Def.’s Resp. at 17–18.

In its comments in the administrative proceeding, SeAH attempted to demonstrate unsuccessfully the alleged double-counting through a hypothetical example, which Commerce addressed. *Remand Results* at 65. Specifically, Commerce explained why SeAH’s hypothetical example demonstrated the opposite—that is, it shows why the net cost of production, *i.e.*, the TOTCOM assigned to finished goods (including the full value of raw material costs consumed during production) plus the G&A expenses (including the net inventory valuation losses from the profit and loss statement that recognize the net change in the value of inventories on hand), do not double-count costs. *Id.* But, having presented a hypothetical example, SeAH now faults Commerce for elaborating on hypothetical facts, which SeAH claims differ from how its accounting system works. SeAH Cmts. at 12–13 (claiming that Commerce misunderstood its accounting). The Court does not interpret Commerce’s response to SeAH’s hypothetical, however, as intending to imply that SeAH consumed raw materials at the lower value, but only to demonstrate why the net of the two categories of expenses (*i.e.*, TOTCOM plus G&A expenses or cost of production) would not double-count costs. The Court notes that GAAP’s intention with the lower-of-cost-or-market policy is for a company to immediately recognize a loss when an inventoried asset falls below its net realizable value, and therefore “match” it to the current period activity.¹⁵ Commerce’s G&A expense calculations are based on the current period in which the inventory valuation losses in value of inventory on hand was recognized by SeAH in its audited profit and loss statement; therefore, Commerce likewise included the inventory valuation losses in its calculation SeAH’s G&A expenses.

Contrary to SeAH’s assertions, the Court agrees with Commerce that there is no double-counting because there are two separate and distinct costs that are being captured here: the product-specific TOT-

¹⁵ See, *e.g.*, Financial Accounting Standards Board (FASB), Standard 330–10–35–2: “The cost basis of recording inventory ordinarily achieves the objectives of a proper matching of costs and revenues. However, under certain circumstances cost may not be the amount properly chargeable against the revenues of the period in which it occurs. A departure from cost is required in these circumstances because cost is satisfactory only if the utility of the goods has not diminished since their acquisition; a loss of utility shall be reflected as a charge against the revenues of the period in which it occurs. Thus, in accounting for inventories, a loss shall be recognized whenever the utility is impaired . . .” (emphasis added) (available at <https://asc.fasb.org/section&trid=2127015>).

COM reported by SeAH reflects the historical costs of the raw materials and semi-finished goods that were consumed in production of finished goods, while the fiscal year G&A expenses reflect the net loss, as recorded on the profit and loss statement, in the value of inventory that was on hand (*i.e.*, not consumed) at the end of the year, a recognition that is required under the home country GAAP followed by SeAH. This recognition of loss in inventory values is no different from accounting entries that recognize the depreciation of fixed assets, bad debt expenses related to current accounts receivables, or asset impairment losses, all of which seek to conservatively allocate the loss in asset values to the production or revenues generated in the period in which the losses occurred.

Finally, the Court concludes that Commerce does not appear to have misunderstood SeAH's accounting in its normal books and records. To demonstrate the alleged misunderstanding, SeAH offers a four-step mini tutorial on its accounting of inventory-valuation losses. SeAH Cmts. at 10–11. However, in doing so, SeAH provides only a balance sheet perspective and omits the corresponding accounting entries that affect the company's profit and loss statement.¹⁶ *See id.* In accordance with GAAP, Commerce explained that SeAH's normal books and records restate the inventory balances on SeAH's balance sheet on a quarterly basis so that they conservatively reflect the lower of cost or net realizable values. At the same time, Commerce determined that SeAH records on its income statement the associated net gain or loss that is the result of this revaluation. *See Remand Results* at 25–26; IDM at 83; *see also* SeAH Cost Verification Report at 4, PR 316. The Court concludes that Commerce's determination that there is no double-counting of expenses because the net inventory losses recorded on SeAH's GAAP-based audited income statement are periodic expenses related to a change in the value and future utility of currently held inventory and are not related to the inventory consumed in current production, is reasonable and supported by substantial evidence.

The Court concludes that Commerce properly included SeAH's inventory valuation losses in its G&A expense ratio and that substantial evidence supports Commerce's determination.

CONCLUSION

In view of the foregoing, judgment will be entered sustaining the *Remand Results*.

¹⁶ Defendant contends that SeAH's tutorial does not reflect double-entry accounting. "For example, when SeAH records an inventory valuation loss (which is discussed in step 3 of SeAH's mini tutorial), there is a corresponding debit to current period expenses." Def.'s Resp. at 19 (citation omitted).

Dated: August 26, 2022
New York, New York

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

Slip Op. 22–101

SEAH STEEL CORPORATION, Plaintiff, v. UNITED STATES, Defendant, and UNITED STATES STEEL CORPORATION, MAVERICK TUBE CORPORATION, IPSCO TUBULARS INC., TENARIS BAY CITY, INC., AND VALLOUREC STAR L.P., Defendant-Intervenors.

Before: Jennifer Choe-Groves, Judge
Court No. 20–00150

[Sustaining the U.S. Department of Commerce’s remand results in the 2017–2018 administrative review of the antidumping duty order on oil country tubular goods from the Republic of Korea.]

Dated: August 29, 2022

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Roger B. Schagrín, Elizabeth J. Drake, and Luke A. Meisner, Schagrín Associates, of Washington, D.C., for Defendant-Intervenor Vallourec Star, L.P.

OPINION**Choe-Groves, Judge:**

Plaintiff SeAH Steel Corporation (“SeAH” or “Plaintiff”) filed this action challenging the final results published by the U.S. Department of Commerce (“Commerce”) in the 2017–2018 administrative review of the antidumping duty order on oil country tubular goods (“OCTG”) from the Republic of Korea (“Korea”). *See Certain Oil Country Tubular Goods from the Republic of Korea (“Final Results”)*, 85 Fed. Reg. 41,949 (Dep’t of Commerce July 13, 2020) (final results of antidumping duty administrative review; 2017–2018); *see also* Issues and Decision Mem. for the Final Results of the 2017–2018 Admin. Review of the Antidumping Duty Order on Certain Oil Country Tubular Goods from the Republic of Korea (July 6, 2020) (“Final IDM”), ECF No. 20–5.

Before the Court are the Final Results of Redetermination Pursuant to Court Remand Oil Country Tubular Goods from the Republic of

Korea (“*Remand Results*”), ECF No. 80–1. *See also* United States Steel Corp.’s Comments Opp’n Remand Redetermination (“U.S. Steel’s Br.”), ECF No. 84; Def.’s Resp. Comments Regarding Remand Redetermination (“Def.’s Br.”), ECF No. 85; Comments of SeAH Steel Corp. Supp. Commerce’s January 24, 2022, Redetermination (“SeAH’s Br.”), ECF No. 86. For the reasons discussed below, the Court sustains the *Remand Results*.

BACKGROUND

The Court presumes familiarity with the facts and procedural history of this case and recites the facts relevant to the Court’s review of the *Remand Results*. *See SeAH Steel Corp. v. United States (“SeAH Steel I”)*, 45 CIT __, __, 539 F. Supp. 3d 1341 (2021). Commerce initiated this fourth administrative review (“OCTG IV”) of the anti-dumping duty order on OCTG from Korea for the period covering September 1, 2017 through August 31, 2018. *Initiation of Antidumping and Countervailing Duty Admin. Reviews*, 83 Fed. Reg. 57,411, 57,413–14 (Dep’t of Commerce Nov. 15, 2018) (initiation notice). Commerce selected Hyundai Steel Company (“Hyundai Steel”) and SeAH as mandatory respondents for individual examination. *Certain Oil Country Tubular Goods from the Republic of Korea*, 84 Fed. Reg. 63,615, 63,615 (Dep’t of Commerce Nov. 18, 2019) (prelim. results of antidumping duty admin. review; 2017–2018); *see also* Decision Mem. for the Prelim. Results of the 2017–2018 Admin. Review of the Anti-dumping Duty Order on Certain Oil Country Tubular Goods from the Republic of Korea (Nov. 8, 2019) (“Prelim. DM”), PR 285.¹

In the *Final Results*, Commerce assigned weighted-average dumping margins of 0% for Hyundai Steel, 3.96% for SeAH, and 3.96% for non-examined companies. *Final Results*, 85 Fed. Reg. at 41,950. Commerce based normal value on constructed value for Hyundai Steel and SeAH because neither mandatory respondent had a viable home market or third-country market during the period of review. Final IDM at 68.

Commerce applied a differential pricing analysis and calculated SeAH’s weighted-average duty margin by the alternative average-to-transaction method. *Id.* at 79–91. Commerce determined that a particular market situation existed in Korea based on a totality-of-the-circumstances assessment of five factors, namely: (1) subsidies from the Government of Korea to producers of hot-rolled coil, (2) the deluge of Chinese hot-rolled products exerting downward pressure on Korean domestic hot-rolled coil prices, (3) strategic alliances between

¹ Citations to the administrative record reflect the public record (“PR”) document numbers.

Korean hot-rolled coil suppliers and Korean OCTG producers, (4) the Government of Korea's influence over the cost of electricity, and (5) steel industry restructuring efforts by the Government of Korea. *See id.* at 5–6. Commerce used a regression-based analysis to quantify the impact of the particular market situation in Korea and adjusted for the particular market situation determination by increasing the reported hot-rolled coil costs by a rate of 17.13%. *See id.* at 49, 61; Commerce's Final Analysis Mem. for SeAH (Jul. 21, 2020) ("SeAH Final Calculations Mem.") at 2, PR 350. Commerce utilized the 2018 financial statements of Tenaris S.A. ("Tenaris") and PAO TMK ("TMK") to calculate SeAH's constructed value profit and selling expenses. *See* Final IDM at 67. Commerce deducted SeAH's reported freight revenue up to actual freight cost and calculated SeAH's constructed export price profit rate using the Tenaris and TMK 2018 financial statements. *See id.* at 106, 109–11; *see also* Analysis of Data Submitted by SeAH Steel Corp. for Prelim. Results (Nov. 8, 2019) ("SeAH Prelim. Calculations Mem.") at 3, PR 290.

In *SeAH Steel I*, 45 CIT __, __, 539 F. Supp. 3d 1341, 1366 (2022), the Court sustained two issues: (1) Commerce's profit calculation included in SeAH's constructed export price and (2) Commerce's exclusion of freight revenue in calculating SeAH's constructed export price. The Court remanded two issues: (1) Commerce's determination of a particular market situation in Korea as unsupported by substantial evidence and (2) Commerce's application of the Cohen's *d* test as part of the differential pricing analysis for further explanation. *Id.*

On remand under protest, Commerce determined that "[n]otwithstanding Commerce's objections to the Court's position that the evidence on which Commerce relied in reaching its finding of an affirmative [particular market situation] determination was insufficient, Commerce is reversing its [particular market situation] finding and removing the adjustment to SeAH's [cost of production] for purposes of this redetermination pursuant to remand." *Remand Results* at 6. With respect to the Cohen's *d* test for differential pricing, Commerce determined on remand that "it is unnecessary to address the issue of applicability of [the] Cohen's *d* test for purposes of this redetermination, because the selection of the comparison method has no material effect on the results of this redetermination." *Id.* at 8.

JURISDICTION AND STANDARD OF REVIEW

The Court has jurisdiction under 19 U.S.C. § 1516a(a)(2)(B)(iii) and 28 U.S.C. § 1581(c), which grant the Court authority to review actions contesting the final results of an administrative review of an anti-dumping duty order. The Court will hold unlawful any determination found to be unsupported by substantial evidence on the record or otherwise not in accordance with the law. 19 U.S.C. § 1516a(b)(1)(B)(i). The Court also reviews determinations made on remand for compliance with the Court's remand order. *Ad Hoc Shrimp Trade Action Comm. v. United States*, 38 CIT __, __, 992 F. Supp. 2d 1285, 1290 (2014), *aff'd*, 802 F.3d 1339 (Fed. Cir. 2015).

DISCUSSION

I. Particular Market Situation

In *SeAH Steel I*, the Court reviewed Commerce's determination that a particular market situation distorted the cost of production of OCTG based on the cumulative effect of five factors: (1) subsidization of Korean hot-rolled coil products by the Korean Government; (2) distortive pricing of unfairly-traded Chinese hot-rolled coil; (3) "strategic alliances" between Korean hot-rolled coil suppliers and Korean OCTG producers; (4) distortive government control over electricity prices in Korea; and (5) steel industry restructuring efforts by the Korean Government. *SeAH Steel I* at 1352. This Court stated:

In summary, the Court concludes that substantial record evidence does not support Commerce's cumulative particular market situation determination in Korea for the 2017–2018 period of review because the record evidence does not demonstrate the existence during the period of review of the five factors allegedly underlying the particular market situation determination. The Court remands Commerce's particular market situation determination *for further explanation or reconsideration consistent with this opinion*.

Id. at 1358 (emphasis added).

Commerce determined on remand that based on the evidentiary record and the "constraints imposed on [Commerce] by the Court's ruling," there was an insufficient evidentiary basis to sustain an affirmative particular market situation determination. *Remand Results* at 7. Commerce explained that "[f]or this redetermination, under protest, we continue to find no [particular market situation] existed in Korea during the [period of review], and we have removed

the [particular market situation] adjustment from our calculation of normal value.” *Id.* at 26.

U.S. Steel filed comments arguing that Commerce erred in the *Remand Results* by limiting its analytical review. Specifically, U.S. Steel alleges that “[b]ecause Commerce’s *Remand Results* adhere to strictures that contravene the Federal Circuit’s analysis in *NEXTEEL*, [28 F.4th 1226 (Fed. Cir. 2022)], remand is necessary for Commerce to render a [particular market situation] determination unencumbered by those unlawful restrictions.” U.S. Steel’s Br. at 2. U.S. Steel emphasizes the recent decision by the U.S. Court of Appeals for the Federal Circuit (“CAFC”) stating that, “[o]n remand, Commerce may seek to justify the particular market situation in accordance with this opinion.” *NEXTEEL Co. v. United States*, 28 F.4th 1226, 1238 (Fed. Cir. 2022). U.S. Steel contends that remand is warranted because “Commerce erroneously treated the Court’s observations with respect to Commerce’s Final IDM as having locked Commerce into those specific positions on remand. Such issues distorted Commerce’s analysis of the contribution of HRC imports, subsidization, government restructuring, and electricity market control to the Korean [particular market situation].” U.S. Steel’s Br. at 20. U.S. Steel faults Commerce for impermissibly restricting its interpretation of the Court’s remand order in *SeAH Steel I* and thus rendering the *Remand Results* “legally erroneous.” *Id.*

The Government argues to the contrary that remand is not warranted and asks the Court to sustain the *Remand Results*. The Government asserts that “[c]ontrary to U.S. Steel’s assertion, Commerce did not ignore record evidence. Rather, Commerce reviewed the administrative record as a whole in light of the fact that the Court has already found much of the evidence insufficient to establish a particular market situation.” Def.’s Br. at 4. The Government contends that “Commerce did not reopen the record on remand and, thus, the evidence on the record is the same.” *Id.* at 5.

U.S. Steel focuses on the CAFC’s opinion in *NEXTEEL Co. v. United States*, 28 F.4th 1226 (Fed. Cir. 2022), stating that the U.S. Court of International Trade cannot direct Commerce to reach a particular outcome. *See generally* Def.’s Br.; *see also NEXTEEL Co. v. United States*, 28 F.4th 1226 (Fed. Cir. 2022). U.S. Steel’s argument is misplaced and inapplicable to this case.

First, the Court notes that Commerce’s determinations made on remand are reviewed for compliance with the Court’s remand order. *Ad Hoc Shrimp Trade Action Comm. v. United States*, 38 CIT __, __, 992 F. Supp. 2d 1285, 1290 (2014), *aff’d*, 802 F.3d 1339 (Fed. Cir. 2015). U.S. Steel argues incorrectly that it is contrary to law for

Commerce to comply with the Court's remand order, when it is settled law that the Court will review Commerce's remand redeterminations in part to assess compliance with the Court's remand order. *See id.*

Second, the Court notes that in *SeAH Steel I*, this Court did not order the Government to arrive at any particular outcome on remand. Rather, this Court issued a broad, open-ended remand that ordered Commerce to "further explain or reconsider its particular market situation determination." *SeAH Steel I* at 1366. The Court neither precluded Commerce from revisiting all of the evidence and providing further explanation, nor prevented Commerce from reopening the record in its particular market situation analysis. Commerce stated in its *Remand Results* that "Commerce's analysis of the existence of a [particular market situation] is made independently based on the administrative record of this review, and in a manner that is consistent both with the statute, and here, the Court's remand opinion and order." *Remand Results* at 16. U.S. Steel urges the Court to remand the case for Commerce to undertake a new remand analysis, but the Court is not persuaded because Commerce already had an opportunity to re-examine or reopen the record in the open-ended remand but chose to remove the particular market situation adjustment upon reviewing the record. SeAH argues that the remand process was "plainly consistent with the Court's remand order and Commerce's obligations on remand," noting that "[i]n the remand proceeding, Commerce reconsidered its original decision in light of the findings in the Court's opinion, reexamined the full record before it, solicited comments from all interested parties, and addressed all of the arguments and evidence presented by the parties. There is no basis on this record for faulting Commerce's remand procedures." SeAH's Br. at 4.

The Government itself requests that the Court sustain, and not remand, the *Remand Results*, and the Court agrees with Defendant on this matter in light of the open-ended remand and Commerce's consideration of the full record on remand.

II. Differential Pricing Analysis

With respect to the Cohen's *d* test for differential pricing, Commerce determined on remand that "it is unnecessary to address the issue of applicability of [the] Cohen's *d* test for purposes of this redetermination, because the selection of the comparison method has no material effect on the results of this redetermination." *Remand Results* at 8. Commerce explained that because it eliminated the particular market situation adjustment from the calculation of the cost of production and normal value, the weighted-average dumping margins calculated using the average-to-average method and alter-

native comparison methods are either zero or *de minimis*. *Id.* at 7. SeAH agrees with Commerce that the differential pricing analysis has been rendered moot because without the particular market situation adjustment, the dumping margin for SeAH would be *de minimis* regardless of which comparison method is used by Commerce. SeAH's Br. at 13.

The Court concludes that because Commerce determined SeAH's dumping margin to be *de minimis*, it is reasonable for Commerce to not apply the differential pricing analysis. The Court sustains Commerce's determination on remand to not apply the differential pricing analysis to calculate SeAH's dumping margin.

CONCLUSION

The Court sustains Commerce's *Remand Results*.

Judgment will be entered accordingly.

Dated: August 29, 2022

New York, New York

/s/ Jennifer Choe-Groves

JENNIFER CHOE-GROVES, JUDGE

Slip Op. 22–102

BLUESCOPE STEEL LTD., BLUESCOPE STEEL (AIS) PTY LTD., AND
BLUESCOPE STEEL AMERICAS, INC., Plaintiffs, v. UNITED STATES,
Defendant, and UNITED STATES STEEL CORP., et al., Defendant-
Intervenors.

Before: Richard K. Eaton, Judge
Court No. 19–00057

[Remand Results are sustained.]

Dated: August 30, 2022

Christopher A. Dunn and *Daniel L. Porter*, Curtis, Mallet-Prevost, Colt & Mosle LLP, of Washington, D.C., for Plaintiffs BlueScope Steel Ltd., BlueScope Steel (AIS) Pty Ltd., and BlueScope Steel Americas, Inc.

Kelly A. Krystyniak, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, D.C., for Defendant the United States. With her on the brief were *Brian M. Boynton*, Principal Deputy Assistant Attorney General, *Patricia M. McCarthy*, Director, and *Tara K. Hogan*, Assistant Director. Of counsel on the brief was *Spencer Neff*, Attorney, Office of the Chief Counsel for Trade Enforcement and Compliance, U.S. Department of Commerce, of Washington, D.C.

Sarah E. Shulman and *Thomas M. Beline*, Cassidy Levy Kent (USA) LLP, of Washington, D.C., for Defendant-Intervenor United States Steel Corp.

OPINION

Eaton, Judge:

Before the court are the U.S. Department of Commerce’s (“Commerce” or the “Department”) Final Results of Redetermination pursuant to the court’s order in *BlueScope Steel Ltd. v. United States*, 45 CIT __, 548 F. Supp. 3d 1351 (2021) (“*BlueScope I*”) and the parties’ submissions. See Final Results of Redetermination Pursuant to Court Remand (Apr. 12, 2022), ECF No. 72 (“Remand Results”); see also Pls.’ Cmts. Supp. Remand Results, ECF No. 74 (“Pls.’ Cmts.”); Def.’s Resp. Pls.’ Submission Regarding Remand Results, ECF No. 75 (“Def.’s Resp.”). Defendant-Intervenors U.S. Steel Corporation, Steel Dynamics, Inc., and SSAB Enterprises LLC have not filed comments on the Remand Results. See Letter from Cassidy Levy Kent (USA) LLP to Court (July 7, 2022), ECF No. 76; see also Letter from Schagrin Associates to Court (July 7, 2022), ECF No. 77.

By their comments, Plaintiffs BlueScope Steel Ltd., BlueScope Steel (AIS) Pty Ltd., and BlueScope Steel Americas, Inc. (“Plaintiffs”) submit that Commerce has complied with the court’s remand order in *BlueScope I*, and ask the court to sustain the Remand Results. See Pls.’ Cmts. at 1–2. For its part, the United States, on behalf of Commerce, likewise maintains that Commerce has complied with the court’s instructions, and, there being no further dispute in this mat-

ter, asks the court to sustain the Remand Results. *See* Def.’s Resp. at 1–2.

For the reasons below, the uncontested Remand Results are sustained.

BACKGROUND

Plaintiffs commenced this action to question the final results of Commerce’s first administrative review of the antidumping duty order on hot-rolled steel flat products from Australia. *See Certain Hot-Rolled Steel Flat Prods. From Austl.*, 84 Fed. Reg. 18,241 (Dep’t Commerce Apr. 30, 2019) (“Final Results”) and accompanying Issues and Decision Mem. (Apr. 23, 2019) (“Final IDM”), PR 122.¹ Specifically, by their motion for judgment on the agency record, Plaintiffs “challenge[d] Commerce’s decision to use facts available to replace all of BlueScope’s^[2] information, and to apply adverse inferences to those facts.” *BlueScope I*, 45 CIT at __, 548 F. Supp. 3d at 1357; *see also* 19 U.S.C. § 1677e(a), (b) (2018). Using “total” adverse facts available,³ Commerce assigned BlueScope a final dumping margin of 99.20 percent.⁴

In *BlueScope I*, familiarity with which is presumed, the court remanded certain matters to Commerce after finding that portions of the Final Results were unsupported by substantial evidence and otherwise not in accordance with law:

[T]he Department’s use of facts available, under 19 U.S.C. § 1677e(a) based on BlueScope’s alleged withholding of requested information by failing to provide it in the form and manner

¹ “PR” refers to the public record. “PRR” refers to the public remand record. “CRR” refers to the confidential remand record.

² References to “BlueScope” are to the sole mandatory respondent, a collapsed entity comprised of Plaintiff BlueScope Steel Ltd. and two of its Australian affiliates that produced and distributed subject merchandise during the period of review.

³ As the court noted in *BlueScope I*: “‘Total adverse facts available’ is not defined by statute or agency regulation. Commerce uses this term ‘to refer to [its] application of adverse facts available . . . to the facts respecting *all of respondents’ production and sales information that the Department concludes is needed for an investigation or review.*” 45 CIT at __, 548 F. Supp. 3d at 1354 n.2 (quoting *Nat’l Nail Corp. v. United States*, 43 CIT __, __, 390 F. Supp. 3d 1356, 1374 (2019) (emphasis added) (citation omitted)) (declining to adopt Commerce’s language).

⁴ Though BlueScope was the sole mandatory respondent in this review, its rate was not used to determine an all-others rate. *See* Final Results, 84 Fed. Reg. at 18,242 (stating “the cash deposit rate for all other manufacturers or exporters will continue to be 29.58 percent, the all-others rate established in the original investigation”). In this case, unlike in *YC Rubber Company (North America) LLC v. United States*, no party has challenged Commerce’s determination of the all-others rate. *See YC Rubber Co. (N. Am.) LLC v. United States*, No. 2021–1489, 2022 WL 3711377 (Fed. Cir. Aug. 29, 2022) (not reported in the Federal Reporter).

requested, is remanded for the agency to determine whether there was in fact a gap in the record; . . .

[T]he Department shall use BlueScope's quantity and value (Section A) submissions, absent a reasoned explanation as to why the form and manner of its submissions prevent[] the Department from discerning ([a]) the total quantity and value of U.S. sales of further processed merchandise made by [BlueScope Steel Ltd.'s U.S. affiliate] Steelscape LLC; ([b]) whether Steelscape made the only sales that could serve as the basis of constructed export price during the period of review; ([c]) the total quantity and value of subject merchandise entered into the United States; and ([d]) whether sales by [BlueScope Steel Ltd.'s Australian affiliate] Australian Iron & Steel to BlueScope Steel Americas represented the total quantity and value of those entries; . . .

Commerce shall comply with its obligation, under 19 U.S.C. § 1677m(d), to notify BlueScope of the nature of the alleged deficiencies in its Section A and Section C responses concerning the U.S. sales reconciliation, and provide an opportunity to remediate; . . .

Commerce shall likewise notify BlueScope of the nature of the alleged deficiencies in its Section B responses concerning its home market sales reconciliation, and provide an opportunity to remediate; . . .

[I]f, on remand, Commerce continues to find that the use of facts available is warranted, and makes the additional, distinct finding that the application of adverse inferences is warranted because BlueScope failed to cooperate "to the best of its ability," under 19 U.S.C. § 1677e(b), then it shall support this finding with substantial evidence.

BlueScope I, 45 CIT at __, 584 F. Supp. 3d at 1369.

On remand, Commerce, on its own initiative, "issued a supplemental questionnaire to BlueScope to address deficiencies in BlueScope's responses, to which it provided timely responses." Remand Results at 3. Also, Commerce "reexamined and reevaluated the record of the instant administrative review and considered comments on [its] Draft Remand Results." Remand Results at 3.

On April 12, 2022, Commerce issued the Remand Results. There, Commerce found that the use of facts available was not necessary based on the record, as supplemented on remand:

We find for these final results of redetermination that we are able to tie BlueScope's reported [quantity and value] information to the sales databases provided, as well as to tie changes BlueScope made to its home market sales databases to its narrative responses. Given there is no gap in the administrative record, we find it inappropriate to base BlueScope's final dumping margin on facts available, and have recalculated the company's individual dumping margin.

Remand Results at 6. Having found the use of facts available was not required under the first step of the two-step analysis (*i.e.*, under 19 U.S.C. § 1677e(a)), Commerce necessarily did not apply adverse facts available in the Remand Results. *See* Remand Results at 3 ("Consequently, for the purposes of these final results of redetermination, we determine that BlueScope has provided timely and complete responses such that the application of facts available is unnecessary and, consequently, we find that the application of AFA is no longer warranted."); *see also BlueScope I*, 45 CIT at ___, 548 F. Supp. 3d at 1357–58 (citing *Nippon Steel Corp. v. United States*, 337 F.3d 1373, 1381 (Fed. Cir. 2003)) (describing application of adverse facts available as a two-step process). Ultimately, Commerce "calculated a weighted-average dumping margin of 4.95 percent for BlueScope" based on the respondent's information. *See* Remand Results at 3.

STANDARD OF REVIEW

The court will sustain a determination by Commerce unless it is "unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B)(i).

DISCUSSION

On remand, Commerce reconsidered whether there was a gap in the factual record and gave BlueScope notice and an opportunity to remediate any deficiencies in its responses to Commerce's Section A (general information, including the quantity and value of the company's U.S. and home market sales), Section B (home market sales), and Section C (U.S. sales) questionnaires, as directed by the court. After issuing a supplemental questionnaire, reviewing BlueScope's response, and reevaluating the evidence of record, Commerce found there was no factual gap:

We find there is no gap in the record (*i.e.*, with respect to BlueScope's [quantity and value] reporting, U.S. sales reconciliation, or home market sales database), and U.S. Steel fails to point to any gaps that would warrant the application of facts

available, much less AFA. Indeed, the record contains all information required to calculate BlueScope's margin.

Remand Results at 22. In other words, the Department found it had the record information it needed to determine a dumping margin for BlueScope based on the company's own reported information, thus obviating the need to resort to facts otherwise available. *See BlueScope I*, 45 CIT at ___, 548 F. Supp. 3d at 1357–58 (citing *Nippon Steel*, 337 F.3d at 1381). Accordingly, Commerce calculated a 4.95 percent weighted-average dumping margin for BlueScope. *See* Remand Results at 3 (citing Final Results of Redetermination Analysis Mem. for BlueScope (Apr. 12, 2022), PRR 25, CRR 74).

No party contests Commerce's findings on remand. *See* Pls.' Cmts. at 1–2 (maintaining that the Remand Results comply with the court's order, and the "new substantive decision set for[th] in Commerce's Remand [Results] rendering a calculated . . . weighted-average dumping margin of 4.95 percent for BlueScope fully reflects the evidentiary record before Commerce and the applicable law. Specifically, the complete evidentiary record before Commerce fully supports Commerce's Remand Redetermination conclusion that, in light of the additional factual information that Commerce sought and received from BlueScope during the remand proceeding, application of adverse facts available is no longer warranted."); *see also* Def.'s Resp. at 2 ("Commerce has fully complied with the Court's remand order in this case, and no party challenged the Remand Results. Indeed, the only party to comment on the Remand Results, BlueScope, commented in support, stating that Commerce's Remand Results fully complied with this Court's opinion and reflected the evidentiary record of the proceeding. . . . For these reasons, we respectfully request that the Court sustain Commerce's remand results and enter final judgment in favor of the United States.").

Commerce has complied with the court's remand instructions, and its findings on remand are supported by substantial evidence and in accordance with law. Accordingly, the court sustains the Remand Results.

CONCLUSION

Based on the foregoing, the court sustains the Remand Results. Judgment will be entered accordingly.

Dated: August 30, 2022

New York, New York

/s/ Richard K. Eaton

JUDGE

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