

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

RIDDELL, INC., PLAINTIFF-APPELLANT, v. UNITED STATES, DEFENDANT-  
APPELLEE.

Appeal No. 2013–1384

Appeal from the United States Court of International Trade in No. 09-CV-0416 and 07-CV-0413, Senior Judge Judith M. Barzilay.

(Decided: June 20, 2014)

*Daniel J. Gluck*, Simon Gluck & Kane LLP, of New York, New York, argued for plaintiff-appellant. With him on the brief were *Christopher M. Kane* and *Mariana Del Rio Kostenwein*.

*Marcella Powell*, Trial Attorney, Commercial Litigation Branch, Civil Division, United States Department of Justice, of New York, New York, argued for defendant-appellee. With her on the brief were *Stuart F. Delery*, Assistant Attorney General, *Jeanne E. Davidson*, Director, of Washington, DC; and *Amy M. Rubin*, Acting Assistant Director, International Trade Field Office, of New York New York. Of counsel on the brief was *Michael W. Heydrich*, Office of the Assistant Chief Counsel, International Trade Litigation, United States Customs and Border Protection, of New York, New York.

Before NEWMAN, LOURIE, and TARANTO, *Circuit Judges*.

TARANTO, *Circuit Judge*.

Riddell, Inc., challenges the Court of International Trade’s upholding of the classification of Riddell’s imported football jerseys, pants, and girdles as “articles of apparel” under chapters 61 and 62 of the Harmonized Tariff Schedule of the United States (HTSUS). *Riddell, Inc. v. United States*, 906 F. Supp. 2d 1355, 1368–69 (Ct. Int’l Trade 2013). Riddell contends that the United States Customs Service (now United States Customs and Border Protection) should have classified the merchandise as “sports . . . equipment” under subheading 9506.99.20 within chapter 95 of the HTSUS. We reject Riddell’s claim to a chapter 95 classification. For the jerseys and pants, we affirm the Customs classification under the particular provisions within chapters 61 and 62 that Customs identified. For the girdles, we conclude, as Customs now agrees, that the proper apparel classification is different from the one Customs initially identified.

### BACKGROUND

The nature of Riddell’s merchandise is not in dispute. The jerseys, pants, and girdles that Riddell imported are all designed to be worn, in conjunction with protective pads (having both hard and soft com-

ponents), during the playing of football. As imported, though, none of the merchandise contains such protective items.

The pants, made of polyester and spandex, end just below the knee and have elastic leg openings. They contain four interior pockets to hold protective pads—two thigh pads and two knee pads. In tandem with a girdle, the pants also help secure three additional pads around a player’s waist—two hip pads and one tail pad. The pants are tailored to wear with the protective pads.

The jerseys, made of 100% polyester knit mesh, have v-neck openings and short sleeves with elastic cuffs. The shoulders, chest, and back are cut with just enough extra room to accommodate shoulder pads while holding them snugly to the body. The jerseys have substantial stitching at the shoulders to withstand the impacts common in full-contact football.

The girdles, made of polyester, are worn beneath football pants and extend from the waist to the thigh. They have several internal pockets to hold hip and tail pads. They function, together with the pants, to hold padding in place.

Customs classified all of the football jerseys, pants, and girdles at issue here as articles of apparel under either chapter 61 or chapter 62 of the HTSUS. Riddell filed two protests under 19 U.S.C. § 1514, arguing that the merchandise should have been classified as football equipment under chapter 95 of the HTSUS. Customs denied Riddell’s protests. Invoking 28 U.S.C. § 1581(a), Riddell then filed two civil actions in the Court of International Trade to challenge the classifications. Because the actions involved similar merchandise and the same core issue of law, the Court of International Trade consolidated them.

Riddell and the United States filed cross-motions for summary judgment. The parties agreed about the nature of the subject merchandise, but disagreed about the scope of the relevant tariff provisions. Riddell argued that the football jerseys, pants, and girdles are properly classified as football equipment under chapter 95, entitled “Toys, games and sports requisites; parts and accessories thereof.” Specifically, Riddell argued for classification under subheading 9506.99.20, which covers the following:

9506. Articles and equipment for general physical exercise, gymnastics, athletics, other sports (including table-tennis) or outdoor games, not specified or included elsewhere in this chapter; swimming pools and wading pools; parts and accessories thereof

\* \* \*

9506.99. Other:

\* \* \*

9506.99.20. Football, soccer and polo articles and equipment, except balls, and parts and accessories thereof

Articles under subheading 9506.99.20 enter the United States duty free.

The government argued that Riddell's football jerseys, pants, and girdles do not fall within the scope of chapter 95 but, as Customs had decided, instead come under chapters 61 and 62, which are entitled, respectively, "Articles of apparel and clothing accessories, knitted or crocheted" and "Articles of apparel and clothing accessories, not knitted or crocheted." Customs classified the football jerseys under subheading 6110.30.30 (which has a 32% duty rate), the football pants under subheading 6114.30.30 (which has a 14.9% duty rate), and the football girdles under subheading 6212.20.00 (which has a 20% duty rate). Those subheadings cover:

6110. Sweaters, pullovers, sweatshirts, waistcoats (vests) and similar articles, knitted or crocheted:

\* \* \*

6110.30. Of man-made fibers:

\* \* \*

6110.30.30. Other.

\* \* \*

6114. Other garments, knitted or crocheted:

\* \* \*

6114.30. Of man-made fibers:

\* \* \*

6114.30.30. Other.

\* \* \*

6212. Brassieres, girdles, corsets, braces, suspenders, garters and similar articles and parts thereof, whether or not knitted or crocheted:

\* \* \*

6212.20.00. Girdles and panty-girdles.

On March 20, 2013, the Court of International Trade granted summary judgment in favor of the government, holding that “the subject merchandise does not satisfy the definition of ‘football equipment’ under subheading 9506.99.20” and, therefore, the items are “properly classified as ‘articles of apparel’ under chapters 61 and 62.” *Riddell*, 906 F. Supp. 2d at 1365, 1368. The Court of International Trade found, as both parties agreed, that Riddell’s football jerseys, pants, and girdles “are composed of textile materials” and “do not come bundled with or otherwise incorporate any form of padding or protective inserts”—the pads being “separate articles entirely.” *Id.* at 1366. Therefore, according to the Court of International Trade, “[e]ven though Riddell’s pants, jerseys, and girdles are specifically designed to accommodate various forms of protective padding for playing organized football, this design feature does not change their identity under the HTSUS from ‘articles of apparel’ to ‘sports equipment.’” *Id.*

Riddell timely appealed to this court. Its primary argument is that its football jerseys, pants, and girdles all constitute football equipment—or parts of or accessories to such equipment—within the meaning of chapter 95, specifically subheading 9506.99.20. Riddell’s secondary argument, with which the government agrees, is that the girdles, if they must be classified as apparel and not football equipment, come under subheading 6114.30.30 rather than, as Customs originally decided, subheading 6212.20.00.

This court has jurisdiction under 28 U.S.C. § 1295(a)(5).

#### DISCUSSION

We review the Court of International Trade’s grant of summary judgment without deference. *CamelBak Prods., LLC v. United States*, 649 F.3d 1361, 1364 (Fed. Cir. 2011). The classification of merchandise under the HTSUS proceeds in two steps. “The first concerns the proper meaning of the tariff provisions, which is a question of law reviewed de novo.” *Lemans Corp. v. United States*, 660 F.3d 1311, 1315 (Fed. Cir. 2011). “The second step concerns whether merchandise falls within a particular heading, which is a question of fact we review only for clear error.” *Id.* Where, as here, “the nature of the merchandise is undisputed, the inquiry collapses into a question of law we review de novo.” *Id.*

“The HTSUS scheme is organized by headings, each of which has one or more subheadings; the headings set forth general categories of merchandise, and the subheadings provide a more particularized segregation of the goods within each category.” *Wilton Indus., Inc. v. United States*, 741 F.3d 1263, 1266 (Fed. Cir. 2013). “The classifica-

tion of merchandise under the HTSUS is governed by the principles set forth in the [General Rules of Interpretation (GRIs)] and the Additional U.S. Rules of Interpretation.” *Id.* We apply the GRIs in numerical order, *see CamelBak*, 649 F.3d at 1364, so that if a particular Rule resolves the classification issue, we do not look to subsequent ones, *see Lemans*, 660 F.3d at 1316.

GRI 1 provides that “classification shall be determined according to the terms of the headings and any relative section or chapter notes.” This case involves textile garments designed to be worn during the playing of football, in conjunction with pads and other articles. We must decide whether these garments are “articles of apparel” under chapters 61 and 62 of the HTSUS or “football . . . equipment” under subheading 9506.99.20 of chapter 95. We have been asked before to make the necessary, if not self-evident, distinction between articles of apparel and sports equipment under the HTSUS. Our precedent, as it has developed, supplies an approach to making the distinction that decides this case.

In *Bauer Nike Hockey USA, Inc. v. United States*, this court addressed the proper classification of pants that not only were “specially designed and intended for use only while playing ice hockey” but, as imported, included “an interior assembly of . . . hard plastic guards and soft . . . foam padding” that collectively accounted for “about 80% of the total weight of the hockey pants.” 393 F.3d 1246, 1248 (Fed. Cir. 2004). We assumed without deciding that the merchandise was *prima facie* classifiable as apparel under chapter 62. *Id.* at 1251. But we concluded that the protection-filled pants fell under heading 9506 as sports equipment, stressing that “it [was] undisputed that Bauer’s pants were specially designed and intended for use only while playing ice hockey.” *Id.* Because the provisional conclusion from applying GRI 1 was that the protection-filled ice-hockey pants were “*prima facie* classifiable under two or more headings,” we turned to another interpretive Rule, namely, GRI 3(a)’s “rule of specificity.” We concluded that the merchandise was most specifically described by a provision within heading 9506 and, therefore, properly classified under that heading. *Id.* at 1251–52.

In *Lemans*, we provided further clarification of the definition of “sports equipment” under heading 9506 and its relation to the apparel classifications. *Lemans* involved motocross jerseys, motocross pants, and motorcycle jackets. *See* 660 F.3d at 1318. We observed that all of the merchandise at issue was “designed exclusively for use in a particular sport,” *id.* at 1319, and contained foam padding that accounted for up to 50% of the total weight of the jerseys, pants, or

jackets. *See id.* at 1313–14. Nonetheless, we held that the merchandise was prima facie classifiable as apparel, noting that chapters 61 and 62 “do not distinguish between apparel designed for general or specific uses,” as indicated by their inclusion of “‘track suits, ski-suits[,] and swim wear,’” and the merchandise “does not contain protective or specialized features to the same degree as the ‘crash helmets’ used by motorcycle and auto racers.” *Id.* at 1317.

We then concluded that the merchandise was not prima facie classifiable as sports equipment under heading 9506. Looking at the Explanatory Notes to heading 9506, we noted that the “vast majority of the examples in those notes are items that a user would not wear on his or her body,” but instead consist of “articles that are entirely separate from the user,” “held by the user in his or her hand,” or “are accessories fastened to a user.” *Id.* at 1321–22. We noted that there were a “few examples” in the Explanatory Notes of items “that a user actually would wear,” but those “are almost exclusively used for protection and would complement, or be worn in addition to, apparel worn for a particular sport.” *Id.* at 1322. We concluded that “to the extent ‘sports equipment’ encompasses articles worn by a user, those articles are not apparel-like and are almost exclusively protective in nature.” *Id.* at 1320.

Taken together, *Lemans* and *Bauer* provide a practical, common-sense approach to the problem before us. The strong general rule is that “sports equipment” does not include an article that, as imported, would be understood as clothing, as a garment, based on the predominance of textile material and the usual predominant function of covering portions of the body. Such garments may of course provide whatever “protection” is inherent in simply covering the skin, *e.g.*, against sun exposure or abrasions. They also may have some features chosen to fit specific activities during which they are intended to be worn, without losing their character as clothing in ordinary understanding. But they would not be “sports equipment” even when designed exclusively for use in a sport. A narrow exception exists for an item that, as imported, contains a character-transforming amount of material not ordinarily found in mere body-covering clothing that functions to provide forms of protection not inherent in common body coverings, *e.g.*, protection against impacts that readily propagate beneath the skin. Importantly for the present case, what would clearly constitute clothing, for lack of the transformative elements that were key in *Bauer*, does not become “sports equipment” just because, after importation, it will be used, even exclusively, in conjunction with non-clothing impact-protecting equipment.

Under this approach, Riddell's football jerseys, pants, and girdles are "articles of apparel" within the meaning of chapters 61 and 62. In *Bauer* we assumed, and in *Lemans* we held, that merchandise containing *some* protective padding still fell within the scope of headings in those chapters. Here, Riddell's merchandise contains no protective padding whatever; instead, the football jerseys, pants, and girdles are "worn on the body and composed entirely of textile material." *Riddell*, 906 F. Supp. 2d at 1368. Riddell's merchandise does "not come bundled with or otherwise incorporate any form of padding or protective inserts." *Id.* at 1366. "The pads are separate articles entirely." *Id.*

That Riddell's merchandise has a specialized use—to be worn along with, and to accommodate, protective pads while playing football—does not make the football jerseys, pants, and girdles lose their character as "articles of apparel." As we said in *Lemans*, "[t]he fact that articles are specialized or intended for specific purposes, such as for sports, does not alone remove them from the category of apparel." 660 F.3d at 1317. Riddell's merchandise, as imported, has not been so transformed as to lose its character as an item properly described as "apparel." See *CamelBak*, 649 F.3d at 1367–68 (sufficient "change in identity" may remove item from an article-naming provision). Riddell's shirts, pants, and girdles are apparel, whatever they may come to be used with.

Riddell's merchandise does not constitute "football . . . equipment" within the meaning of subheading 9506.99.20. If the apparel in *Lemans*, which contained some protective padding, fell outside heading 9506, then so does Riddell's football apparel, which lacks protective padding. Though "designed exclusively for use in a particular sport," Riddell's merchandise itself is not "almost exclusively used for protection," does not "complement" apparel, and is not "worn in addition to[] apparel." 660 F.3d at 1322. Riddell's merchandise is apparel, used along with protective equipment. And it makes no difference if (as Riddell argues) the football jerseys, pants, and girdles are *required* to play football: a sports organization can require use of what constitutes apparel just as it can require use of non-apparel. For those reasons, Riddell's football jerseys, pants, and girdles are not "equipment" within the scope of heading 9506.

Nor do the items come within that provision as "parts" of or "accessories" to equipment. Note 3 to chapter 95 states: "Subject to [N]ote 1 above, parts and accessories which are suitable for use solely or principally with articles of this chapter are to be classified with those articles." The referenced Note 1 specifically excludes from chapter 95 "[s]ports clothing or fancy dress, of textiles, of chapter 61 or 62." That exclusion encompasses Riddell's football jerseys, pants, and girdles,

which are within chapter 61 or 62. Riddell's merchandise, because it is outside the main category of sports "equipment" and is within an "apparel" classification of chapter 61 or 62, cannot constitute a part of or accessory to sports equipment. Indeed, even when not accompanied by protective pads, Riddell's merchandise "performs its separate function without loss of any of its essential characteristics and, whether separate or joined [to the pads], is complete in itself." *ABB, Inc. v. United States*, 421 F.3d 1274, 1277 (Fed. Cir. 2005). Riddell's football jerseys, pants, and girdles, even apart from padding, perform their function as clothing. For that reason too, they are not parts or accessories under heading 9506.

Having rejected Riddell's invocation of chapter 95, we address Riddell's narrow argument with respect to the football girdles—that if they are "articles of apparel," they should be classified under subheading 6114.30.30 as "[o]ther garments, knitted or crocheted," rather than under subheading 6212.20.00 as "[b]rassieres, girdles, corsets, braces, suspenders, garters and similar articles and parts thereof." The government agrees with this argument, apparently because nothing in the record indicates that Riddell's girdles provide body support, which is the function the government has previously identified as the "essential characteristic" of heading 6212 articles.<sup>1</sup> *Van Dale Indus. v. United States*, 18 C.I.T. 247, 252 (1994); see also Customs Ruling HQ 957469 at 6 (Nov. 7, 1995) ("Customs believes that . . . girdles [under heading 6212] are commonly understood to be undergarments which provide support."). We therefore hold that the girdles at issue should be classified under subheading 6114.30.30.

#### CONCLUSION

We affirm the Court of International Trade's judgment with respect to the classification of Riddell's football jerseys under subheading 6110.30.30 and of Riddell's football pants under subheading 6114.30.30. We reverse, however, with respect to Riddell's football girdles, which are properly classified under subheading 6114.30.30.

No Costs.

#### **AFFIRMED IN PART, REVERSED IN PART**

<sup>1</sup> See Br. of Appellee at 27 (stating that the government "would not object to" classification under subheading 6114.30.30); Oral Argument at 19:02–50 (the government states that, because "these girdles are not used for body support," it does not "dispute [classification under] 6114.30 based on the facts of this case").

CHEMSOL, LLC AND MC INTERNATIONAL, LLC, PLAINTIFFS-APPELLANTS, v.  
UNITED STATES AND UNITED STATES CUSTOMS AND BORDER PROTECTION,  
DEFENDANTS-APPELLEES.

Appeal No. 2013–1402, –1403

Appeals from the United States Court of International Trade in Nos. 11-CV-0516 and 11-CV-0517, Chief Judge Donald C. Pogue.

(Decided: June 24, 2014)

*Russell A. Semmel*, Neville Peterson LLP, of Washington, DC, argued for plaintiffs-appellants. With him on the brief was *George W. Thompson*.

*Claudia Burke*, Assistant Director, Commercial Litigation Branch, Civil Division, United States Department of Justice, of Washington, DC, argued for defendants-appellees. With her on the brief were *Stuart F. Delery*, Assistant Attorney General, and *Jeanne E. Davidson*, Director. Of counsel was *Justin Reinhart Miller*, Attorney, International Trade Field Office, of New York, New York. Of counsel on the brief was *Yelena Slepak*, Attorney, Office of the Assistant Chief Counsel, International Trade Litigation, United States Customs and Border Protection, of New York, New York.

Before *O'Malley*, *Mayer*, and *Wallach*, *Circuit Judges*.

*Wallach*, *Circuit Judge*.

Appellants Chemsol, LLC and MC International, LLC (d/b/a Miami Chemical) (“MCI”) appeal the decision of the United States Court of International Trade (“CIT”) dismissing their case for lack of subject matter jurisdiction. *Chemsol, LLC v. United States*, 901 F. Supp. 2d 1362 (Ct. Int’l Trade 2013). Because the CIT properly held it did not have jurisdiction over this case, this court affirms.

#### BACKGROUND

In 2009, Chemsol made six entries of citric acid, purportedly from the Dominican Republic, and in 2009 and 2010, MCI made thirteen entries of citric acid, purportedly from India (collectively, “the Entries”). Appellants claimed duty-free status for the Entries and therefore did not deposit any duties on entry. In 2010, United States Immigration and Customs Enforcement (“ICE”) and United States Customs and Border Protection (“Customs”) (collectively, “the Government”) initiated an investigation to determine whether Chinese citric acid was being transshipped through other countries to evade antidumping and countervailing duties applicable to imports of citric acid from China. Customs suspected that Appellants’ Entries were actually produced in China, but were transshipped through the Dominican Republic and India to avoid duties.

To complete the transshipment investigation, Customs extended the deadline for liquidation of the Entries pursuant to 19 U.S.C. § 1504(b) (2006). For Chemsol, as of the time it filed this suit, Customs had extended liquidation for all of its Entries at least twice. As to

MCI, as of the date of filing, Customs had extended liquidation once for all of its Entries, a second time for most of its Entries, and a third time for one Entry. It is undisputed that both Chemsol and MCI received notice of these extensions.

In response to the extensions, Appellants filed suit in the CIT on December 16, 2011, seeking “relief declaring the extensions unlawful such that the entries have therefore been ‘deemed’ liquidated by operation of law.” *Chemsol*, 901 F. Supp. 2d at 1363; see J.A. 31, 43. Though the Entries were not yet deemed liquidated because the liquidation period was extended with notice, Appellants asserted the CIT had jurisdiction under 28 U.S.C. § 1581(i) (2006), the CIT’s “residual jurisdiction” provision. The Government moved to dismiss for lack of subject matter jurisdiction,<sup>1</sup> claiming Appellants could not rely on § 1581(i) because they were first required to challenge the extensions before Customs by means of a post-liquidation protest, after which they could seek judicial review of any protest denial pursuant to 19 U.S.C. § 1515, the Tariff Act’s “review of protests” provision. Jurisdiction over such a denial, the Government argued, would then be proper under 28 U.S.C. § 1581(a).

The CIT agreed, observing that “[i]n the time that has elapsed since the commencement of this action, ICE has completed its investigation and, but for [Appellants’] suit, Customs could complete its administrative process and liquidate [Appellants’] remaining entries.”<sup>2</sup> *Chemsol*, 901 F. Supp. 2d at 1365. The CIT held “the statutory review process for challenging liquidation of [Appellants’] entries under . . . 19 U.S.C. §§ 1515–16[] and 28 U.S.C. § 1581(a), provides an adequate remedy for [Appellants’] claims,” and accordingly granted the Government’s motion to dismiss for lack of subject matter jurisdiction. *Id.* at 1363–64 (footnote omitted).

Appellants filed these timely appeals. This court has jurisdiction pursuant to 28 U.S.C. § 1295(a)(5).

<sup>1</sup> In the alternative, the Government moved to dismiss for failure to state a claim upon which relief may be granted. *Chemsol*, 901 F. Supp. 2d at 1365. Because the CIT dismissed this case for lack of jurisdiction, the CIT did not reach the other motion to dismiss. *Id.* at 1369 n.9.

<sup>2</sup> The CIT also held that Chemsol’s claims relating to four of the nineteen Entries were moot because the Entries had auto-liquidated duty free in Appellants’ favor. *Chemsol*, 901 F. Supp. 2d at 1365; see *SKF USA, Inc. v. United States*, 512 F.3d 1326, 1329 (Fed. Cir. 2008) (“[A] court action [is] moot once liquidation occurs.”). Specifically, in response to an inquiry from the CIT, on March 7, 2013, the Government reported that one of Chemsol’s Entries had auto-liquidated in its favor and three Entries were extended a third (and final) time. J.A. 60–61. As to MCI, the Government reported that three Entries had auto-liquidated in MCI’s favor and nine Entries were extended a third (and final) time. J.A. 63–64.

## DISCUSSION

### I. Standard of Review

This court reviews de novo the CIT's dismissal for lack of subject matter jurisdiction. *Ford Motor Co. v. United States*, 688 F.3d 1319, 1322 (Fed. Cir. 2012).

### II. Legal Framework

#### A. Jurisdiction

The CIT's limited jurisdiction is enumerated in 28

U.S.C. § 1581(a) through (i). Subsection (a) vests the CIT with “exclusive jurisdiction of any civil action commenced to contest the denial of a protest [by Customs].” Subsections (b) through (g) delineate other specific grants of jurisdiction. Subsection (i), the “residual jurisdiction” provision, provides:

In addition to the jurisdiction conferred upon the [CIT] by subsections (a)–(h) of this section . . . , the [CIT] shall have exclusive jurisdiction of any civil action commenced against the United States, its agencies, or its officers, that arises out of anylaw of the United States providing for—

- (1) revenue from imports or tonnage;
- (2) tariffs, duties, fees, or other taxes on the importation of merchandise for reasons other than the raising of revenue;
- (3) embargoes or other quantitative restrictions on the importation of merchandise for reasons other than the protection of the public health or safety; or
- (4) administration and enforcement with respect to the matters referred to in paragraphs (1)–(3) of this subsection and subsections (a)–(h) of this section.

28 U.S.C. § 1581(i).

While the residual jurisdiction provision is a “catch all provision,” “[a]n overly broad interpretation of this provision . . . would threaten to swallow the specific grants of jurisdiction contained within the other subsections and their corresponding requirements.” *Norman G. Jensen, Inc. v. United States*, 687 F.3d 1325, 1329 (Fed. Cir. 2012). Therefore, this court has repeatedly held that subsection (i) “may not be invoked when jurisdiction under another subsection of § 1581 is or could have been available, unless the remedy provided under that other subsection would be manifestly inadequate.” *Ford*, 688 F.3d at 1323 (quoting *Miller & Co. v. United States*, 824 F.2d 961, 963 (Fed. Cir. 1987)). Thus, if a litigant has access to the CIT under subsections

(a) through (h), “it must avail itself of this avenue of approach by complying with all the relevant prerequisites there to” unless the remedy available under another subsection is “manifestly inadequate.” *Hartford Fire Ins. Co. v. United States*, 544 F.3d 1289, 1292 (Fed. Cir. 2008) (quoting *Am. Air Parcel Forwarding Co. v. United States*, 718 F.2d 1546, 1549 (Fed. Cir. 1983)). A litigant asking the court to exercise jurisdiction over his or her claim has the burden of establishing that jurisdiction exists. *See Rocovich v. United States*, 933 F.2d 991, 993 (Fed. Cir. 1991) (citing *KVOS, Inc. v. Associated Press*, 299 U.S. 269, 278 (1936)).

### B. Liquidation

When importing merchandise into the United States, “the importer of record shall deposit with [Customs] at the time of entry . . . the amount of duties and fees estimated to be payable on such merchandise,” including applicable antidumping or countervailing duties. 19 U.S.C. § 1505(a). Customs generally must “liquidate” the entries “within 1 year from . . . the date of entry.” *See id.* § 1504(a)(1). “Liquidation means the final computation or ascertainment of the duties . . . accruing on an entry,” after which the final amount due (if any) is calculated and billed, completing the import transaction. 19 C.F.R. § 159.1 (2010); *Ford*, 688 F.3d at 1321 (“The process for bringing . . . customs transactions to final resolution is called ‘liquidation.’”). If Customs does not liquidate the entry within one year, the entry is “deemed liquidated at the rate of duty, value, quantity, and amount of duties asserted by the importer of record” on its entry documentation. 19 U.S.C. § 1504(a)(1). In other words, “deemed liquidation” is liquidation by operation of law.

Before the elapse of the one-year liquidation period, however, under § 1504(b)(1), Customs “may extend the period in which to liquidate an entry if . . . the information needed for the proper appraisal or classification of the imported or withdrawn merchandise, . . . or for ensuring compliance with applicable law, is not available to [Customs].” However, Customs may only extend the liquidation period three times, resulting in a total of four years from the date of entry within which Customs must liquidate the entries or they will be deemed liquidated. *Id.* § 1504(b); 19 C.F.R. § 159.12(e), (f).

Whether by Customs’ action or by operation of law, liquidation is final unless an importer files a timely protest with Customs challenging its decision “within 180 days after *but not before* . . . [the] date of liquidation.” 19 U.S.C. § 1514(c)(3)(A) (emphasis added). “Absent such a protest, the Customs decision is final” and is no longer subject

to administrative or judicial review. *Hartford Fire*, 544 F.3d at 1292 (citation omitted). This court has confirmed that liquidation is the “final challengeable event” and “[f]indings related to liquidation,” such as the need for extensions, “merge with the liquidation.” See *Volkswagen of Am., Inc. v. United States*, 532 F.3d 1365, 1370 (Fed. Cir. 2008); see also *United States v. Utex Int’l Inc.*, 857 F.2d 1408, 1410 (Fed. Cir. 1988) (“All findings involved in a [Customs] decision merge in the liquidation. It is the liquidation which is final and subject to protest, not the preliminary findings or decisions of customs officers.”) (citations omitted). This is also evident from the statute, which specifies that “decisions of [Customs], including the legality of all orders and findings . . . as to [,inter alia,] . . . the liquidation or reliquidation of an entry,” are final unless a timely protest is filed. 19 U.S.C. § 1514(a)(5); see also *id.* § 1514(c)(3)(A) (“A protest of a *decision, order, or finding* described in subsection (a) of this section shall be filed with [Customs] within 180 days after but not before . . . [the] date of liquidation or reliquidation.”) (emphasis added).

### III. The CIT Properly Dismissed for Lack of Jurisdiction

#### A. Relief is Available to Appellants Under 28 U.S.C. § 1581(a)

The CIT held it lacked jurisdiction under § 1581(i) because Appellants’ “challenge to Customs’ extensions of the time for liquidation may be brought, after liquidation, by filing a protest and obtaining jurisdiction in this court under Section 1581(a).” *Chemsol*, 901 F. Supp. 2d at 1366. The CIT noted that Customs’ actions in this case were “well within the four-year period allowed for extensions; Customs continues to actively investigate the appropriate liquidation for the entries.” *Id.* Furthermore, the CIT stated, “[u]pon conclusion of that process and liquidation of the entries, the importers will have ample opportunity to raise any issues through the protest and judicial review process that culminates in § 1581(a).” *Id.*

Appellants argue the CIT erred in failing to find § 1581(i) confers subject matter jurisdiction over this action. In support, Appellants first argue the CIT failed to follow this court’s opinion in *Ford*, 688 F.3d at 1323, which Appellants claim involves a “materially identical fact pattern [ ] and legal issues.” Appellants’ Br. 10 (capitalization removed).

In *Ford*, this court found jurisdiction under § 1581(i) available for a deemed liquidation claim in which Customs’ inaction was at issue. In doing so, this court noted that “[i]t is undisputed that at the time of filing of Ford’s complaint, [Customs] had not affirmatively liquidated

any of the nine entries. It is also undisputed that the general one-year time period imposed by Congress for liquidating such entries had long since expired.” *Ford*, 688 F.3d at 1321–22. This court then held (1) the case involved “a valid invocation of the court’s residual jurisdiction, as the importer could not have asserted jurisdiction under any of the other enumerated provisions of § 1581,” and (2) “post complaint efforts by [Customs] to clear the importer’s accounts did not undo such jurisdiction.” *Id.* at 1321. This court concluded that “[w]here, as here, there has been an allegation that [Customs] *unlawfully failed to make any [protestable] decision*, we cannot see how an administrative appeal could have been initiated pre-filing.” *Id.* at 1327 (emphasis added).

Appellants insist the CIT erred when it found *Ford* distinguishable because, here, Customs extended the liquidation period with proper notice, whereas in *Ford* Customs failed to act altogether. Appellants contend this is a misreading of the facts in *Ford* because only the first claim of Ford’s Complaint alleged that none of its entries was extended, while the second, third, and fourth claims of the Complaint alleged, in the alternative, that if Customs did issue extensions, such extensions “lacked notice, reasoning, or validity.” Appellants’ Br. 14. On this basis, Appellants argue “[t]he fact pattern and legal issues now before the Court are all but identical to [*Ford*] *in every material way*” because “[i]n both cases, the importer asserted that [Customs] *purported to extend liquidation* for certain entries, and *notice thereof was issued*, but either no reason or an invalid reason was given for the extensions, thereby rendering them void.”<sup>3</sup> *Id.* at 12 (emphases added).

Appellants’ reliance on *Ford* is misplaced. In contrast to *Ford*, here deemed liquidation had not yet occurred when Appellants filed their complaints, and Customs had extended the liquidation period pursuant to its statutory authority in 19 U.S.C. § 1504(b) to determine the country of origin of the Entries and the proper duty rate. There is no

<sup>3</sup> Appellants also argue that “[b]y reversing the decision below, this Court can ensure that the CIT is consistent not just with the Circuit but also with itself.” Appellants’ Br. 17. In support, they compare two decisions of the judge who authored the decision below, which purportedly conflict. *Id.* Appellants quote this case and contend it “is in remarkable, direct contrast to an opinion of then-Judge Pogue thirteen years ago.” *Id.* (citation omitted). As Chemsol’s counsel well knows, however, the purportedly conflicting opinion by Chief Judge Pogue was authored prior to this court’s cases expressly limiting the bounds of residual jurisdiction under § 1581(i). *E.g.*, *Norman G. Jensen*, 687 F.3d at 1328; *Hartford Fire*, 544 F.3d at 1292; *Int’l Custom Prods., Inc. v. United States*, 467 F.3d 1324, 1327 (Fed. Cir. 2006); see Oral Arg. at 7:57–8:10, available at <http://www.ca9.uscourts.gov/oral-argument-recordings/all/chemsol.html> (counsel replying “yes” when asked whether there is “a line of cases that expressly limit . . . the bounds of residual jurisdiction under [§] 1581(i) that came out of this court”).

dispute that Customs properly notified Appellants of the extensions to the liquidation period. Thus, this case presents exactly the scenario in which “§ 1514’s protest provisions [can] be invoked” because “Customs . . . engage[d] in some sort of decision-making process,” *Ford*, 688 F.3d at 1327 (quoting *Xerox Corp. v. United States*, 423 F.3d 1356, 1363 (Fed. Cir. 2005)), and, any objections to the validity of the extensions would be merged into the later liquidation. This court has also clarified that “all aspects of entry [are] merged in the liquidation and that ‘absent timely reliquidation or protest’ the liquidation [is] final.” *Volkswagen*, 532 F.3d at 1370 (quoting *Utex*, 857 F.2d at 1412). Thus, “[i]f an importer wishes to challenge [an aspect of entry], the importer must protest the liquidation.” *Id.* As the Government points out, “[t]his approach makes sense—it recognizes that the decision to extend the period for liquidation may be necessary to determine the ultimate country of origin, classification, or rate assessed and, therefore, should be subsumed in the liquidation for purposes of administrative and judicial review.” Appellees’ Br. 13. Thus, while *Ford* rightfully sought a declaration that its entries were deemed liquidated, because the one-year liquidation period had elapsed without notice of any action by Customs, here such a declaration is not appropriate because Customs issued timely extensions, thereby preventing deemed liquidation.

In addition, unlike in this case, whether extensions had occurred was an issue very much in dispute in *Ford*. Indeed, in determining whether *Ford* had conceded this issue in a post-complaint statement, this court stated “[w]e read *Ford*’s statement as only acknowledging that [Customs] had taken some administrative action with the purpose of extending liquidation, and not necessarily as conceding that extension had been effectuated.” *Ford*, 688 F.3d at 1330. Thus, Appellants’ statement that “[i]n both cases, the importer asserted that [Customs] purported to extend liquidation for certain entries, *and notice thereof was issued*,” Appellants’ Br. 12 (emphasis added), is a mischaracterization of the facts in *Ford*. Appellants’ reliance on the other claims of *Ford*’s Complaint also does not help their argument. This court recognized that *Ford* argued, in the alternative, that if any extension had been effectuated, *Ford* “received no notice of such an extension or suspension, and urged that notice was required for any putative extension to be effective.” *Ford*, 688 F.3d at 1322. Here, there is no dispute that Appellants received proper notice. Appellants’ insistence that notice was issued in both cases, and that this case is “materially identical” to *Ford*, is erroneous.

Appellants’ suggestion that these cases are identical also ignores another substantial difference: in this case, Customs extended the

liquidation period for the express purpose of undertaking a fraud investigation because it suspected that Appellants' Entries were fraudulently made. In contrast, in *Ford* it was unclear whether Customs had extended the liquidation period and, if so, why extensions were necessary. There is no suggestion that *Ford* stands for the broad proposition that any challenge to an extension of liquidation is immediately reviewable under § 1581(i). Appellants' argument would vitiate the extension provision available to Customs under 19 U.S.C. § 1504(b) and prevent it from gathering additional information prior to final liquidation. As the CIT accurately observed:

Customs' reason for extending the liquidation period for [Appellants'] imports is to allow ICE time to conclude its investigation of possible transshipment of goods. To allow [Appellants] to interrupt the administrative process currently underway by providing declarative relief would severely undermine Customs and ICE's ability to conduct meaningful investigations into possible fraudulent activity.

*Chemsol*, 901 F. Supp. 2d at 1368.

Appellants also argue jurisdiction over their claims is proper under § 1581(i) because no other basis of jurisdiction is available and adequate. They say that jurisdiction under subsection (a) is not available because Customs "has not made and might never make a protestable decision." Appellants' Br. 20 (capitalization removed). That is, Appellants contend, because Customs may never affirmatively liquidate the Entries before they are deemed liquidated in Appellants' favor, it is uncertain whether Appellants will ever need to protest a Customs decision. In contrast, Appellants continue, subsection (i) "offers an affirmative avenue to the court where an importer, *after the liquidation period has uneventfully elapsed*, can . . . go straight to court for a judicial declaration that such liquidation has occurred, and thereby forestall an improper subsequent affirmative liquidation by [Customs]." *Id.* at 9–10 (emphasis added).

These arguments ignore established law. Congress created an express statutory scheme in § 1581(a) for administrative and judicial review of Customs' actions, providing for a protest before Customs and review of protest denials in the CIT. 19 U.S.C. §§ 1514(c)(3) ("A protest of a decision, order, or finding . . . shall be filed with [Customs] within 180 days after but not before . . . [the] date of liquidation or reliquidation."), 1515; 28 U.S.C. § 1581(a). Thus, the CIT "may adjudicate disputes stemming from denials of protests once the importer has exhausted its administrative protest options." *Ford*, 688 F.3d at

1327 (citing 28 U.S.C. § 1581(a)); see *United States v. U.S. Shoe Corp.*, 523 U.S. 360, 365 (1998) (“A protest. . . is an essential prerequisite when one challenges an actual Customs decision.”).

Customs’ decision to extend the liquidation period is a normal, if infrequent, part of its processing of entries, see 19 U.S.C. § 1504(b), and the propriety of an extension made with proper notice may only first be challenged before Customs in an administrative protest after liquidation. As noted previously, §§ 1504(b) and 1514(a) together contemplate that all determinations involved in a final liquidation, including extensions, are subsumed into the liquidation. Indeed, this court routinely reviews the CIT’s adjudication of the validity of a Customs extension as part of its review of a protest denial under § 1581(a). See, e.g., *Ford Motor Co. v. United States*, 286 F.3d 1335 (Fed. Cir. 2002); *Ford Motor Co. v. United States*, 157 F.3d 849 (Fed. Cir. 1998); *Intercargo Ins. Co. v. United States*, 83 F.3d 391 (Fed. Cir. 1996); *St. Paul Fire & Marine Ins. Co. v. United States*, 6 F.3d 763 (Fed. Cir. 1993); *Pagoda Trading Corp. v. United States*, 804 F.2d 665 (Fed. Cir. 1986).

Appellants apparently believe immediate review of extension decisions is necessary so they need not wait for the four-year deemed liquidation period to end. Immediate review by the courts would extend the time to liquidate far past that deadline, as evidenced by this case. Further, such interim review might not obviate the need for a subsequent protest to final liquidation after the extension challenge is fully litigated. In other words, allowing earlier review of extension decisions delays the administrative process until final resolution of the extension challenge, at which point the administrative process resumes and could very well lead to an administrative protest of the final liquidation decision anyway. Indeed, earlier review could cut off legitimate investigatory work conducted by Customs, such as the investigation into the suspected fraudulent transshipment scheme in this case, preventing Customs from concluding its investigation.

Only where Customs fails to extend the liquidation period, or fails to notify the importers of an extension as required by statute (as occurred in *Ford*), may importers seek a declaration that their entries have liquidated by operation of law *once the deemed liquidation period has passed*. Where extensions are made with proper notice during ongoing investigations by Customs, however, § 1581(a) provides jurisdiction for importers who object to the final liquidation, or any interim decisions merged therein, including the decision to extend the liquidation period.

Appellants also argue the CIT erred in finding § 1581(a) would become available in the future because jurisdiction must be assessed

at the time of filing. This was error, according to Appellants, because § 1581(i) jurisdiction is foreclosed only when another subsection of 1581 is available at the time of filing. In support, Appellants contend that “in every case where this Court has dismissed an action brought under § 1581(i) . . . , it has pointed to predicates for other bases for jurisdiction which existed *prior to, or at the time*, the complaint was filed.” Appellants’ Br. 23–24. Because there was no protestable decision at the time Appellants filed their complaints, they contend § 1581(a) is not available to them.

Appellants are incorrect. For example, in *Norman G. Jensen*, upon which Appellants rely, this court stated, “jurisdiction over the present suit could be procured under another subsection of § 1581 simply by requesting accelerated disposition under § 1515(b) *and then* securing jurisdiction under § 1581(a),” 687 F.3d at 1331 (emphasis added), demonstrating that some future action was required on the part of the appellants in that case to secure jurisdiction under § 1581(a). It is the availability of jurisdiction under § 1581(i) that must be determined at the time of filing, not the immediate availability of possible resort to another subsection of § 1581. The CIT has repeatedly and correctly held that when relief is prospectively and realistically available under another subsection of 1581, invocation of subsection (i) is incorrect. *See, e.g., Tianjin Magnesium Int’l Co. v. United States*, 533 F. Supp. 2d 1327, 1338 (Ct. Int’l Trade 2008); *Abitibi-Consol. Inc. v. United States*, 437 F. Supp. 2d 1352, 1356–59 (Ct. Int’l Trade 2006).

Appellants are correct that in *Ford* this court stated “that subject matter jurisdiction is determined at the time of the complaint, and . . . does not depend on subsequent events.” *Ford*, 688 F.3d at 1324. This does not mean immediate review under the residual jurisdiction provision is appropriate when Customs is engaged in a statutorily-authorized administrative process that will lend itself to jurisdiction under another provision of § 1581. Indeed, the “mere recitation of a basis for jurisdiction [is] not . . . controlling,” and courts “must look to the true nature of the action in a district court in determining jurisdiction.” *Hartford Fire*, 544 F.3d at 1293 (citing *Norsk Hydro Can., Inc. v. United States*, 472 F.3d 1347, 1355 (Fed. Cir. 2006)). Here, the CIT properly found “the true nature of [Appellants’] action is a challenge to Customs’ extensions of the time for liquidation. But Customs’ actions, as alleged in [Appellants’] complaints, are well within the four-year period allowed for extensions.” *Chemsol*, 901 F. Supp. 2d at 1366. Unlike *Ford*, where Customs failed to take any reviewable action prior to the time the entries liquidated by operation of law, here subsection (a) is the appropriate avenue for challenging an

extension made with proper notice. *See Hartford Fire*, 544 F.3d at 1292. Because jurisdiction under subsection (a) would be available, the CIT correctly declined to exercise jurisdiction under subsection (i). *See Norman G. Jensen*, 687 F.3d at 1330 (“[B]ecause Jensen could obtain jurisdiction under § 1581(a), jurisdiction under § 1581(i) does not exist.” (citing *Hartford Fire*, 544 F.3d at 1292)).

B. Relief Under 28 U.S.C. § 1581(a) is Not Manifestly Inadequate

Finally, Appellants argue that even if jurisdiction under § 1581(a) is available, it is “manifestly inadequate” because it cannot remedy Appellants’ injury. According to Appellants, subsection (a) offers a remedy to importers who believe they have been injured by the liquidation process and the remedy is limited to the refund of excess duties. Here, Appellants contend such a remedy is inadequate because they have not deposited any duties; rather, they made their Entries duty free. Appellants’ injury, they state, is the uncertainty that results from the ongoing investigation, and the relief they seek is a declaration that deemed liquidation has occurred. Thus, Appellants continue, the harm they suffered cannot be remedied by § 1581(a) through the protest procedure because the remedy would be limited to compensation for economic losses.

Appellants’ arguments misstate both the facts and law, however. The statute does not allow Customs to delay liquidation “indefinitely,” Appellants’ Br. 19, or at its whim. Rather, the statute specifies that Customs may extend liquidation “if . . . the information needed for the proper appraisal or classification of the imported or withdrawn merchandise, . . . or for ensuring compliance with applicable law, is not available to the Customs Service.” 19 U.S.C. § 1504(b). Customs may only extend liquidation three times, resulting in a total of four years from the date of entry within which Customs must liquidate the entries or they will be deemed liquidated. *Id.* ; 19 C.F.R. § 159.12(f). Four years is not “indefinite.” To the extent Appellants contend their injury is the delay in processing the Entries, as noted, immediate review of extension decisions would extend the liquidation process far past the deemed liquidation period, and would not foreclose the possibility of further delays due to subsequent protests to final liquidation after the interim extension challenge is fully litigated.

Here, Customs extended liquidation with proper notice. As to Appellants’ concern about “certainty in their liabilities and predictab[ility] in the processing of their customs obligations,” Appellants’ Br. 27, under the express statutory scheme established by Congress, Appellants’ Entries will certainly be affirmatively liquidated by Customs or

deemed liquidated in their favor by four years from the date of entry at the latest. Indeed, if Customs fails to liquidate within the four-year period and a deemed liquidation notice is not issued, Appellants could seek redress by filing a subsection (i) complaint seeking a declaration of deemed liquidation under *Ford*. That is not this case. As the CIT found:

Final agency action has not occurred and the record shows that Customs' investigation continues to be active and has not lapsed into inactivity as it did in *Ford*. The matter can be brought under § 1581(a) after the [Appellants'] entries have liquidated and [Appellants have] filed an administrative protest, should [they] continue to feel at that point in time that [they have] been injured. In this context, [Appellants] cannot claim that the § 1581(a) remedy is manifestly inadequate as there is no meaningful assertion of harm in letting Customs process and liquidate their entries.

*Chemsol*, 901 F. Supp. 2d at 1368 (citations omitted).

“[A] belief that [a plaintiff] had no remedy under subsection 1581(a) [does] not make that remedy inadequate,” *Hartford Fire*, 544 F.3d at 1294, and Appellants “cannot take it upon [themselves] to determine whether it would be futile to protest or not,” *Int'l Custom Prods., Inc. v. United States*, 467 F.3d 1324, 1328 (Fed. Cir. 2006). For these reasons, the CIT properly found that jurisdiction under § 1581(a) was available and adequate, rendering jurisdiction under subsection (i) improper.

#### CONCLUSION

Accordingly, the decision of the Court of International Trade is  
**AFFIRMED**

R.T. FOODS, INC., PLAINTIFF-APPELLANT, v. UNITED STATES,  
DEFENDANT-APPELLEE.

Appeal No. 2013–1188

Appeal from the United States Court of International Trade in No. 09-CV-0455,  
Judge Gregory W. Carman.

(Decided: July 3, 2014)

*Peter S. Herrick*, Peter S. Herrick, P.A., of Miami, Florida, argued for plaintiff-appellant.

*Beverly A. Farrell*, Trial Attorney, International Trade Field Office, Commercial Litigation Branch, Civil Division, United States Department of Justice, of New York, New York, argued for defendant-appellee. With her on the brief were *Stuart F. Delery*, Assistant Attorney General, *Jeanne E. Davidson*, Director, and *Amy M. Rubin*, Acting Assistant Director.

Before Dyk, Clevenger, and Wallach, *Circuit Judges*.

Wallach, *Circuit Judge*.

R.T. Foods, Inc. (“R.T.”) appeals the decision of the United States Court of International Trade (“CIT”) denying its motion for summary judgment and granting the cross-motion for summary judgment of the United States (the “Government”). *See R.T. Foods, Inc. v. United States*, 887 F. Supp. 2d 1351 (Ct. Int’l Trade 2012). Because the CIT properly classified R.T.’s products, this court affirms.

#### BACKGROUND

Between October 2007 and August 2008, R.T. made twenty-four entries of “Tempura Vegetables” and “Vegetable Bird’s Nests” from Thailand (“subject merchandise”), ten through the port of Boston and fourteen through the port of Long Beach. “The parties do not dispute the identity of the subject merchandise: frozen tempura battered vegetable mixtures sold under the names of ‘Vegetable Bird’s Nests’ and ‘Tempura Vegetables.’” *Id.* at 1353. The “Vegetable Bird’s Nests” product consists of julienne-cut carrots, onion, and kale, which are “mixed together, dipped in tempura batter, deep fried, flash frozen,” and packaged for retail. *Id.* The “Tempura Vegetables” medley consists of “three Bird’s Nests, three pieces of sweet potato, three pieces of carrot, three pieces of wing bean, three pieces of long or green bean, and three pieces of eggplant”; the individual vegetables are dusted with tempura batter, deep fried, flash frozen, and packaged for retail. *Id.*

United States Customs and Border Protection (“Customs”) classified the ten Boston entries and three of the Long Beach entries under the Harmonized Tariff Schedule of the United States<sup>1</sup> (“HTSUS”)

<sup>1</sup> All references to the HTSUS refer to the 2008 edition.

subheading 2004.90.85,<sup>2</sup> which carries a duty rate of 11.2%. The remaining eleven entries into the port of Long Beach were liquidated under R.T.'s proposed subheading, HTSUS 2106.90.99,<sup>3</sup> which carries a duty-free preference for products from Thailand. According to Customs, the latter entries were accidentally entered duty-free under R.T.'s claimed subheading.

In March 2009, R.T. timely filed three protests challenging Customs' classification of all twenty-four entries. After the protests were denied, R.T. commenced this action at the CIT in October 2009. The parties filed motions for summary judgment. As an initial matter, the CIT held it only had jurisdiction over three of the twenty-four entries.<sup>4</sup> On December 14, 2012, the CIT denied R.T.'s motion for summary judgment and granted the Government's cross-motion for summary judgment, thereby upholding Customs' classification of the subject merchandise under HTSUS 2004.90.85.

Appellant filed a timely appeal. This court has jurisdiction pursuant to 28 U.S.C. § 1295(a)(5) (2012).

## DISCUSSION

### I. Standard of Review

This court reviews the CIT's grant of summary judgment on tariff classifications de novo. *Lemans Corp. v. United States*, 660 F.3d 1311, 1315 (Fed. Cir. 2011); *Cummins Inc. v. United States*, 454 F.3d 1361, 1363 (Fed. Cir. 2006). In assessing Customs' classification determinations, this court employs the two-step analysis used by the CIT: (1) ascertaining "the proper meaning of the tariff provisions, which is a question of law reviewed de novo"; and (2) determining "whether merchandise falls within a particular heading, which is a question of fact we review only for clear error." *Lemans*, 660 F.3d at 1315 (citing *Cummins*, 454 F.3d at 1363). However, "[w]here, as here, the nature of the merchandise is undisputed, the inquiry collapses into a ques-

<sup>2</sup> HTSUS 2004.90.85 covers "Other vegetables prepared or preserved otherwise than by vinegar or acetic acid, frozen, other than products of heading 2006: Other vegetables and mixtures of vegetables: Other: Other, including mixtures."

<sup>3</sup> HTSUS 2106.90.99 provides for "Food preparations not elsewhere specified or included: Other: Other: Other: Frozen."

<sup>4</sup> Under 28 U.S.C. § 2636(a)(1) (2006), a civil action challenging Customs' denial of a protest must be commenced within 180 days of mailing of the notice of the denial. Therefore, the CIT found it was barred from hearing a challenge to one of the three protests, which covered the ten entries into the port of Boston, because it fell outside this limitations period. *R.T. Foods*, 887 F. Supp. 2d at 1355. As to the eleven entries into the port of Long Beach covered by another protest, the CIT found these entries had already liquidated in R.T.'s favor. Thus, there was no case or controversy as to these entries, so the CIT lacked jurisdiction over them. *Id.* at 1356. R.T. Foods has not appealed these determinations so only the classification of three of the entries remains at issue.

tion of law we review de novo.” *Id.* ; see *R.T. Foods*, 887 F. Supp. 2d at 1359 (“Since there is no dispute between the parties as to the nature of the merchandise involved in this case and the only issues to be resolved are legal, the case is ripe for disposal at the summary judgment stage.”). Accordingly, there are no genuine factual disputes precluding summary judgment. See *Link Snacks, Inc. v. United States*, 742 F.3d 962, 966 (Fed. Cir. 2014).

## II. Legal Framework

### A. Classification Pursuant to the HTSUS

The HTSUS is composed of classification headings, each of which has one or more subheadings. *Deckers Outdoor Corp. v. United States*, 714 F.3d 1363, 1366 (Fed. Cir. 2013). “The headings contain ‘general categories of merchandise,’ whereas ‘the subheadings provide a more particularized segregation of the goods within each category.’” *Id.* (quoting *Orlando Food Corp. v. United States*, 140 F.3d 1437, 1439 (Fed. Cir. 1998)). Along with the headings and subheadings, which are enumerated in chapters 1 through 99 of the HTSUS (each of which has its own section and chapter notes), the HTSUS statute also contains the “General Notes,” the “General Rules of Interpretation” (“GRI”), the “Additional United States Rules of Interpretation” (“ARI”), and various appendices for particular categories of goods.<sup>5</sup> See *Baxter Healthcare Corp. of P.R. v. United States*, 182 F.3d 1333, 1337 (Fed. Cir. 1999) (citing 19 U.S.C. § 3004(a) (1994)). The classification of merchandise is governed by the GRIs and the ARIs, which are applied in numerical order. *BenQ Am. Corp. v. United States*, 646 F.3d 1371, 1376 (Fed. Cir. 2011).

The classification analysis always begins with GRI 1, which directs that “classification shall be determined according to the terms of the headings and any relative section or chapter notes.” HTSUS GRI 1 (emphasis added); see *Orlando Food*, 140 F.3d at 1440 (“[A] court first construes the language of the heading, and any section or chapter notes in question, to determine whether the product at issue is classifiable under the heading.”). “Absent contrary legislative intent, HTSUS terms are to be construed according to their common and commercial meanings, which are presumed to be the same.” *Carl Zeiss, Inc. v. United States*, 195 F.3d 1375, 1379 (Fed. Cir. 1999)

<sup>5</sup> The World Customs Organization’s “Explanatory Notes,” which accompany each chapter of the HTSUS, are “not legally binding, are ‘persuasive[,]’ and are ‘generally indicative’ of the proper interpretation of the tariff provision.” *Lemans*, 660 F.3d at 1316 (quoting *Drygel, Inc. v. United States*, 541 F.3d 1129, 1134 (Fed. Cir. 2008)).

(citing *Simod Am. Corp. v. United States*, 872 F.2d 1572, 1576 (Fed. Cir. 1989)). Pursuant to GRI 1, the possible headings are to be evaluated without reference to their subheadings, which cannot be used to expand the scope of their respective headings. *Orlando Food*, 140 F.3d at 1440 (“Only after determining that a product is classifiable under the heading should the court look to the subheadings to find the correct classification for the merchandise. . . . [W]hen determining which heading is . . . more appropriate for classification, a court should compare only the language of the headings and not the language of the subheadings.”); *EOS of N. Am., Inc. v. United States*, 911 F. Supp. 2d 1311, 1327–28 (Ct. Int’l Trade 2013); *BASF Corp. v. United States*, 798 F. Supp. 2d 1353, 1362 (Ct. Int’l Trade 2011). Finally, if the proper heading can be determined under GRI 1, the court is not to look to the subsequent GRIs. See *CamelBak Prods., LLC v. United States*, 649 F.3d 1361, 1364 (Fed. Cir. 2011) (citing *Mita Copystar Am. v. United States*, 160 F.3d 710, 712 (Fed. Cir. 1998)) (“We apply GRI 1 as a substantive rule of interpretation, such that when an imported article is described in whole by a single classification heading or subheading, then that single classification applies, and the succeeding GRIs are in operative.”).

#### B. The Competing Headings

Customs classified the subject merchandise under HTSUS 2004, which provides for “Other vegetables prepared or preserved otherwise than by vinegar or acetic acid, frozen, other than products of heading 2006.”<sup>6</sup> This heading is an *eo nomine* provision, or one that “describes an article by a specific name.” *CamelBak Prods.*, 649 F.3d at 1364 (citing *Carl Zeiss*, 195 F.3d at 1379). “[A]n *eo nomine* provision includes all forms of the named article, including improved forms.” *Kahrs Int’l, Inc. v. United States*, 713 F.3d 640, 646 (Fed. Cir. 2013) (citing *Camel-Bak Prods.*, 649 F.3d at 1364–65). However, “when an article ‘is in character or function something other than as described by a specific statutory provision—either more limited or more diversified—and *the difference is significant*,’ it is not properly classified within an *eo nomine* provision.” *CamelBak Prods.*, 649 F.3d at 1365 (emphasis added) (quoting *Casio, Inc. v. United States*, 73 F.3d 1095, 1097 (Fed. Cir. 1996)). To determine whether such a difference is significant enough to remove an article from an *eo nomine* provision, this court has looked to “whether the item possess[es] features *substantially in excess* of those within the common meaning of the term,” or whether the subject article is “a change in identity of

<sup>6</sup> HTSUS 2006 concerns “[v]egetables, fruit, nuts, fruit-peel and other parts of plants preserved by sugar” and therefore is inapplicable here.

the article described by the statute.” *Id.* (alteration in original) (citations omitted).

R.T.’s proposed heading is HTSUS 2106, which provides for “Food preparations not elsewhere specified or included.” This heading is a “basket provision” as indicated by the terms “not elsewhere specified or included.” *Int’l Bus. Machs. Corp. v. United States*, 152 F.3d 1332, 1338 (Fed. Cir. 1998); HTSUS 2106. “A basket provision is not a specific provision.” *Int’l Bus. Machs.*, 152 F.3d at 1338. Therefore, “[c]lassification of imported merchandise in a basket provision is only appropriate if there is no tariff category that covers the merchandise more specifically.” *Rollerblade, Inc. v. United States*, 116 F. Supp. 2d 1247, 1251 (Ct. Int’l Trade 2000), *aff’d*, 282 F.3d 1349 (Fed. Cir. 2002). In other words, because HTSUS 2106 is a basket provision, any products that are “specified or included” in another tariff heading cannot be classified in HTSUS 2106.

### III. The Subject Merchandise Was Properly Classified in HTSUS 2004

The CIT found the subject merchandise fell under the *eo nomine* heading of HTSUS 2004, stating “[t]o *prima facie* fall under heading 2004 . . . five criteria must be met: the products must be (1) vegetables that are (2) prepared or preserved, (3) otherwise than by vinegar or acetic acid, which are (4) frozen, and are (5) other than products of heading 2006.” *R.T. Foods*, 887 F.2d at 1358. The CIT explained that both the “Vegetable Bird’s Nests” and the “Tempura Vegetables” satisfied all five criteria because “they are (1) vegetables that are (2) prepared (3) in tempura batter, not in vinegar or acetic acid, which are (4) flash frozen, and are (5) not products preserved by sugar as provided for by heading 2006.” *Id.* After finding the subject merchandise *prima facie* fell within HTSUS 2004, the CIT then “review[ed] . . . the possible subheadings” and determined “the proper subheading is 2004.90.85,” which provides for “Other vegetables prepared or preserved otherwise than by vinegar or acetic acid, frozen, other than products of heading 2006: Other vegetables and mixtures of vegetables: Other: Other, including mixtures.” *Id.* at 1359; HTSUS 2004.

In doing so, the CIT rejected R.T.’s proposed heading, HTSUS 2106, which it described as “an expansive basket heading that only applies in the absence of another applicable heading.” *R.T. Foods*, 887 F.2d at 1358 (“To *prima facie* fall under [HTSUS] 2016 . . . two criteria must be met: the products must be (1) a food preparation, which is (2) not elsewhere specified or included. Both Bird[s] Nests and Vegetable Medley satisfy the first criterion, but not the second: they are (1) a food preparation by common meaning, but they are (2) elsewhere

specified or included.”). The CIT also noted “Customs has consistently classified tempura-coated products by the underlying main food dipped into the tempura batter, not as a food preparation.” *Id.*

R.T. argues the CIT erred in classifying the subject merchandise under the *eo nomine* provision of HTSUS 2004 because “[t]here is a significant difference between *eo nomine* vegetables in heading 2004 . . . and RT’s products which changed the identity of the vegetables to pre-made ready-to-eat meals.” Appellant’s Br. 3. In other words, according to R.T., because its manufacturing process changed the identity of the vegetables, the products were removed from the *eo nomine* provision. *Id.* at 1, 7–8; Reply 2–3 (“[T]he processing of the original vegetables . . . transforms the vegetables into a ‘food preparation’ distinct from vegetables that are simply prepared or preserved. It is that transformation—a change in identity—that precludes the use of subheading 2004.90.85.”). In support, R.T. points to Note 1 to Chapter 20, which specifies that Chapter 20, under which HTSUS 2004 falls, does not cover vegetables prepared or preserved by the processes described in Chapter 7, which “covers vegetables, . . . whether fresh, chilled, frozen (uncooked or cooked by steaming or boiling in water), provisionally preserved or dried (including dehydrated, evaporated or freeze-dried).” HTSUS ch. 20, note 1; HTS ch. 7, Explanatory Note 1 (J.A. 186). To Appellant, because its products “have been cut, wrapped in tempura batter, deep-fried and frozen in a process as specified under Chapter 7, they cannot be classified under Chapter 20.” Appellant’s Br. at 8–9.

R.T. also argues that, because classification under heading 2004 is incorrect, the CIT erred in failing to perform a “principle use” analysis, which R.T. contends would have led the CIT to conclude that classification pursuant to R.T.’s proposed basket provision was proper. A “principle use” analysis is only used for those headings “controlled by use,” as opposed to *eo nomine* headings. *See* HTSUS ARI 1(a). Such an analysis involves determining “the use which exceeds any other *single* use” of the merchandise in the United States. *Aromont USA Inc. v. United States*, 671 F. 3d 1310, 1312 (Fed. Cir. 2012); HTSUS ARI 1(a). Appellant argues, under such an analysis, “RT’s food preparations are not principally used as vegetables. RT’s consumer’s expectation is to buy a pre-made meal that ‘makes even the worst cook look like a pro.’”<sup>7</sup> Appellant’s Br. 3 (citation omitted). According to Appellant, the manufacturing process of the

<sup>7</sup> R.T.’s record citations do not at all show the subject products are pre-made meals. *See* J.A. 52, 106. Indeed, at oral argument, R.T.’s counsel conceded the subject merchandise was not “referenced at all” in the portion of the record cited by R.T. for that proposition. Oral Arg. at 28:37–29:00, available at <http://www.ca9.uscourts.gov/oral-argument-recordings/2013-1188/all>.

subject merchandise transforms the vegetables into a product that is principally used as a pre-made meal.

The subject merchandise is properly classified under HTSUS 2004. As noted, the identity of the subject merchandise is not in dispute; the only issue is whether the products are named by the *eo nomine* provision or whether they differ so significantly they can no longer be properly classified within this provision. See *CamelBak Prods.*, 649 F.3d at 1365 (“In order to determine whether the subject article is classifiable within an *eo nomine* provision, we look to whether the subject article is *merely an improvement* over or whether it is, instead, a *change in identity* of the article described by the statute.” (emphases added)). The merchandise named by HTSUS 2004 includes “Other vegetables prepared or preserved otherwise than by vinegar or acetic acid, frozen, other than products of [HTSUS] 2006.” This court agrees with the CIT that the subject merchandise *prima facie* falls into this heading because the products are (1) vegetables, (2) that are prepared, (3) in tempura batter (and not in vinegar or acetic acid), (4) flash frozen, and are (5) not products preserved by sugar as provided for by HTSUS 2006.

R.T.’s argument that its manufacturing process transformed the vegetables into pre-made ready-to-eat meals is unsupported by any evidence and is unpersuasive. This court has noted there are “several analytical tools or factors [used] to assess whether the subject articles are beyond the reach of [an] *eo nomine* . . . provision,” which include the design, use, and function of the subject articles. *CamelBak Prods.*, 649 F.3d at 1367. R.T. has not identified a feature or component of the subject merchandise that so substantially transforms the vegetables so as to remove them from the *eo nomine* provision. Furthermore, R.T. has not shown how tempura battering and frying does not fall within the *eo nomine* provision’s specification that the frozen vegetables be “prepared or preserved otherwise than by vinegar or acetic acid.” Absent such a substantial transformation, it is clear the merchandise falls within the scope of heading 2004.

Additionally, there is no basis for interpreting the heading so as to exclude merchandise prepared in this manner. This court has cautioned that “we should not read a use limitation into an *eo nomine* provision unless the name itself inherently suggests a type of use.” *Kahrs Int’l*, 713 F.3d at 646 (“While Kahrs’ merchandise possesses some unique features related to its intended use . . . , we disagree with Kahrs that these features are sufficiently significant to transform its identity . . . and we *see* no reason to read additional limitations into the tariff schedule.”). There is no such suggestion in this *eo nomine*

provision that a use limitation is appropriate, nor is there any indication that the identity of the goods was so significantly transformed so as to remove the goods from this provision. *See CamelBak Prods.*, 649 F.3d at 1365. Accordingly, R.T. has failed to show that its products possess a feature or component that endows them with a unique identity substantial enough to justify removal from the scope of the *eo nomine* provision in which they *prima facie* fall.

As to R.T.'s argument that classification under HTSUS 2004 is precluded by Note 1(a) to Chapter 20, R.T. is correct that HTSUS 2004 is qualified by Note 1(a), which provides: "This chapter does not cover: (a) Vegetables, fruit or nuts, prepared or preserved by the processes specified in chapter 7, 8 or 11." However, Chapters 8 and 11 do not encompass vegetables, and Chapter 7 covers various vegetables that are "fresh, chilled, frozen (*uncooked or cooked by steaming or boiling in water*), *provisionally preserved or dried* (including dehydrated, evaporated or freeze-dried)." J.A. 186 (emphasis added). R.T. has offered no record evidence that the subject merchandise is prepared or preserved by the processes included within HTSUS Chapter 7. Indeed, while the "Vegetable Bird's Nests" and the "Tempura Vegetables" are comprised of frozen vegetables, they are not "uncooked or cooked by steaming or boiling in water," nor are they "provisionally preserved or dried." Because Chapter 7 does not include processes such as dipping in batter and frying, the subject merchandise is not excluded from HTSUS 2004 by virtue of Note 1(a) to Chapter 20.

Finally, because the subject merchandise is "specially provided for" elsewhere, *Int'l Bus. Machs.*, 152 F.3d at 1338, classification under R.T.'s proposed basket provision is inappropriate. R.T.'s proposed "principal use" analysis has no bearing on the proper classification of the subject merchandise because the products are named by an *eo nomine* provision.

#### IV. The Subject Merchandise Was Properly Classified in Subheading 2004.90.85

Having determined the proper heading, this court must now determine the proper subheading for the subject merchandise. Upon independent review of HTSUS 2004's subheadings, this court finds the subject merchandise is properly classified under subheading 2004.90.85. The subheadings of HTSUS 2004 are as follows:

2004	Other vegetables prepared or preserved otherwise than by vinegar or acetic acid, frozen, other than products of heading 2006:
2004.10	Potatoes
2004.10.40	Yellow (Solano) potatoes

2004.10.80	Other
	French fries
	Other
2004.90	Other vegetables and <i>mixtures of vegetables</i> :
2004.90.10	Antipasto
2004.90.80	Beans
2004.90.85	<i>Other</i>
	Carrots
	Sweet corn
	Peas
	<i>Other, including mixtures</i>

HTSUS 2004 (emphases added). Because the subject merchandise is not “potatoes” it is properly classified under subheading 2004.90, which encompasses “mixtures of vegetables.” Furthermore, because the subject merchandise is not “antipasto” or “beans,” it is properly classified under subheading 2004.90.85 for “Other: Other, including mixtures.”

#### CONCLUSION

Accordingly, the decision of the Court of International Trade is **AFFIRMED**

DEPENDABLE PACKAGING SOLUTIONS, INC., PLAINTIFF-APPELLANT, v. UNITED STATES, DEFENDANT-APPELLEE.

Appeal No. 2013–1300

Appeal from the United States Court of International Trade in No. 10-CV-0330, Judge Richard K. Eaton.

(Decided: July 9, 2014)

*Peter S. Herrick*, Peter S. Herrick, P.A., of Miami, Florida, argued for plaintiff-appellant.

*Edward F. Kenny*, Trial Attorney, International Trade Field Office, Commercial Litigation Branch, Civil Division, United States Department of Justice, of New York, New York, argued for defendant-appellee. With him on the brief were *Stuart F. DeLer Y*, Assistant Attorney General, *Jeanne E. Davidson*, Director, and *Amy M. Rubin*, Acting Assistant Director, International Trade Field Office. Of counsel on the brief was *Sheryl A. French*, Office of Assistant Chief Counsel, United States Customs and Border Protection, of New York, New York.

Before Wallach, Mayer, and Chen, *Circuit Judges*.

WALLACH, *Circuit Judge*.

Before the court is Dependable Packaging Solutions, Inc.’s (“Dependable”) appeal regarding the classification of certain types of glass merchandise. For the reasons set forth below, the holding of the Court of International Trade (“CIT”) is affirmed.

#### BACKGROUND

Dependable imports and distributes packing, janitorial, floral, and office supplies, and certain glass items. On May 29, 2010, Dependable imported certain glass items from the People’s Republic of China and identified them on their respective commercial invoices as “Generic Bud Vases” for the smaller (“bud vases”) and “Generic Trumpet Vases” (“trumpet vases”) for the larger (collectively, “the vases” or “the merchandise”). Both types of vases have an inexpensive look and visible seams. When imported, the bud vases were valued at \$0.30 or less and the trumpet vases at more than \$0.30 but no greater than \$3.00.

After importing the vases, Dependable sells them to mass-market flower-packing houses that fill them with water and flowers. The packing houses then ship the flower-packed vases to supermarkets or similar retailers, where the vase and flower combinations are displayed and sold as a single unit. Similar vases are sold empty at retail. Dependable’s vases are not sold empty at retail, though they can be reused.

When the vases were imported, Dependable classified them under the Harmonized Tariff Schedule of the United States (“HTSUS”)<sup>1</sup>

<sup>1</sup> All references to the HTSUS refer to the 2010 edition.

7018.90.50.<sup>2</sup> At liquidation, U.S. Customs and Border Protection (“Customs”) classified the bud vases under HTSUS 7013.99.404 and the trumpet vases under HTSUS 7013.99.50.5. The vases were thus classified under heading 7013, which provides for “Glassware of a kind used for . . . indoor decoration . . . (other than that of heading 7010 or 7018).” Specifically, heading 7013 provides, in relevant part:

7013	Glassware of a kind used for table, kitchen, toilet, office, <i>indoor decoration or similar purposes</i> (other than that of heading 7010 or 7018):
	Other glassware
7013.99	Other . . .
7013.99.40	Other:
	Valued not over \$0.30 each . . . 38%
7013.99.50	Valued over \$0.30 but not over \$3 each . . . 30%

(emphasis added).

Dependable timely protested but Customs failed to act within thirty days, resulting in a deemed denial. After the assessed duties were paid, Dependable filed this action in the CIT, abandoning its entered classification under heading 7018.90.50 and asserting both vases should be classified under HTSUS heading 7010, which includes “containers, of glass, of a kind used for the conveyance or packing of goods.” In particular, heading 7010 states, in relevant part:

7010	Carboys, bottles, flasks, jars, pots, vials, ampules and other containers, of glass, of a kind used for the conveyance or packing of goods; preserving jars of glass; stoppers, lids and other closures, of glass: . . .
7010.90	Other . . .
7010.90.30	Other . . . 5.2%.

Dependable contended its vases should be classified under HTSUS 7010.90.30.

<sup>2</sup> HTSUS 7018.90.50 covers: “Glass beads, imitation pearls, imitation precious or semiprecious stones and similar glass small wares and articles thereof other than imitation jewelry; glass eyes other than prosthetic articles; statuettes and other ornaments of lamp-worked glass, other than imitation jewelry; glass microspheres not exceeding 1 mm in diameter: . . . Other: . . . Other.”

After reviewing both competing headings and conducting a *Carborundum* analysis,<sup>3</sup> the CIT determined “a reasonable jury could only conclude that the vases here are commercially fungible with other inexpensive clear glass vases whose principal use is decorative, rather than with glass packing containers.” *Dependable Packaging Solutions, Inc. v. United States*, No. 10–0330, 2013 WL 646328, at \*9 (Ct. Int’l Trade Feb. 20, 2013). The CIT accordingly held Customs’ classification was correct and granted summary judgment in favor of the Government. Dependable timely appeals. This court has jurisdiction pursuant to 28 U.S.C. § 1295(a)(5) (2012).

## DISCUSSION

### I. Standard of Review

This court reviews the CIT’s grant of summary judgment on tariff classifications de novo. *Lemans Corp. v. United States*, 660 F.3d 1311, 1315 (Fed. Cir. 2011); *Cummins Inc. v. United States*, 454 F.3d 1361, 1363 (Fed. Cir. 2006). In assessing Customs’ classification determinations, this court employs the two-step analysis used by the CIT: (1) ascertaining “the proper meaning of the tariff provisions, which is a question of law reviewed de novo”; and (2) determining “whether merchandise falls within a particular heading, which is a question of fact we review only for clear error.” *Lemans*, 660 F.3d at 1315 (citing *Cummins*, 454 F.3d at 1363). However, “[w]here . . . the nature of the merchandise is undisputed, the inquiry collapses into a question of law we review de novo.” *Id.* “Here, there is no genuine dispute as to ‘exactly what the merchandise is’ or as to its actual use.” *Dependable Packaging*, 2013 WL 646328, at \*2 (citing *Bausch & Lomb, Inc. v. United States*, 148 F.3d 1363, 1365 (Fed. Cir. 1998)). Although the parties disagreed as “to the ‘principal use’ of the vases,” the CIT held this was “not a material dispute precluding summary judgment.” *Id.*

### II. Legal Framework

#### A. Classification Pursuant to the HTSUS

The HTSUS is composed of classification headings, each of which has one or more subheadings. *Deckers Outdoor Corp. v. United States*, 714 F.3d 1363, 1366 (Fed. Cir. 2013). “The headings contain ‘general categories of merchandise,’ whereas ‘the subheadings provide a more particularized segregation of the goods within each category.’” *Id.*

<sup>3</sup> When, as here, the CIT performs a principal use analysis to determine the proper heading for the imported merchandise, the CIT analyzes several factors, commonly referred to as the “*Carborundum* factors,” in order to determine which goods are “commercially fungible with the imported goods.” *Aromont USA, Inc. v. United States*, 671 F.3d 1310, 1312–13 (Fed. Cir. 2012).

(quoting *Orlando Food Corp. v. United States*, 140 F.3d 1437, 1439 (Fed. Cir. 1998)). Along with the headings and subheadings, which are enumerated in chapters 1 through 99 of the HTSUS (each of which has its own section and chapter notes), the HTSUS statute also contains the “General Notes,” the “General Rules of Interpretation” (“GRI”), the “Additional United States Rules of Interpretation” (“ARI”), and various appendices for particular categories of goods. See *Baxter Healthcare Corp. of P.R. v. United States*, 182 F.3d 1333, 1337 (Fed. Cir. 1999) (citing 19 U.S.C. § 3004(a) (1994)). The classification of merchandise is governed by the GRIs and the ARIs, which are applied in numerical order. *BenQ Am. Corp. v. United States*, 646 F.3d 1371, 1376 (Fed. Cir. 2011). The World Customs Organization’s “Explanatory Notes,” which accompany each chapter of the HTSUS, are “not legally binding, are ‘persuasive[,]’ and are ‘generally indicative’ of the proper interpretation of the tariff provision.” *Lemans*, 660 F.3d at 1316 (quoting *Drygel, Inc. v. United States*, 541 F.3d 1129, 1134 (Fed. Cir. 2008)).

The classification analysis always begins with GRI 1, which directs that “classification shall be determined according to the terms of the headings and any relative section or chapter notes.” HTSUS GRI 1 (emphasis added); see *Orlando Food*, 140 F.3d at 1440 (“[A] court first construes the language of the heading, and any section or chapter notes in question, to determine whether the product at issue is classifiable under the heading.”). “Absent contrary legislative intent, HTSUS terms are to be construed according to their common and commercial meanings, which are presumed to be the same.” *Carl Zeiss, Inc. v. United States*, 195 F.3d 1375, 1379 (Fed. Cir. 1999) (citing *Simod Am. Corp. v. United States*, 872 F.2d 1572, 1576 (Fed. Cir. 1989)). Pursuant to GRI 1, the possible headings are to be evaluated without reference to their subheadings, which cannot be used to expand the scope of their respective headings. *Orlando Food*, 140 F.3d at 1440 (“Only after determining that a product is classifiable under the heading should the court look to the subheadings to find the correct classification for the merchandise. . . . [W]hen determining which heading is . . . more appropriate for classification, a court should compare only the language of the headings and not the language of the subheadings.”); *EOS of N. Am., Inc. v. United States*, 911 F. Supp. 2d 1311, 1327–28 (Ct. Int’l Trade 2013). Finally, if the proper heading can be determined under GRI 1, the court is not to look to the subsequent GRIs. See *CamelBak Prods., LLC v. United States*, 649 F.3d 1361, 1364 (Fed. Cir. 2011) (citing *Mita Copystar Am. v. United States*, 160 F.3d 710, 712 (Fed. Cir. 1998)) (“We apply GRI 1 as a substantive rule of interpretation, such that when an imported article

is described in whole by a single classification heading or subheading, then that single classification applies, and the succeeding GRIs are inoperative.”).

All the relevant HTSUS headings in this case are principal use provisions,<sup>4</sup> which are governed by ARI 1(a). “[A] tariff classification controlled by use (other than actual use) is to be determined in accordance with the use in the United States at, or immediately prior to, the date of importation, of goods of that class or kind to which the imported goods belong, and the controlling use is the principal use.” ARI 1(a); *see also Primal Lite, Inc. v. United States*, 182 F.3d 1362, 1363 (Fed. Cir. 1999). This court has explained that the purpose of “principal use” provisions “is to classify particular merchandise according to the ordinary use of such merchandise, even though particular imported goods may be put to some atypical use.” *Primal Lite, Inc.*, 182 F.3d at 1364. Thus, for example, “a classification covering vehicles principally used for automobile racing would cover a race car, even if the particular imported car was actually used solely in an advertising display.” *Id.*

#### B. The Competing Headings

The parties are in agreement that the vases should be classified under HTSUS chapter 70 (“Glass and glassware”), but disagree about the appropriate heading. Currently the subject merchandise is classified under heading 7013, which provides for “Glassware of a kind used for table, kitchen, toilet, office, indoor decoration or similar purposes (other than that of heading 7010 or 7018).” Dependable argues the vases should be classified under heading 7010, which includes “containers, of glass, of a kind used for the conveyance or packing of goods.”

#### III. The Scope of Heading 7013

The Explanatory Notes to HTSUS 7013 specifically identify “vases” as an example of “glassware for indoor decoration and other glassware covered by heading 7013.” *See* Explanatory Notes to the Harmonized Commodity Description and Coding Sys., 70.13, 4th ed. (2007) (“Explanatory Notes”) (“This heading covers . . . [g]lassware for indoor decoration and other glassware . . . such as vases.”). The CIT concluded Dependable’s vases were “vases” within the scope of 7013, in part by relying on dictionary definitions of the word “vase.” *Dependable Packaging*, 2013 WL 646328, at \*4–5 & n.12 (“An open container, as of glass or porcelain, used for holding flowers or for

<sup>4</sup> The parties correctly agree that the competing headings, 7010 and 7013, are principal use provisions.

ornamentation.” (quoting American Heritage Dictionary of the English Language 1904 (4th ed. 2000)); “[A] usually round vessel of greater depth than width used chiefly as an ornament or for holding flowers.” (Merriam-Webster’s Online Dictionary, Vase, <http://www.merriam-webster.com/dictionary/vase> (last visited June 13, 2014))).

Dependable argues “it was an error to rely on a definition of ‘vase’ since the term vase does not appear” in Dependable’s proposed heading 7010. Appellant’s Br. 9. Dependable contends the CIT instead “should have concentrated on the definition of container, which does appear in heading 7010.” *Id.* Appellees counter the CIT correctly determined “the products at issue are glass flower ‘vases’ despite Dependable’s avoidance of that term.” Appellee’s Br. 14 (citing *Dependable Packaging*, 2013 WL 646328, at \*5).

Dependable’s argument is without merit. The CIT properly relied upon the Explanatory Notes in determining the scope of heading 7013. The Explanatory Notes “do not constitute controlling legislative history but nonetheless are intended to clarify the scope of . . . and to offer guidance in interpreting” the HTSUS. *Mita Copystar Am.*, 21 F.3d at 1082 (citation omitted). The Explanatory Notes are “generally indicative of the proper interpretation of the [HTSUS].” *Lynteq, Inc. v. United States*, 976 F.2d 693, 699 (Fed. Cir. 1992) (quoting H.R. Rep. No. 100576 (1988), reprinted in 1988 U.S.C.C.A.N 1547, 1582). Dependable is therefore incorrect that the term “vase” is irrelevant to the proper interpretation of the headings.

Additionally, Dependable itself identifies the merchandise as either “Generic Bud Vase” or “Generic Trumpet Vase” on its commercial invoices, see *Dependable Packaging*, 2013 WL 646328, at \*1; its sales brochures, J.A. 150–159; and in its responses to Customs’ interrogatories, J.A. 194. Dependable never denies the merchandise is vases, see J.A. 47, and indeed, during oral argument agrees it is. See Oral Argument at 4:21–4:25, available at <http://www.caafc.uscourts.gov/oral-argumentrecordings/13-1300/all> (counsel replying “yes” when asked whether the subject merchandise is “sold by the stores, as being in vases”). Finally, Dependable conceded the merchandise is vases: “Q[uestion:] When you say glass containers, are you referring to vases, like the vases that are at issue in this case? A[nswer]: Yes.” J.A. 47. Accordingly, we find no error in the CIT’s focus on “vase,” and therefore turn to determining the principal use of the merchandise at issue.

#### IV. The Principal Use of the Merchandise

Principal use provisions “call for a determination as to the group of goods that are commercially fungible with the imported goods” in order to identify the “use ‘which exceeds any other *single* use.’” *Aromont USA, Inc. v. United States*, 671 F.3d 1310, 1312 (Fed. Cir. 2012) (quoting *Primal Lite*, 182 F.3d at 1365; *Lenox Collections v. United States*, 20 C.I.T. 194, 196 (1996)). The CIT analyzes the “*Carborundum* factors” in determining which goods are “commercially fungible with the imported goods.” *Id.* at 1312–13. The factors include:

[The] use in the same manner as merchandise which defines the class; the general physical characteristics of the merchandise; the economic practicality of so using the import; the expectation of the ultimate purchasers; the channels of trade in which the merchandise moves; the environment of the sale, such as accompanying accessories and the manner in which the merchandise is advertised and displayed; and the recognition in the trade of this use.

*Id.* (citing *United States v. Carborundum Co.*, 536 F.2d 373, 377 (CCPA 1976)).

The CIT found the “[a]pplication of the *Carborundum* Factors demonstrates that Dependable’s vases are commercially fungible with other clear glass vases that are primarily used for decorative purposes,” thus falling under heading 7013. *Dependable Packaging*, 2013 WL 646328, at \*5. Dependable disputes that determination here.

##### A. General Physical Characteristics

The CIT found this factor “shows that the vases are commercially fungible with other clear glass vases that are sold empty at retail and are used for decorative purposes.” *Id.*

The general physical characteristics of the merchandise are not disputed by either party. Examining the merchandise, the CIT found:

The bud vases are eight inches in height, with a quarter-inch lip that the parties agree is not designed for any sort of closure. The lip surrounds an opening measuring one and one-half inches in diameter. The bud vases have a narrow neck extending downward five inches from the opening. The neck then widens into a bulbous shape, two and three-quarters inches in diameter at its widest point, and ends in a slightly concave bottom two inches in

diameter. The bud vases also have deepening striations beginning one inch below the lip that continue to the bottom of the article.

The trumpet vases are nine and three-quarter inches in height with a quarter-inch lip that the parties agree is not designed for any sort of closure. The lip surrounds an opening measuring three and three-quarter inches in diameter. The diameter of the opening gradually narrows (as one moves two-thirds of the way down the vase) to a diameter of three inches, widening again thereafter to end in a bottom measuring four and one-quarter inches in diameter.

*Id.* at \*1 (footnote omitted). The vases' physical characteristics are indistinguishable from other glass vases sold at retail for the purpose of decoration. *See* J.A. 218, 220–22 (testimony of a Customs Senior Import Specialist about her visits to various retail stores that sold similar vases for decorative purposes), 239–46 (exhibit documenting various retail stores selling similar vases for decorative purposes).

Additionally, “[t]he design features of the vases that Dependable points to as indicating use as [] packing material (narrow waists, long necks, small openings, inexpensive glass) are apparent in . . . other, virtually identical vases,” which indicates Dependable’s merchandise is “commercially fungible” with other inexpensive vases that are sold empty at retail and used for decorative purposes. *Dependable Packaging*, 2013 WL 646328, at \*5.

Finally, Dependable’s vases do not include closures and thus are not well-suited for “conveyance or packing,” as required by Dependable’s proposed heading. Subheading 7010.90.30 provides for:

Carboys, bottles, flasks, jars, pots, vials, ampoules and other containers of glass, of a kind used for the conveyance or packing of goods; preserving jars of glass; stopper, *lids and other closures of glass* : . . . Other: . . . Other.

HTSUS 7010.90.30 (emphasis added). The products listed in this heading typically have closures. The Explanatory Notes to heading 7010 further support this proposition: “The above-mentioned containers are generally designed for some type of closure”; “They generally have a large opening, a short neck (if any), and as a rule, a lip or flange to hold the lid or cap”; and the covered containers also include “[a]mpoules . . . intended to serve, after sealing.” *See also Latitudes Int’l Fragrance, Inc. v. United States*, 931 F. Supp. 2d 1247, 1254 (Ct. Int’l Trade 2013) (“The capacity of the bottles to take a stopper is a physical characteristic that distinguishes glassware for the convey-

ance of goods under heading 7010 from decorative glassware under heading 7013.”). Accordingly, that Dependable’s vases do not have a closure is indicative that they do not have the physical characteristics of merchandise that would fall under heading 7010.

Because Dependable’s vases are fungible with other decorative glassware that falls under heading 7013, the general physical characteristics favor classifying the vases under heading 7013.

#### B. Actual Use

The CIT determined the “use in the same manner which defines the class,” or actual use, favored classifying Dependable’s merchandise as glass vases primarily used for decorative purposes. “[A]ctual use of the particular imported goods is evidence of the principal use of the merchandise involved. Actual use of the goods involved is but one of a number of factors, and perhaps one of the more important of the *Carborundum* factors.” *Aromont*, 671 F.3d at 1313. Dependable contends the actual use of the merchandise is use for “wet packing and conveyance of flowers” from the packing house to retailers. Appellant’s Br. 14.

The CIT correctly concluded that the actual use of the merchandise is primarily decorative. It is undisputed that the merchandise is filled with flowers when sold to the end purchaser, and the unit is sold for a price higher than either the flowers or the vase individually. Additionally, purchasers of the unit at retail are able to display flowers in the vases and then reuse the vases in order to display flowers bought later in time. Indeed, Dependable concedes that consumers “do[] not want to go to the trouble of buying vases and flowers separately, but want[] the ease of having the glass containers and flowers as a unit ready to be *displayed at home or in the office.*” *Id.* at 19 (emphasis added).

Dependable’s vases are not “sold empty at retail, indicating that they have some use as packing materials.” *Dependable Packaging*, 2013 WL 646328, at \*7. However, the ultimate use of the merchandise, consistent with the way in which other inexpensive glass vases are used, evidences a primarily decorative purpose. Additionally, that the vases can be used for conveyance does not negate the fact that they are also used primarily as decoration. Accordingly, the actual use of the merchandise is primarily decorative, which favors classification under heading 7013.

#### C. Economic Practicality

The CIT found there was “no admissible evidence on the record that

the vases' use as packing containers is economically practical.”<sup>5</sup> *Dependable Packaging*, 2013 WL 646328, at \*7. According to Dependable, however, this factor is “decisive” in finding the vases are classifiable under 7010 rather than 7013 because “Dependable’s glass containers are the most economically feasible way to ship flowers from a packing house to supermarkets.” Appellant’s Br. 21 (citing J.A. 123). Dependable asserts that because Dependable conveys and packs the flowers before arrival at the retailers, supermarkets do not need to hire florists.

Dependable fails to offer any evidence for this statement, and indeed, when asked during oral argument about its statement in its briefing that “most supermarkets do not have florist[s] on their premises that can care for flowers,” Appellant’s Br. 21–22, counsel conceded “I perhaps did misp[ea]k.” Oral Argument at 15:26–16:20. Without evidence on the record that supports Dependable, this factor favors classifying the merchandise under heading 7013.

#### D. Expectations of the Ultimate Purchasers

Dependable argues the ultimate consumers of Dependable’s merchandise purchase the vases “not for the purpose of acquiring a decorative vase but for the conveyance of transporting flowers in a container.” Appellant’s Br. 17.

The record indicates that, at retail, the unit of the vase and flowers sells for more than the cost of flowers or vase alone. Retail purchasers pay extra for the pairing of flowers and vase when compared to the cost of flowers alone. *See* J.A. 85 (“Q[uestion:] You take the exact same bouquet of roses, you buy it out of the bucket without a vase, it’s less expensive than the bouquet in the vase[?] A[nswer:] Yes. It’s less cost for transport and product obviously.”); *see also* Oral Argument at 4:39–5:03 (counsel replying “yes” to both whether customers pay more for the vase and flower combination and whether retailers charge more for that combination). That the unit price is more expensive than flowers alone indicates that acquiring Dependable’s vases is not merely incidental to the purchase of the flowers, as would be the case if the vases were merely packing containers.

Dependable also argues that a purchaser “would not expect to reuse the glass containers for decoration after transporting the flowers to their intended location.” Appellant’s Br. 17. However, Dependable has

<sup>5</sup> “[U]nder 28 U.S.C. § 2639(a)(1), a classification of merchandise by Customs is presumed to be correct . . . [so] the burden of proof is upon the party challenging the classification.” *Rollerblade, Inc. v. United States*, 282 F.3d 1349, 1352 (Fed. Cir. 2002) (internal quotation marks and citations omitted).

provided no support for this assertion. *See Dependable Packaging*, 2013 WL 646328, at \*6. It is also not disputed “that the vases are capable of reuse and that the ultimate purchaser would have the option to do so.” *Id.* ; *see also* J.A. 79. The CIT correctly determined that the ultimate purchaser buys the vases for primarily decorative purposes, not to perform conveyance or packaging.

#### E. Channels of Trade

Dependable argues that because its vases “are never sold for any purpose other than that of being used as a container for conveying or packing of flowers” this factor supports classification under 7010. Appellant’s Br. 19. However, Dependable’s sale of the empty vases to packing houses does not mean they are fungible with glass containers intended to be used for packaging or conveyance. The ultimate purchaser buys the vase at retail for the purpose of decoration, as determined above. Thus, we agree with the CIT’s analysis that “the movement of the vases in trade merely suggests that Dependable’s vases travel in an atypical manner to the final purchasers who employ them in a typical manner.” *Dependable Packaging*, 2013 WL 646328, at \*6.

#### F. Environment of the Sale

The manner in which a product is displayed and advertised is relevant to an analysis of this factor. *See Carborundum*, 536 F.2d at 377. It is undisputed that the vases are filled with flowers and displayed for sale at the retail location in order to encourage customers to purchase the vase and flower unit because of the decorative value of the vase and flowers combined. Indeed, Dependable’s own marketing materials depict some of its vase and flower units being used as decoration and state “retailers hope that consumers would be attracted to the presentation of the flowers within glass containers.” *See* J.A. 160, 161, 164; Appellant’s Br. 20.

#### G. Recognition in the Trade of This Use

Under this factor, “courts consider whether the merchandise is recognized in the trade as having that particular use or whether it meets certain specifications recognized in the trade for that particular class of products.” *Aromont*, 671 F.3d at 1316. Dependable contends the trade recognizes its merchandise as “utility vases,” which reflects “the durability of the glass containers” and their ability to protect the flowers during transport. Appellant’s Br. 23. However, the only record evidence related to this factor is Dependable’s testimony about the use of its actual customers, “rather than connoting any

broad commercial meaning or industry practice.” *Dependable Packaging*, 2013 WL 646328, at \*8 (citing J.A. 76–77) (“Q[uestion:] Is that a term of art, utility vase? A[nswer:] Of art, no. Q[uestion:] Is it something used in the industry, that term ‘utility vase’? A[nswer:] They usually use utility vase as cheap.”). As discussed above, the record shows that vases that are “virtually indistinguishable” from Dependable’s glass vases are sold empty at retail for the purpose of decoration. *Id.* The record thus shows that this factor is neutral.

In sum, nearly every *Carborundum* factor weighs heavily in favor of classifying Dependable’s merchandise under heading 7013 rather than heading 7010, and not one supports Dependable. Accordingly, the CIT correctly granted summary judgment upholding Customs’ classification of the vases under heading 7013.

#### CONCLUSION

The decision of the CIT is

**AFFIRMED**

