U.S. Customs and Border Protection

PROPOSED REVOCATION OF SIX RULING LETTERS, MODIFICATION OF ONE RULING LETTER, AND PROPOSED REVOCATION OF TREATMENT RELATING TO THE TARIFF CLASSIFICATION OF CERTAIN NECK, FACE, HEAD, AND ARM COVERINGS

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

ACTION: Notice of proposed revocation of six ruling letters, modification of one ruling letter, and proposed revocation of treatment relating to the tariff classification of certain neck, face, head, and arm coverings.

SUMMARY: Pursuant to section 625(c), Tariff Act of 1930 (19 U.S.C. § 1625(c)), as amended by section 623 of title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that U.S. Customs and Border Protection (CBP) intends to revoke or modify seven ruling letters concerning tariff classification of certain neck, face, head, and arm coverings under the Harmonized Tariff Schedule of the United States (HTSUS). Similarly, CBP intends to revoke any treatment previously accorded by CBP to substantially identical transactions. Comments on the correctness of the proposed actions are invited.

DATE: Comments must be received on or before February 8, 2025.

ADDRESS: Written comments are to be addressed to U.S. Customs and Border Protection, Office of Trade, Regulations and Rulings, Attention: Shannon L. Stillwell, Commercial and Trade Facilitation Division, 90 K St., NE, 10th Floor, Washington, DC 20229–1177. CBP is also allowing commenters to submit electronic comments to the following email address: *1625Comments@cbp.dhs.gov*. All comments should reference the title of the proposed notice at issue and the *Customs Bulletin* volume, number and date of publication. Arrangements to inspect submitted comments should be made in advance by calling Ms. Shannon L. Stillwell at (202) 325–0739 or by emailing shannon.l.stillwell@cbp.dhs.gov.

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

SUPPLEMENTARY INFORMATION:

BACKGROUND

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

Pursuant to 19 U.S.C. § 1625(c)(1), this notice advises interested parties that CBP is proposing to revoke or modify seven ruling letters pertaining to the tariff classification of certain neck, face, head, and arm coverings. Although in this notice, CBP is specifically referring to New York Ruling Letter ("NY") N311707 (dated June 9, 2020 – Attachment A), Headquarters Ruling Letter ("HQ") 950751 (dated December 9, 1991 – Attachment B), W968280 (dated August 15, 2007 – Attachment C), NY K83753, (dated April 7, 2004 – Attachment D), NY N300387 (dated September 27, 2018 – Attachment D), NY N204320 (dated February 28, 2012 – Attachment E), NY N300387, (dated September 27, 2018 – Attachment F), and NY K86452 (dated June 8, 2004 – Attachment G), this notice also covers any rulings on this merchandise which may exist but have not been specifically identified. CBP has undertaken reasonable efforts to search existing databases for rulings in addition to the seven identified. No further rulings have been found. Any party who has received an interpretive ruling or decision (i.e., a ruling letter, internal advice memorandum or decision, or protest review decision) on the merchandise subject to this notice should advise CBP during the comment period.

Similarly, pursuant to 19 U.S.C. § 1625(c)(2), CBP is proposing to revoke any treatment previously accorded by CBP to substantially identical transactions. Any person involved in substantially identical transactions should advise CBP during this comment period. An importer's failure to advise CBP of substantially identical transactions or of a specific ruling not identified in this notice may raise

issues of reasonable care on the part of the importer or its agents for importations of merchandise subsequent to the effective date of the final decision on this notice.

In NY N311707, CBP classified certain neck, face, head, and arm coverings in heading 6505, HTSUS, HTSUS, which provides for "Hats and other headgear, knitted or crocheted, or made up from lace, felt or other textile fabric, in the piece (but not in strips), whether or not lined or trimmed; hair-nets of any material, whether or not lined or trimmed." Additionally, CBP has reviewed six other rulings with substantially similar merchandise: (1) HQ 950751, which classified knit scarf-tubes, or funnels, in heading 6505, HTSUS; (2) HQ W968280, which classified a tubular head and neck cover identified as "the Original Buff®" in heading 6505, HTSUS; (3) NY K83753, which classified a cylinder shaped item identified as "The Headcase™" in heading 6505, HTSUS; (4) NY N204320, which classified an article identified as "Solarguard Headgear, style number SGHMAHI" in heading 6505, HTSUS; (5) NY N300387, which classified Style HG-100, a cylinder shaped item identified as "Adult Unisex Winter Headgear" that covers the head and neck, in heading 6505, HTSUS; and (6) NY K86452, which classified a protective sleeve that can also be worn as headwear or around an athlete's neck for protection and comfort, identified as "Sample 2," in heading 6505, HTSUS. CBP has reviewed NY N311707, HQ 950751, HQ W968280, NY K83753, NY N204320, NY N300387, and NY K86452 and has determined the ruling letters to be in error.

It is now CBP's position that the articles at issue in HQ 950751, HQ W968280, NY N311707, NY K83753, NY N204320, NY N300387 are properly classified in heading 6117, HTSUS, specifically in subheading 6117.10.20, HTSUS, which provides for "Other made up clothing accessories, knitted or crocheted; knitted or crocheted parts of garments or of clothing accessories: Shawls, scarves, mufflers, mantillas, veils and the like: Of man-made fibers." Additionally, it is now CBP's position that the article at issue in NY K86452 is classified in heading 6117, HTSUS, specifically in subheading 6117.80.95, HTSUS, which provides for "Other made up clothing accessories, knitted or crocheted; knitted or crocheted parts of garments or of clothing accessories: Other accessories: Other: Other."

Pursuant to 19 U.S.C. § 1625(c)(1), CBP is proposing to revoke NY N311707, HQ 950751, HQ W968280, NY K83753, NY N204320, and NY N300387, to modify NY K86452, and to revoke or modify any other ruling not specifically identified to reflect the analysis contained in the proposed HQ H323071, set forth as Attachment H to this

notice. Additionally, pursuant to 19 U.S.C. § 1625(c)(2), CBP is proposing to revoke any treatment previously accorded by CBP to substantially identical transactions.

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

YULIYA A. GULIS,
Director
Commercial and Trade Facilitation Division

Attachments

N311707

June 9, 2020
CLA-2–65:OT:RR:NC:N3:358
CATEGORY: Classification
TARIFF NO.: 6505.00.6090, 9903.88.03

MR. CHEN C. LIU
ALLSTAR MARKETING GROUP, LLC
2 SKYLINE DRIVE
HAWTHORNE, NY 10532

RE: The tariff classification of headgear from China

DEAR MR. LIU:

In your letter dated May 11, 2020, you requested a tariff classification ruling. No samples were submitted with this request.

Item #109032P identified as "Neck Gaiter" is a tubular shaped panel with finished edges that covers the head and neck and measures approximately 10 by 21 inches when laying flat. In your letter and subsequest correspondence you state that the item protects the wearer from the sun with UPF 50, blocking up to 98 percent of UV rays as well as dust, debris and wind when used as a face cover. You also state that the item is constructed of 92 percent polyester and 8 percent spandex knit fabric. The Neck Gaiter will be imported in three different styles, Full Gaiter which measures 10 by 21 inches, Half Gaiter which measures 9 by 10.5 inches and Youth Gaiter which measures 7.5 by 8 inches in various colors under item #s 5121, 5131, 5133, 5135, 5140, 5141, 5142, 108007, 108008, 108009, 109255, 109452, 109453, 109454, 109455, 109457, 109458, 109459, 109462, 109463, 108008P, 108009P, 109032P, 109363P, 109393P, 109394P, 109452P, 109457P, 109460P, 109461P, A389180 848 000, A389180 851 000, A389180 852 000.

The applicable subheading for all items will be 6505.00.6090, Harmonized Tariff Schedule of the United States (HTSUS), which provides for "Hats and other headgear, knitted or crocheted, or made up from lace, felt or other textile fabric, in the piece (but not in strips), whether or not lined or trimmed; hair-nets of any material, whether or not lined or trimmed: Other: Other: Of man-made fibers: Knitted or crocheted or made up from knitted or crocheted fabric: Not in part of braid...Other: Other: Other." The rate of duty will be 20 cents per kilogram plus 7 percent as valorem.

Pursuant to U.S. Note 20 to Subchapter III, Chapter 99, HTSUS, products of China classified under subheading 6505.00.6090, HTSUS, unless specifically excluded, are subject to an additional 25 percent ad valorem rate of duty. At the time of importation, you must report the Chapter 99 subheading, i.e., 9903.88.03, in addition to subheading 6505.00.6090, HTSUS, listed above.

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

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

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

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

Sincerely,

STEVEN A. MACK
Director
National Commodity Specialist Division

HQ 950751
December 9, 1991
CLA-2 CO:R:C:T 950751 CRS
CATEGORY: Classification
TARIFF NO.: 6505.90.6080

MR. FELIX MONTESINO
R.H. MACY CORPORATE BUYING
ELEVEN PENN PLAZA
NEW YORK, NY 10001–2006

RE: Knit scarf-tube; funnel; DD 857257 revoked.

DEAR MR. MONTESINO:

This is to advise you of a change in the classification of women's knit scarf-tubes, or funnels, as a result of the decision in Headquarters Ruling Letter (HRL) 087177 dated October 2, 1990, a copy of which is enclosed. As a result of this ruling, funnels are classifiable in subheading 6505.90.6080, Harmonized Tariff Schedule of the United States Annotated (HTSUSA) rather than in subheading 6117.80.0025, HTSUSA, as stated in DD 857257, issued to you on October 25, 1990.

Accordingly, we are revoking DD 857257 pursuant to 19 CFR 177.9(d)(1). This revocation will not be applied retroactively to DD 857257 (19 CFR 177.9(d)(2)) and will not, therefore, affect past transactions under that ruling. However, for the purposes of future transactions in merchandise of this type, DD 857257 will not be valid precedent. We recognize that pending transactions may be adversely affected by this revocation, in that current contracts for importations arriving at a port subsequent to this decision will be classified pursuant to it. If such a situation arises, you may apply for relief from the binding effects of this decision as may be warranted by the circumstances. Please be advised that in some instances involving import restraints, such relief may require separate approvals from other government agencies.

Sincerely,

JOHN DURANT,
Director
Commercial Rulings Division

Enclosure

HQ W968280
August 15, 2007
CLA-2 OT:RR:CTF:TCM W968280 HMC
CATEGORY: Classification
TARIFF NO.: 6505.90.6090

PORT DIRECTOR
U.S. CUSTOMS AND BORDER PROTECTION
P.O. BOX 17423
WASHINGTON, DC 20041

ATTN: Import Specialist Division

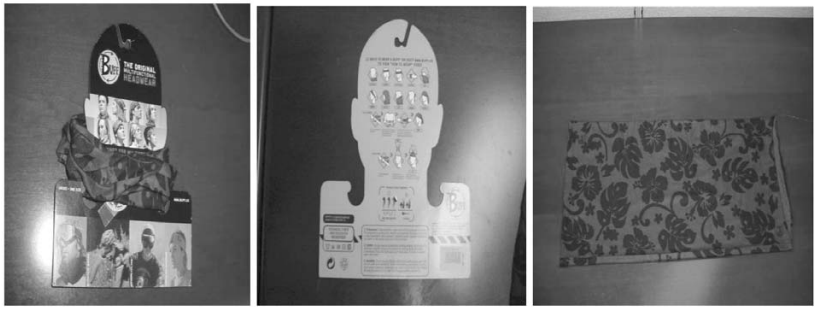
Re: Internal Advice; Classification of the Original Buff®

DEAR PORT DIRECTOR:

This is in response to your memorandum, dated June 2, 2006, forwarding a request for internal advice, dated February 17, 2006, and letter, dated January 12, 2006, both submitted by the law offices of Stein, Shostak, Shostak, Pollack & Ohara, LL, on behalf of Original Buff, S.L. (hereinafter referred to as "the requester"), concerning the classification under the Harmonized Tariff Schedule of the United States ("HTSUS"), of the Original Buff.® A sample was submitted with the request for internal advice.

FACTS:

The sample submitted is the Original Buff® ("Buff") that is made from a tubular 100% knit polyester microfiber fabric that measures approximately 50 centimeters in length and 25 centimeters in width when lying flat. The display card that holds the merchandise indicates that the Buff is designed to quickly wick, absorb and evaporate moisture, and that the microfiber from which it is made is breathable and wind resistant, and performs as an insulator that keeps the wearer warm in the winter and cool in the summer. The display card also describes the Buff as a seamless article, slightly stretchy for custom fit, which makes the merchandise comfortable head and neck wear. The card further identifies the Buff as multi-functional headwear, designed for multi-sport use and illustrates 12 ways to wear it. The 12 ways to wear the Buff are referred to as the "neckerchief," "headband," "blind chicken," "wristband," "mask," "hairband," "balaclava," "scarf," "scrunchy," "sahariane," "cap" and the "pirate." The sample provided is a grey colored Buff with a printed pattern of black flowers and leaves. The display card is in the shape of a human head and shoulders and the Buff is marketed wrapped around the "shoulder" of the card, as shown in the pictures of the item below:



In the January 12, 2006 letter, counsel for the requester explains that in 2005, the United States distributor of the Buff, Buff USA, LLC, entered the Buff under subheading 6505.90.6090, HTSUS, as other headgear, of man-made fibers, knitted or crocheted or made up from knitted or crocheted fabric, not in part of braid. Subsequently, CBP issued a Notice of Proposed Action, dated September 1, 2005, in which CBP proposed to reclassify the Buff under subheading 6117.80.9540, HTSUS, as other made up clothing accessories, knitted or crocheted. However, counsel states that CBP has recently proposed to reclassify the Buff under subheading 6003.30.60, HTSUS, as other knitted fabric, of synthetic fibers. Counsel for the requester contends that the Buff is classifiable under subheading 6505.90.6090, HTSUS.

ISSUE:

Whether the Buff is classifiable as other headgear under subheading 6505.90.60, HTSUS, as other made up clothing accessories under subheading 6117.80.95, HTSUS, or as other knitted or crocheted fabric under subheading 6003.30.60, HTSUS.

LAW AND ANALYSIS:

Merchandise is classifiable under the HTSUS, in accordance with the General Rules of Interpretation (GRIs). GRI 1 provides, in part, that for legal purposes, classification shall be determined according to the terms of the headings and any relative section or chapter notes, and provided the headings or notes do not require otherwise, according to GRIs 2 through 6.

The Harmonized Commodity Description and Coding System Explanatory Notes (ENs) constitute the official interpretation of the Harmonized System. While not legally binding on the contracting parties, and therefore not dispositive, the ENs provide a commentary on the scope of each heading of the Harmonized System and are thus useful in ascertaining the classification of merchandise under the System. CBP believes the ENs should always be consulted. See T.D. 89–80, 54 *Fed. Reg.* 35127, 35128 (Aug. 23, 1989).

The HTSUS subheadings under consideration for the Buff are as follows:

6003	Knitted or crocheted fabrics of a width not exceeding 30 cm, other than those of heading 6001 or 6002:
	* * *
6003.30	Of synthetic fibers:

	* * *
6003.30.60	Other....
	* * * *
6117	Other made up clothing accessories, knitted or crocheted; knitted or crocheted parts of garments or of clothing accessories:
	* * *
6117.80	Other accessories:
	* * *
	Other:
	* * *
6117.80.95	Other....
	* * * *
6505	Hats and other headgear, knitted or crocheted, or made up from lace, felt or other textile fabric, in the piece (but not in strips), whether or not lined or trimmed; hair-nets of any material, whether or not lined or trimmed:
	* * *
6505.90	Other:
	* * *
	Other:
	* * *
	Of man-made fibers:
	Knitted or crocheted or made up from knitted or crocheted fabric:
	* * *
6505.90.60	Not in part of braid....
	* * * *

Counsel for the requester contends that the Buff is classifiable, applying GRI 1, as other headgear under subheading 6505.90.6090, HTSUS, on the premise that the Buff is a hood that is styled almost identically to the merchandise considered in Headquarters Ruling Letter ("HQ") 087177, dated October 2, 1990, in which CBP determined that a ladies "funnel" article was a hood and thus headgear of heading 6505, HTSUS. Alternatively, counsel argues that should CBP not be able to discern the essential character of the Buff, applying GRI 3(c), the merchandise should still be classified in heading 6505, HTSUS. To support its GRI 3(c) argument, counsel cites New York Ruling Letter ("NY") K86452, dated June 8, 2004, NY K83753, dated April 7, 2004, and NY 838399, dated April 10, 1989.

The merchandise considered in HQ 087177 is described in that ruling as a knit tubular article of headwear, known in the trade as a ladies "funnel," approximately 25 inches in length, made of 100 percent acrylic, and with a ribbed knit opening at one end. The ruling further states that:

> It is designed to be worn over the head and neck by gathering it together and pulling it over the head until one's face is exposed at the ribbed knit end. The full head and neck coverage provides warmth and protection against the elements, and as such, functions much like a hood. Although

> the garment, when worn is significantly full at the nape of the neck, the excess material does not cover the shoulders or back in the manner of a scarf or shawl.

CBP, applying GRI 1, classified the merchandise in heading 6505, HTSUS. Citing EN 65.05 and a dictionary definition of the term "hood," CBP found that because the merchandise served in the same manner as a detachable hood, the "funnel" was substantially similar to headgear described in heading 6505, HTSUS. We disagree with counsel's contention that the subject Buff is almost identical to the funnel article at issue in HQ 087177. As stated in the sample display card submitted, the Buff does not have a finished ribbed end like the merchandise considered in HQ 087177. Therefore, it is our view that the subject merchandise is distinguishable from the merchandise considered in HQ 087177.[1] We nevertheless find that the subject merchandise is described by heading 6505, HTSUS.

The General EN to Chapter 65, states that:

> With the **exception** of the articles listed below this Chapter covers hat-shapes, hat-forms, hat bodies and hoods, and hats and other headgear of all kinds, irrespective of the materials of which they are made and of their intended use (daily wear, theatre, disguise, protection, etc.).
>
> It also covers hair-nets of any material and certain specified fittings for headgear.
>
> The hats and other headgear of this Chapter may incorporate trimmings of various kinds and of any material, including trimmings made of the materials of Chapter 71.

This Chapter **does not include**:

(a) Headgear for animals (**heading 42.01**).

(b) Shawls, scarves, mantillas, veils and the like (**heading 61.17** or **62.14**).

(c) Headgear showing signs of appreciable wear and presented in bulk, bales, sacks or similar bulk packings (**heading 63.09**).

(d) Wigs and the like (**heading 67.04**).

(e) Asbestos headgear (**heading 68.12**).

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[1] Furthermore, we disagree with counsel's alternative argument that the subject merchandise should be classified in heading 6505, HTSUS, pursuant to GRI 3(c). Note 1(o) to Section XI, HTSUS, provides that Section XI does not cover hairnets or other headgear or parts thereof of Chapter 65. Thus, if an article were described by heading 6505, HTSUS, it would be classifiable in that heading in accordance to GRI 1. Also, the articles considered in two of the cases cited by counsel are distinguishable from the subject merchandise. In NY K86452, dated June 8, 2004, CBP considered a protective sleeve that could also be worn as headwear or around an athlete's neck for protection or comfort. CBP classified the protective sleeve pursuant to GRI 3(c) because neither the headwear features nor the sleeve features, which included a notched, cuffed opening at the upper end of the sleeve with a hook and loop system, imparted the essential character to the article. The Buff, being considered in this case does not have the features of the merchandise considered in NY K86452. Also, the articles considered in NY 838399, dated April 10, 1989, are distinguishable from the Buff because that case involved three styles of caps, which are completely different from the subject merchandise. Moreover, contrary to counsel's contention, CBP in NY 838399 did not apply GRI 3(c) to the merchandise considered in that ruling which counsel seeks to compare with the Buff.

(f) Dolls' hats, other toy hats or carnival articles (**Chapter 95**).

(g) Various articles used as hat trimmings (buckles, clasps, badges, feathers, artificial flowers, etc.) when not incorporated in headgear (appropriate headings).

The term "headgear" is not defined in the section or chapter notes of the HTSUS, or in the ENs. CBP has nevertheless relied on dictionary definitions to determine whether merchandise is headgear.[2] In particular CBP has cited the definition provided in *The Random House Dictionary of the English Language, Unabridged Edition* (1983), which defines the term "headgear" as "any covering for the head, esp. a hat, cap, bonnet, etc." *See, e.g.,* HQ 085390, dated December 14, 1989, and HQ 966541, dated September 9, 2003. Applying the above definition of the term "headgear" to this case, we find that the Buff falls within the above-cited definition of "headgear" as it is specifically designed for wearing on the head. Also, the Buff is marketed as headgear with multiple uses, the majority of which would be to cover the head. We further find that inasmuch as the language of General EN to Chapter 65, HTSUS, includes headgears of all kinds and the merchandise is not like any of the specific exceptions cited therein, the Buff is described by heading 6505, HTSUS. This conclusion is supported by NY K83753, dated April 7, 2004, cited by counsel.

The merchandise considered in NY K83753 is the Headcase,™ which is described in that ruling as a cylinder shaped item that measures approximately 9 x 17 inches, made of 100% polyester microfiber and without seams. It does appear that the Headcase™ is substantially similar to the Buff. While the legal reasoning applied in NY K83753 appears to be incorrect,[3] we agree with its conclusion and find that, like the Headcase™ considered in NY K83753, the Buff is described by heading 6505, HTSUS. Because Note 1(o) to Section XI, HTSUS, excludes articles of Chapter 65, the subject merchandise is not classifiable in headings 6117 or 6003, HTSUS. Accordingly, the subject merchandise is classifiable under subheading 6505.90.60, HTSUS, which provides for "Hats and other headgear, knitted or crocheted, or made up from lace, felt or other textile fabric, in the piece (but not in strips), whether or not lined or trimmed; hair-nets of any material, whether or not lined or trimmed: Other: Other: Of man-made fibers: Knitted or crocheted or made up from knitted or crocheted fabric: Not in part of braid."[4]

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[2] A tariff term that is not defined in the text of the HTSUS or the ENs is construed in accordance with its common and commercial meaning. *Nippon Kogaku (USA) Inc. v. United States*, 69 CCPA 89, 673 F.2d 380 (1982). Common and commercial meaning may be determined by consulting dictionaries, lexicons, scientific authorities and other reliable sources. *C.J. Tower & Sons v. United States*, 69 CCPA 128, 673 F.2d 1268 (1982).

[3] *See supra*, note 1.

[4] We note that the country of origin marking "Made in the EU" on the back side of the card that holds the Buff for sale does not satisfy the country of origin requirements at 19 CFR Part 134. See HQ 734820, dated April 21, 1994, and HQ 734667, dated June 16, 1992, which hold that the marking "EU" is not an acceptable marking designation because the "EU" is not recognized as a country.

HOLDING:

By application of GRI 1, the Buff is classifiable in heading 6505, HTSUS. It is specifically classifiable under subheading 6505.90.60, HTSUS, which provides for "Hats and other headgear, knitted or crocheted, or made up from lace, felt or other textile fabric, in the piece (but not in strips), whether or not lined or trimmed; hair-nets of any material, whether or not lined or trimmed: Other: Other: Of man-made fibers: Knitted or crocheted or made up from knitted or crocheted fabric: Not in part of braid" with a column one general duty rate of 20 cents per kilogram plus 7% ad valorem. Duty rates are provided for your convenience and are subject to change. The text of the most recent HTSUS and the accompanying duty rates are provided on the Internet at www.usitc.gov/tata/hts/.

Sincerely,

MYLES B. HARMON,
Director
Commercial and Trade Facilitation Division

NY K83753
April 7, 2004
CLA-2–65:RR:NC:3:353 K83753
CATEGORY: Classification
TARIFF NO.: 6505.90.6090

MR. ALAN WELLS
MENTAL HEADGEAR
118 AVA DRIVE
HEWITT, TX 76643

RE: The tariff classification of Headcase™ multi-functional item from China.

DEAR MR. WELLS:

In your letter dated March 4, 2004 you requested a classification ruling.

The submitted sample is a Headcase™ multi-functional item. Styles C5150 and C5160 are constructed of knit polyester fabric. The Headcase™ is a cylinder shaped item that measures approximately 9x17 inches when laying flat. The literature states:

"The Headcase™ multi-functional accessory works for all kinds of activities. It provides maximum comfort and protection against wind, snow and sun. The Headcase™ is manufactured with 100% polyester micro-fibre which is wind-resistant, breathable, and wicks moisture. It provides maximum comfort and protection against wind, snow and sun. The Headcase™ is constructed without seams and it will not lose its shape. The micro-fibre dries in minutes, retains its elasticity and does not fray."

The literature then shows the Headcase™ being used as a bandana, helmet cover, scrunchie, facemask, headband, beanie, balaclava, neckwarmer and legionnaire.

You suggest classification as a helmet cover in heading 6507. However, the helmet cover is but a single use. The item has multiple uses as a clothing accessory of heading 6117 as a bandana, scrunchie, facemask, headband and neckwarmer; it also has multiple uses as headgear of heading 6505 as a beanie, balaclava and legionnaire.

No single use imparts the essential character to the Headcase™. When there is no essential character, merchandise shall be classified according to General Rule of Interpretation (GRI) 3 (c), which states the merchandise "...shall be classified under the heading which occurs last in numerical order among those which equally merit consideration." Headings 6117 and 6505, the headings with multiple uses, equally merit consideration and the merchandise will be classified under heading 6505.

The applicable subheading for the Headcase™ will be 6505.90.6090, Harmonized Tariff Schedule of the United States (HTS), which provides for "Hats and other headgear, knitted or crocheted, or made up from lace, felt or other textile fabric...whether or not lined or trimmed...Other: Of man-made fibers: Knitted or crocheted or made up from knitted or crocheted fabric: Not in part of braid, Other: Other: Other." he duty rate will be 20 cents per kilogram plus 7% ad valorem.

The Headcase™ falls within textile category designation 659. Based upon international textile trade agreements products of China are subject to quota and the requirement of a visa.

The designated textile and apparel categories and their quota and visa status are the result of international agreements that are subject to frequent renegotiations and changes. To obtain the most current information, we

suggest that you check, close to the time of shipment, the *Textile Status Report for Absolute Quotas*, which is available at our Web site at www.cbp.gov. In addition, the designated textile and apparel categories may be subdivided into parts. If so, visa and quota requirements applicable to the subject merchandise may be affected and should also be verified at the time of shipment.

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

A copy of the ruling or the control number indicated above should be provided with the entry documents filed at the time this merchandise is imported. If you have any questions regarding the ruling, contact National Import Specialist Kenneth Reidlinger at 646–733–3053.

Sincerely,

ROBERT B. SWIERUPSKI
Director,
National Commodity Specialist Division

N300387
September 27, 2018
CLA-2–65:OT:RR:NC:N3:358
CATEGORY: Classification
TARIFF NO.: 6505.00.6090

MR. PETER SALVATO
METRO CUSTOM BROKERS
1325 FRANKLIN AVE., SUITE 103
GARDEN CITY, NY 11530

RE: The tariff classification of headgear from China

DEAR MR. SALVATO:

In your letter dated August 31, 2018, you requested a tariff classification ruling on behalf of your client, Folsom Corp/Bimini Bay Outfitters. A sample of the item was provided.

Style HG-100, identified as "Adult Unisex Winter Headgear," is a cylinder shaped item that covers the head and neck and measures approximately 10 by 19 inches when laying flat. You state the item is constructed of two fabrics; the outer fabric is a printed (camouflage pattern) 100 percent polyester knit fabric, and the interior knit lining is composed of 95 percent polyester, 5 percent spandex.

The applicable subheading for Style HG-100 will be 6505.00.6090, Harmonized Tariff Schedule of the United States (HTSUS), which provides for "Hats and other headgear, knitted or crocheted, or made up from lace, felt or other textile fabric, in the piece (but not in strips), whether or not lined or trimmed; hair-nets of any material, whether or not lined or trimmed: Other: Other: Of man-made fibers: Knitted or crocheted or made up from knitted or crocheted fabric: Not in part of braid...Other: Other: Other." The rate of duty will be 20 cents per kilogram plus 7 percent as valorem.

Effective July 6, 2018, the Office of the United States Trade Representative (USTR) imposed an additional tariff on certain products of China classified in the subheadings enumerated in Section XXII, Chapter 99, Subchapter III U.S. Note 20(b), HTSUS. The USTR imposed additional tariffs, effective August 23, 2018, on products classified under the subheadings enumerated in Section XXII, Chapter 99, Subchapter III U.S. Note 20(d), HTSUS. Subsequently, the USTR imposed further tariffs, effective September 24, 2018, on products classified under the subheadings enumerated in Section XXII, Chapter 99, Subchapter III U.S. Note 20(f) and U.S. Note 20(g), HTSUS. For additional information, please see the relevant Federal Register notices dated June 20, 2018 (83 F.R. 28710), August 16, 2018 (83 F.R. 40823), and September 21, 2018 (83 F.R. 47974). Products of China that are provided for in subheading 9903.88.01, 9903.88.02, 9903.88.03, or 9903.88.04 and classified in one of the subheadings enumerated in U.S. Note 20(b), U.S. Note 20(d), U.S. Note 20(f) or U.S. Note 20(g) to subchapter III shall continue to be subject to antidumping, countervailing, or other duties, fees and charges that apply to such products, as well as to those imposed by the aforementioned Chapter 99 subheadings.

Products of China classified under subheading 6505.00.6090, HTSUS, unless specifically excluded, are subject to the additional 10 percent ad valorem rate of duty. At the time of importation, you must report the Chapter 99 subheading, i.e., 9903.88.03, in addition to subheading 6505.00.6090, HTSUS, listed above.

The tariff is subject to periodic amendment so you should exercise reasonable care in monitoring the status of goods covered by the Notice cited above and the applicable Chapter 99 subheading.

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

This ruling is being issued under the assumption that the subject goods, in their condition as imported into the United States, conform to the facts and the description as set forth both in the ruling request and in this ruling. In the event that the facts or merchandise are modified in any way, you should bring this to the attention of Customs and you should resubmit for a new ruling in accordance with 19 CFR 177.2. You should also be aware that the material facts described in the foregoing ruling may be subject to periodic verification by Customs.

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

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

Sincerely,

STEVEN A. MACK
Director
National Commodity Specialist Division

N204320
February 28, 2012
CLA-2–65 OT:RR:NC:N3:353
CATEGORY: Classification
TARIFF NO.: 6505.00.6090

MS. MARYELLEN DENNISON
THE FOLSOM CORPORATION
43 MCKEE DRIVE
BOX 616
MAHWAH, NJ 07430

RE: The tariff classification of Solarguard Headgear from China.

DEAR MS. DENNISON:

In your letter dated February 8, 2012, you requested a tariff classification ruling. The sample will be retained by this office.

The submitted sample, identified as Solarguard Headgear, style number SGHMAHI, is constructed from a tubular Coolmax® knitted fabric, that measures approximately 9 ½ inches in width and 20 inches in length. The display card that holds the merchandise indicates that the Solarguard is designed to provide UV protection and quickly wick, absorb and evaporate moisture. The seamless article is slightly stretchy for comfortable wear. The display card also illustrates several ways to wear the item; including as a skullcap, balaclava, face mask, hairband and scarf.

The Solarguard Headgear will be imported in different print patterns, but the same design, construction and fabric, under style numbers SGHSAIL, SGHPIRATE, SGHSLAM, SGHBATIK, SGHDOLPHIN, SGHPECES, SGHCAMO, SGHRTMAX, SGHRTAP.

The applicable subheading for the Solarguard Headgear will be 6505.00.6090, Harmonized Tariff Schedule of the United States (HTSUS), which provides for "Hats and other headgear, knitted or crocheted, or made up from lace, felt or other textile fabric...Other: Of man-made fibers: knitted or crocheted or made up from knitted or crocheted fabric: Not in part of braid, Other: Other: Other." The duty rate will be 20 cents per kilogram plus 7 percent ad valorem.

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

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

A copy of the ruling or the control number indicated above should be provided with the entry documents filed at the time this merchandise is imported. If you have any questions regarding the ruling, contact National Import Specialist Kimberly Praino at (646) 733–3053.

Sincerely,

THOMAS J. RUSSO
Director
National Commodity Specialist Division

NY K86452

June 8, 2004
CLA-2–61:RR:NC:3:353 K86452
CATEGORY: Classification
TARIFF NO.: 6117.80.9510, 6505.90.1540

JAMES O. NEWMAN & HARRIET L. NEWMAN
1844 S. MARENGO AVE. #34
ALHAMBRA, CA 91803

RE: The tariff classification of removable protective sleeves from Australia, China and South Africa.

DEAR MR./MS. NEWMAN:

In your undated letter you requested a classification ruling.

The submitted samples are removable protective sleeves that are designed for protection, promotion, fashion, spirit and fun.

Sample #1 is a removable athletic arm sleeve composed of knit 90–92% cotton and 8–10% Lycra fabric. The item is tubular in shape and a cuff opening at each end, Patent #US D442,765 S.

Sample #2 is a protective sleeve that can also be worn as headwear or around an athlete's neck for protection and comfort. It is comprised of a tubular body having a notched, cuffed opening at an upper end of the sleeve. At the sleeve's upper end, the cuff has two radial cuff ties, while lengthwise, ties are provided at the inseam. This allows the item to be secured to the head. The upper cuff also has a hook and loop system to secure the item on the wearer's arm. The item is composed of knit 92% cotton and 8% Spandex fabric, Patent #US 6,665,876 B1.

For Sample #2, neither the sleeve heading (6117) nor the headwear portion heading (6505) imparts the essential character to the item. Following General Rule of Interpretation (GRI) 3 (c), it will be classified under the heading which occurs last in numerical order in the HTS.

The applicable subheading for Sample #1 will be 6117.80.9510, Harmonized Tariff schedule of the United States, (HTS), which provides for "Other made up clothing accessories, knitted or crocheted...Other accessories: Other: Other, Of cotton." The duty rate will be 14.6% ad valorem. The textile category is 359.

The applicable subheading for Sample #2 will be 6505.90.1540, Harmonized Tariff Schedule of the United States (HTS), which provides for "Hats and other headgear...made up from lace, felt or other textile fabric...Other: Of cotton, flax or both: Knitted, Of cotton: Other: Other." The duty rate will be 7.9% ad valorem. The textile category designation is 359.

Based upon international textile trade agreements products of Australia and South Africa are not subject to quota and the requirement of a visa. Sample #1 from China is subject to quota and the requirement of visa, Sample #2 is not subject to quota or the requirement of a visa.

The designated textile and apparel categories and their quota and visa status are the result of international agreements that are subject to frequent renegotiations and changes. To obtain the most current information, we suggest that you check, close to the time of shipment, the *Textile Status Report for Absolute Quotas*, which is available at our Web site at www.cbp.gov. In addition, the designated textile and apparel categories may

be subdivided into parts. If so, visa and quota requirements applicable to the subject merchandise may be affected and should also be verified at the time of shipment.

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

A copy of the ruling or the control number indicated above should be provided with the entry documents filed at the time this merchandise is imported. If you have any questions regarding the ruling, contact National Import Specialist Kenneth Reidlinger at 646–733–3053.

Sincerely,

ROBERT B. SWIERUPSKI
Director,
National Commodity Specialist Division

HQ H323071
OT:RR:CTF:FTM H323071 TSM
CATEGORY: Classification
TARIFF NO: 6117.10.20; 6117.80.95

MS. FRANK J. DESIDERIO
GRUNFELD DESIDERIO LEBOWITZ SILVERMAN & KLESTADT LLP
599 LEXINGTON AVENUE FL 36
NEW YORK, NY 10022

RE: Revocation of NY N311707, HQ 950751, HQ W968280, NY K83753, NY N204320, and NY N300387, and Modification of NY K86452; Tariff classification of certain neck, face, head, and arm coverings

DEAR MR. DESIDERIO:

This letter is in reference to New York Ruling Letter ("NY") N311707, which was issued to Allstar Marketing Group, LLC on June 9, 2020. In that ruling, U.S. Customs and Border Protection ("CBP") classified a "Neck Gaiter" in heading 6505, HTSUS, which provides for "Hats and other headgear, knitted or crocheted, or made up from lace, felt or other textile fabric, in the piece (but not in strips), whether or not lined or trimmed; hair-nets of any material, whether or not lined or trimmed." We have since reviewed NY N311707 and determined the classification of the "Neck Gaiter" to be incorrect.

Similarly, we have reviewed six other rulings with substantially similar merchandise: (1) Headquarters Ruling Letter ("HQ") 950751, dated December 9, 1991, which classified knit scarf-tubes, or funnels, in heading 6505, HTSUS; (2) HQ W968280, dated August 15, 2007, which classified a tubular head and neck cover identified as "the Original Buff®" in heading 6505, HTSUS; (3) NY K83753, dated April 7, 2004, which classified a cylinder shaped item identified as "The Headcase™" in heading 6505, HTSUS; (4) NY N204320, dated February 28, 2012, which classified an article identified as "Solarguard Headgear, style number SGHMAHI" in heading 6505, HTSUS; (5) NY N300387, dated September 27, 2018, which classified Style HG-100, a cylinder shaped item identified as "Adult Unisex Winter Headgear" that covers the head and neck, in heading 6505, HTSUS; and (6) NY K86452, dated June 8, 2004, which classified a protective sleeve that can also be worn as headwear or around an athlete's neck for protection and comfort, identified as "Sample 2," in heading 6505, HTSUS.[1]

Upon additional review, we have found the above-referenced rulings to be in error. For the reasons set forth below, we hereby revoke NY N311707, HQ 950751, HQ W968280, NY K83753, NY N204320, NY N300387, and modify NY K86452.

FACTS:

In NY N311707, the merchandise was described as follows:

> Item #109032P identified as "Neck Gaiter" is a tubular shaped panel with finished edges that covers the head and neck and measures approximately 10 by 21 inches when laying flat. In your letter and subsequent correspondence you state that the item protects the wearer from the sun with UPF 50, blocking up to 98 percent of UV rays as well as dust, debris

[1] We note that NY K86452 also classified one other product, a removable athletic arm sleeve identified as "Sample 1," which is not at issue here.

and wind when used as a face cover. You also state that the item is constructed of 92 percent polyester and 8 percent spandex knit fabric. The Neck Gaiter will be imported in three different styles, Full Gaiter which measures 10 by 21 inches, Half Gaiter which measures 9 by 10.5 inches and Youth Gaiter which measures 7.5 by 8 inches in various colors...

In HQ 950751, the merchandise was described as follows:

... women's knit scarf-tubes, or funnels ...

In HQ W968280, the merchandise was described as follows:

The sample submitted is the Original Buff® ("Buff") that is made from a tubular 100% knit polyester microfiber fabric that measures approximately 50 centimeters in length and 25 centimeters in width when lying flat. The display card that holds the merchandise indicates that the Buff is designed to quickly wick, absorb and evaporate moisture, and that the microfiber from which it is made is breathable and wind resistant, and performs as an insulator that keeps the wearer warm in the winter and cool in the summer. The display card also describes the Buff as a seamless article, slightly stretchy for custom fit, which makes the merchandise comfortable head and neck wear. The card further identifies the Buff as multi-functional headwear, designed for multi-sport use and illustrates 12 ways to wear it. The 12 ways to wear the Buff are referred to as the "neckerchief," "headband," "blind chicken," "wristband," "mask," "hairband," "balaclava," "scarf," "scrunchy," "sahariane," "cap" and the "pirate." The sample provided is a grey colored Buff with a printed pattern of black flowers and leaves. The display card is in the shape of a human head and shoulders and the Buff is marketed wrapped around the "shoulder" of the card...

In NY K83753, the merchandise was described as follows:

The submitted sample is a Headcase™ multi-functional item. Styles C5150 and C5160 are constructed of knit polyester fabric. The Headcase™ is a cylinder shaped item that measures approximately 9 x17 inches when laying flat. The literature states:

"The Headcase™ multi-functional accessory works for all kinds of activities. It provides maximum comfort and protection against wind, snow and sun. The Headcase™ is manufactured with 100% polyester micro-fibre which is wind-resistant, breathable, and wicks moisture. It provides maximum comfort and protection against wind, snow and sun. The Headcase™ is constructed without seams and it will not lose its shape. The micro-fibre dries in minutes, retains its elasticity and does not fray."

The literature then shows the Headcase™ being used as a bandana, helmet cover, scrunchie, facemask, headband, beanie, balaclava, neckwarmer and legionnaire.

In NY N204320, the merchandise was described as follows:

The submitted sample, identified as Solarguard Headgear, style number SGHMAHI, is constructed from a tubular Coolmax® knitted fabric, that measures approximately 9 ½ inches in width and 20 inches in length. The display card that holds the merchandise indicates that the Solarguard is designed to provide UV protection and quickly wick, absorb and evaporate moisture. The seamless article is slightly stretchy for comfortable

wear. The display card also illustrates several ways to wear the item; including as a skullcap, balaclava, face mask, hairband and scarf.

In NY N300387, the merchandise was described as follows:

Style HG-100, identified as "Adult Unisex Winter Headgear," is a cylinder shaped item that covers the head and neck and measures approximately 10 by 19 inches when laying flat. You state the item is constructed of two fabrics; the outer fabric is a printed (camouflage pattern) 100 percent polyester knit fabric, and the interior knit lining is composed of 95 percent polyester, 5 percent spandex.

In NY K86452, the merchandise was described as follows:

Sample #2 is a protective sleeve that can also be worn as headwear or around an athlete's neck for protection and comfort. It is comprised of a tubular body having a notched, cuffed opening at an upper end of the sleeve. At the sleeve's upper end, the cuff has two radial cuff ties, while lengthwise, ties are provided at the inseam. This allows the item to be secured to the head. The upper cuff also has a hook and loop system to secure the item on the wearer's arm. The item is composed of knit 92% cotton and 8% Spandex fabric, Patent #US 6,665,876 B1.

ISSUE:

What is the tariff classification of the neck, face, head, and arm coverings at issue?

LAW AND ANALYSIS:

Merchandise imported into the United States is classified under the HTSUS. Tariff classification is governed by the principles set forth in the General Rules of Interpretation ("GRIs") and, in the absence of special language or context which requires otherwise, by the Additional U.S. Rules of Interpretation. The GRIs and the Additional U.S. Rules of Interpretation are part of the HTSUS and are to be considered statutory provisions of law for all purposes. GRI 1 requires that classification be determined first according to the terms of the headings of the tariff schedule and any relative section or chapter notes. In the event that the goods cannot be classified solely on the basis of GRI 1, and if the heading and legal notes do not otherwise require, the remaining GRIs 2 through 6 may then be applied in order.

The 2024 HTSUS headings at issue are as follows:

6117 Other made up clothing accessories, knitted or crocheted; knitted or crocheted parts of garments or of clothing accessories

* * *

6505 Hats and other headgear, knitted or crocheted, or made up from lace, felt or other textile fabric, in the piece (but not in strips), whether or not lined or trimmed; hair-nets of any material, whether or not lined or trimmed

* * *

Note 1 to Section XI provides in relevant part:

This section does not cover:

(o) Hair-nets or other headgear or parts thereof of chapter 65

* * *

Additional U.S. Note 1 to Chapter 65 provides:

This chapter does not include mufflers, shawls, scarves, mantillas, veils and the like (heading 6117 or 6214).

* * *

The Harmonized Commodity Description and Coding System Explanatory Notes ("ENs") constitute the official interpretation of the Harmonized System at the international level. While not legally binding, the ENs provide a commentary on the scope of each heading of the HTS and are thus useful in ascertaining the proper classification of the merchandise. *See* T.D. 89–90, 54 Fed. Reg. 35127, 35128 (August 23, 1989).

EN 1 to Section XI provides in relevant part:

This section does not cover:

(o) Hair-nets or other headgear or parts thereof of Chapter 65

* * *

EN to Chapter 65 provides:

With the **exception** of the articles listed below this Chapter covers hat-shapes, hat-forms, hat bodies and hoods, and hats and other headgear of all kinds, irrespective of the materials of which they are made and of their intended use (daily wear, theatre, disguise, protection, etc.).

It also covers hair-nets of any material and certain specified fittings for headgear.

The hats and other headgear of this Chapter may incorporate trimmings of various kinds and of any material, including trimmings made of the materials of Chapter 71.

This Chapter **does not include**:

(a) Headgear for animals (**heading 42.01**).

(b) Shawls, scarves, mantillas, veils and the like (**heading 61.17** or **62.14**).

(c) Headgear showing signs of appreciable wear and presented in bulk, bales, sacks or similar bulk packings (**heading 63.09**).

(d) Wigs and the like (**heading 67.04**).

(e) Asbestos headgear (**heading 68.12**).

(f) Dolls' hats, other toy hats or carnival articles (**Chapter 95**).

(g) Various articles used as hat trimmings (buckles, clasps, badges, feathers, artificial flowers, etc.) when not incorporated in headgear (appropriate headings).

* * *

EN 61.17, HTSUS, provides:

This heading covers made up knitted or crocheted clothing accessories, not specified or included in the preceding headings of this Chapter or elsewhere in the Nomenclature. The heading also covers knitted or crocheted parts of garments or of clothing accessories, (**other than** parts of articles of **heading 62.12**).

The heading covers, inter alia:

(1) **Shawls, scarves, mufflers, mantillas, veils** and the like.

(2) **Ties, bow ties and cravats**.

(3) **Dress shields, shoulder or other pads**.

(4) **Belts of all kinds (including bandoliers) and sashes (e.g., military or ecclesiastical)**, whether or not elastic. These articles are included here even if they incorporate buckles or other fittings of precious metal or are decorated with pearls, precious or semi-precious stones (natural, synthetic or reconstructed).

(5) **Muffs**, including muffs with mere trimmings of furskin or artificial fur on the outside.

(6) **Sleeve protectors.**

(7) **Kneebands, other than** those of **heading 95.06** used for sport.

(8) **Labels, badges, emblems, "flashes" and the like (excluding** embroidered motifs of **heading 58.10**) made up **otherwise** than by cutting to shape or size. (When made up only by cutting to shape or size these articles are **excluded - heading 58.07**.)

(9) **Separately presented removable linings for raincoats** or similar garments.

(10) **Pockets, sleeves, collars, collarettes, wimples, fallals of various kinds** (such as rosettes, bows, ruches, frills and flounces), **bodice-fronts, jabots, cuffs, yokes, lapels and similar articles**.

(11) **Handkerchiefs**.

(12) **Headbands**, used as protection against the cold, to hold the hair in place, etc.

The heading **does not include**:

(a) Clothing accessories for babies, knitted or crocheted, of **heading 61.11**.

(b) Brassières, girdles, corsets, braces, suspenders, garters and similar articles, and parts thereof **(heading 62.12).**

(c) Belts for occupational use (e.g., window-cleaners' or electricians' belts) or rosettes **not** for garments **(heading 63.07).**

(d) Knitted or crocheted headgear **(heading 65.05)** and fittings for headgear **(heading 65.07).**

(e) Feather trimmings **(heading 67.01).**

(f) Trimmings of artificial flowers, foliage or fruit of **heading 67.02.**

(g) Strips of press fasteners and hooks and eyes on knitted tape **(heading 60.01, 60.02, 60.03, 83.08 or 96.06,** as the case may be).

(h) Slide fasteners (zippers) **(heading 96.07).**

* * *

EN 65.05, HTSUS, provides:

This heading covers hats and headgear (whether or not lined or trimmed) made directly by knitting or crocheting (whether or not fulled or felted),

or made up from lace, felt or other textile fabric in the piece, whether or not the fabric has been oiled, waxed, rubberised or otherwise impregnated or coated.

It also includes hat-shapes made by sewing, but **not** hat-shapes or headgear made by sewing or otherwise assembling plaits or strips (**heading 65.04**). This heading also covers felt and other felt headgear, made from the hat bodies, hoods or plateaux (felt discs) of **heading 65.01** , including hoods which have simply been blocked to shape and hoods with made brims.

The articles are classified here whether or not they have been lined or trimmed.

They include:

(1) Hats, whether or not trimmed with ribbons, hat pins, buckles, artificial flowers, foliage or fruit, feathers or other trimmings of any material.

(2) Headgear of feathers or artificial flowers is **excluded (heading 65.06).**

(3) Berets, bonnets, skull-caps and the like. These are usually made directly by knitting or crocheting, and are frequently fulled (e.g., basque berets).

(4) Certain oriental headgear (e.g., fezzes). These are usually made directly by knitting or crocheting, and are frequently fulled.

(5) Peaked caps of various kinds (uniform caps, etc.).

(6) Professional and ecclesiastical headgear (mitres, birettas, mortarboards, etc.).

(7) Headgear made up from woven fabric, lace, net fabric, etc., such as chefs' hats, nuns' head-dresses, nurses' or waitresses' caps, etc., having clearly the character of headgear.

(8) Cork or pith helmets, covered with textile fabric.

(9) Sou'westers.

(10) Hoods.

Detachable hoods for capes, cloaks, etc., presented with the garments to which they belong, are, however, **excluded** and are classified with the garments according to their constituent materials.

(11) Top hats and opera hats.

* * *

At issue is whether the merchandise under consideration is classified in heading 6117, HTSUS, or heading 6505, HTSUS. Consistent with Note 1(o) to Section XI, HTSUS, which includes Chapters 50–63, HTSUS, and thus heading 6117, HTSUS, Section XI does not cover hair-nets or other headgear or parts thereof of Chapter 65. Similarly, EN 1(o) to Section XI also provides that this section does not cover hair-nets or other headgear or parts thereof of Chapter 65. Therefore, applying Note 1(o) to Section XI and EN 1(o) to Section XI, we conclude that merchandise classified in heading 6117, HTSUS,

is not classifiable in any heading of Chapter 65, HTSUS, including heading 6505, HTSUS. Moreover, Additional U.S. Note 1 to Chapter 65 and EN to Chapter 65 provide in relevant part that Chapter 65 does not cover shawls, scarves, mantillas, veils and the like of heading 6117, HTSUS. Accordingly, due to the mutually exclusive nature of the referenced notes, we conclude that if the merchandise under consideration is classified in heading 6117, HTSUS, it is excluded from classification in heading 6505, HTSUS. Similarly, if the correct classification is in heading 6505, HTSUS, classification shawls, scarves, mantillas, veils and the like of heading 6117, HTSUS, is not appropriate.

Heading 6117, HTSUS, provides for "Other made up clothing accessories, knitted or crocheted; knitted or crocheted parts of garments or of clothing accessories." The types of accessories classified in heading 6117, HTSUS, are specified in EN 61.17, which provides that the heading covers, among others, shawls, scarves, mufflers, mantillas, veils and the like; ties, bow ties and cravats; dress shields, shoulder or other pads; belts; muffs; sleeve protectors, kneebands; labels, badges, emblems and the like; removable linings for raincoats; pockets, sleeves, collars, lapels and similar articles; handkerchiefs, and headbands. The articles at issue in HQ 950751, HQ W968280, NY N311707, NY K83753, NY N204320, and NY N300387, are described as cylinder or tubular shaped items, scarf-tubes, or funnels, to be worn around the neck and, in some instances, head. As such, they are most akin to scarves provided for in heading 6117, HTSUS, and more specifically the types of scarves best described as "infinity scarves." In this regard, we note that although the term "scarf" is not defined by the HTSUS or the relevant notes, the meaning of this term has been ascertained by consulting dictionaries.[2] Specifically, the Collins Dictionary defines "scarf" as "a piece of cloth that you wear around your neck or head, usually to keep yourself warm."[3] Similarly, the Cambridge Dictionary defines "scarf" as "a piece of cloth that covers the shoulders, neck, or head for warmth or appearance."[4] With regard to "infinity scarf," the Merriam Webster Dictionary definition is "a scarf that has the form of a loop without ends and that is typically worn around the neck."[5] Similarly, Your Dictionary defines "infinity-scarf" as "a neckwarmer resembling a scarf, but

[2] When, as in this case, a tariff term is not defined by the HTSUS or its legislative history, "the term's correct meaning is its common meaning." *See Mita Copystar Am. v. United States*, 21 F.3d 1079, 1082 (Fed. Cir. 1994) citing *Lynteq, Inc. v. United States*, 976 F.2d 693 (Fed. Cir. 1992). The common meaning of a term used in commerce is presumed to be the same as its commercial meaning. *See Simod Am. Corp. v. United States*, 872 F.2d 1572, 1576 (Fed. Cir. 1989) citing *Nippon Kogaki (USA), Inc. v. United States*, 69 C.C.P.A. 89, 673 F.2d 380, 382 (1982). To ascertain the common meaning of a term, a court may consult "dictionaries, scientific authorities, and other reliable information sources" and "lexicographic and other materials." *See C. J. Tower & Sons v. United States,* 673 F.2d 1268, 1271 (CCPA 1982) citing *Schott Optical Glass, Inc. v. United States*, 612 F.2d 1283 (CCPA 1979); *Simod*, 872 F.2d at 1576.

[3] *Scarf*, Collins Dictionary, https://www.collinsdictionary.com/us/dictionary/english/scarf (last visited Sept. 27, 2024).

[4] *Scarf*, Cambridge Dictionary, https://dictionary.cambridge.org/us/dictionary/english/scarf (last visited Sept. 27, 2024).

[5] *Infinity scarf*, Merriam-Webster, https://www.merriam-webster.com/dictionary/infinity%20scarf#:~:text=noun,typically%20worn%20around%20the%20neck (last visited Sept. 27, 2024).

forming a loop with no ends."[6] Consistent with these definitions, once again we conclude that the articles at issue in HQ 950751, HQ W968280, NY N311707, NY K83753, NY N204320, and NY N300387, are best described as scarves and classified in heading 6117, HTSUS, and specifically in subheading 6117.10.20, HTSUS, which provides for "Other made up clothing accessories, knitted or crocheted; knitted or crocheted parts of garments or of clothing accessories: Shawls, scarves, mufflers, mantillas, veils and the like: Of man-made fibers."

Moving next to the article at issue in NY K86452, which is described as "a protective sleeve that can also be worn as headwear or around an athlete's neck for protection and comfort," we note that it is not akin to "shawls, scarves, mufflers, mantillas, veils and the like" provided for in subheading 6117.10, HTSUS. Although the article at issue in NY K86452 can also be worn as headwear or around the neck, it is designed as a sleeve to be worn on the arm. As such, it best qualifies as one of the "other accessories" of subheading 6817.80, HTSUS. Specifically, it is classified in subheading 6117.80.95, HTSUS, which provides for "Other made up clothing accessories, knitted or crocheted; knitted or crocheted parts of garments or of clothing accessories: Other accessories: Other: Other."

Turning to heading 6505, HTSUS, consistent with the foregoing discussion we conclude that the articles at issue in HQ 950751, HQ W968280, NY N311707, NY K83753, NY N204320, NY N300387, and NY K86452, are not classified in this heading. As discussed above, consistent with Note 1(o) to Section XI, HTSUS, and EN 1(o) to Section XI, the above-discussed articles at issue are not classifiable in any heading of Chapter 65, HTSUS, because they are provided for in heading 6117, HTSUS. Moreover, consistent with Additional U.S. Note 1 to Chapter 65 and EN to Chapter 65, Chapter 65 does not cover shawls, scarves, mantillas, veils and the like of heading 6117, HTSUS.

HOLDING:

Under the authority of GRIs 1 and 6, the articles at issue in HQ 950751, HQ W968280, NY N311707, NY K83753, NY N204320, NY N300387, are classified in heading 6117, HTSUS, and specifically in subheading 6117.10.20, HTSUS, which provides for "Other made up clothing accessories, knitted or crocheted; knitted or crocheted parts of garments or of clothing accessories: Shawls, scarves, mufflers, mantillas, veils and the like: Of man-made fibers." The 2024 column one general rate of duty is 11.3% ad valorem.

The article at issue in NY K86452 is classified in heading 6117, HTSUS, and specifically in subheading 6117.80.95, HTSUS, which provides for "Other made up clothing accessories, knitted or crocheted; knitted or crocheted parts of garments or of clothing accessories: Other accessories: Other: Other." The column one general rate of duty is 14.6 % ad valorem.

EFFECT ON OTHER RULINGS:

HQ 950751, dated December 9, 1991, HQ W968280, dated August 15, 2007, NY N311707, dated June 9, 2020, NY K83753, dated April 7, 2004, NY N204320, dated February 28, 2012, and NY N300387, dated September 27, 2018, are hereby REVOKED.

NY K86452, dated June 8, 2004, is hereby MODIFIED.

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[6] *Infinity-scarf*, Your Dictionary, https://www.yourdictionary.com/infinity-scarf (last visited Sept. 27, 2024).

Sincerely,

YULIYA A. GULIS,
Director
Commercial and Trade Facilitation Division

19 CFR PART 177

REVOCATION OF ONE RULING LETTER, MODIFICATION OF ONE RULING LETTER, AND REVOCATION OF TREATMENT RELATING TO THE TARIFF CLASSIFICATION OF A MEN'S VEST

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

ACTION: Notice of revocation of one ruling letter, modification of one ruling letter, and of revocation of treatment relating to the tariff classification of a men's vest.

SUMMARY: Pursuant to section 625(c), Tariff Act of 1930 (19 U.S.C. § 1625(c)), as amended by section 623 of title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that U.S. Customs and Border Protection (CBP) is revoking one ruling letter and modifying one ruling letter concerning tariff classification of a men's vest under the Harmonized Tariff Schedule of the United States (HTSUS). Similarly, CBP is revoking any treatment previously accorded by CBP to substantially identical transactions. Notice of the proposed action was published in the *Customs Bulletin*, Vol. 56, No. 14, on April 13, 2022. No comments were received in response to that notice.

EFFECTIVE DATE: This action is effective for merchandise entered or withdrawn from warehouse for consumption on or after March 8, 2025.

FOR FURTHER INFORMATION CONTACT: John E. Rhea, Food, Textiles, and Marking Branch, Regulations and Rulings, Office of Trade, at (202) 325–0035.

SUPPLEMENTARY INFORMATION:

BACKGROUND

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

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

Pursuant to 19 U.S.C. § 1625(c)(1), a notice was published in the *Customs Bulletin*, Vol. 56, No. 14, on April 13, 2022, proposing to revoke one ruling letter and modify one ruling letter pertaining to the tariff classification of a men's vest. Any party who has received an interpretive ruling or decision (i.e., a ruling letter, internal advice memorandum or decision, or protest review decision) on the merchandise subject to this notice should have advised CBP during the comment period.

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

In Headquarters Ruling Letter ("HQ") W964512, dated January 30, 2001 and New York Ruling Letter ("NY") G80065, dated August 24, 2000, CBP classified a men's vest in heading 6211, HTSUS, specifically in subheading 6211.33.0054, HTSUS Annotated ("HTSUSA"), which provides for "Track suits, ski-suits and swimwear; other garments: Other garments, mens' or boys': of man-made fibers: Vests: Other." CBP has reviewed HQ W964512 and NY G80065 with respect to the tariff classification of a men's vest and has determined the ruling letters to be in error. It is now CBP's position that a men's vest is properly classified, in heading 6201, HTSUS, specifically in subheading 6201.40.7000, HTSUS, which provides for "Men's or boys' overcoats, carcoats, capes, cloaks, anoraks (including ski-jackets), windbreakers and similar articles (including padded, sleeveless jackets), other than those of heading 6203: Anoraks (including ski-jackets), windbreakers and similar articles (including padded, sleeveless jackets): Of man-made fibers: Other: Other: Other: Other: Water resistant."

Pursuant to 19 U.S.C. § 1625(c)(1), CBP is revoking HQ 964512, modifying NY G80065, and revoking or modifying any other ruling not specifically identified to reflect the analysis contained in HQ H300624, set forth as an attachment to this notice. Additionally, pursuant to 19 U.S.C. § 1625(c)(2), CBP is revoking any treatment previously accorded by CBP to substantially identical transactions.

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

YULIYA A. GULIS,
Director
Commercial and Trade Facilitation Division

Attachment

HQ H300624
December 18, 2024
OT:RR:CTF:FTM HQ H300624 JER
CATEGORY: Classification
TARIFF NO.: 6201.40.70

MS. SHERI LAWSON
TRADE & REGULATORY SERVICES
PBB GLOBAL LOGISTICS
434 DELAWARE AVE.
BUFFALO, NY 14202

RE: Revocation of HQ 964512 and Modification of NY G80065; Tariff Classification of a Men's Vest

DEAR MS. LAWSON:

On January 30, 2001, U.S. Customs and Border Protection ("CBP") issued Headquarters Ruling Letter ("HQ") W964512 in response to your request for reconsideration of New York Ruling Letter ("NY") G80065, dated August 24, 2000 (referenced in HQ 964512 as Port Decision ("PD") G80065), on behalf of your client, Ash City Division ("Ash City"), GH Imported Merchandise & Sales Limited, pertaining to the tariff classification under the Harmonized Tariff Schedule of the United States ("HTSUS") of a men's vest imported from Cambodia. NY G80065 classified the men's vest under heading 6211, HTSUS, and specifically under subheading 6211.33.0054, HTSUS Annotated ("HTSUSA"), which provides for "Track suits, ski-suits and swimwear; other garments: Other garments, mens' or boys': of man-made fibers: Vests: Other."

In the request for reconsideration, Ash City opined that the subject men's vest should be classified as a sleeveless jacket under heading 6201, HTSUS, which provides for "Men's or boys' overcoats, carcoats, capes, cloaks, anoraks (including ski-jackets), windbreakers and similar articles (including padded sleeveless jackets), other than those of heading 6203." In HQ 964512, CBP affirmed the decision in NY G80065 and upheld the classification of the imported men's vests in heading 6211, HTSUS, as a vest. NY G80065 concerned the tariff classification of a men's vest and men's jacket. Upon further review, CBP has determined that HQ 964512 was incorrect in affirming NY G80065 with respect to only the men's vest. The classification of the men's jacket in NY G80065 is not affected by this decision. CBP has determined that the men's vest in NY G80065 is classified under heading 6201, HTSUS. As such, we find that both HQ 964512 and NY G80065 are incorrect. Accordingly, HQ 964512 is hereby revoked and NY G80065 is modified to reflect the proper classification of the men's vest.

Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. § 1625(c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act, Pub. L. No. 103–182, 107 Stat. 2057, 2186 (1993), notice of the proposed action was published on April 13, 2022, in Volume 56, Number 14, of the *Customs Bulletin*. No comments were received in response to this notice. Upon review of our decision in HQ H300624, CBP found typographical errors. We note that none of the typographical errors or incorrect references affect the substantive findings or outcome of the decision.

FACTS:

In HQ 964512, the men's vest was described as follows:

> The subject merchandise is men's vest with an outershell composed of 100 percent nylon woven fabric coated with polyurethane. The polyurethane coating is not visible to the naked eye. The garment features a knit, mesh, man-made fiber lining and a full frontal opening with a zipper closure extending through the stand up collar. The garment also has slanted pockets with zippered closures located below the waist and a hemmed bottom.

In the September 11, 2000, request for reconsideration of NY G80065, the vest was described as follows:

> The vest has a woven nylon shell and will be made in Cambodia. It has been treated with a 600mm polyurethane clear coat finish, which can pass the AATCC Test Method 35–1985. The water-resistant coating does not obscure the underlying fabric and is not visible. Fabric details follow. A sample is enclosed.

ISSUE:

Whether the subject men's vest is classified under heading 6201, HTSUS, as a sleeveless jacket or under heading 6211, HTSUS, as a vest.

LAW AND ANALYSIS:

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

The 2024 HTSUS provisions under consideration are as follows:

6201	Men's or boys' overcoats, carcoats, capes, cloaks, anoraks (including ski-jackets), windbreakers and similar articles (including padded, sleeveless jackets), other than those of heading 6203:
6201.40	Of man-made fibers:
	Anoraks (including ski-jackets), windbreakers and similar articles (including padded, sleeveless jackets:
	Recreational performance wear:
	Other:
	Other:
	Other:
	Other:
6201.40.7000	Water resistant
	. . .
	Other

6201.40.7511	Men's . . .
* * * * *	
6211	Track suits, ski-suits and swimwear; other garments:
	Other garments, men's or boys'
6211.33	Of man-made fibers:
6211.33.50	Recreational performance outerwear
	Vests
* * * * *	

The Additional U.S. Note to Chapter 62, HTSUS, addresses "water resistance" and states in pertinent part:

> *For the purposes of subheadings . . . 6201.40.70, . . .*, the term *"water resistant"* means that garments classifiable in those subheadings must have a water resistance (see current version of ASTM designations D7017) such that, under a head pressure of 600 millimeters, not more than 1.0 gram of water penetrates after two minutes when tested in accordance with the current version of AATCC Test Method 35–1985.[1] This water resistance must be the result of a rubber or plastics application to the outer shell, lining, or inner lining.

* * * * *

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

The provisions of EN 61.01 apply, *mutatis mutandi*, to heading 6201, HTSUS. EN 61.01 provides, in pertinent part, as follows:

> This heading covers a category of knitted or crocheted garments for men or boys, characterized by the fact that they are generally worn over all other clothing for protection against the weather.
>
> It includes:
>
> Overcoats, raincoats, car-coats, capes including ponchos, cloaks, anoraks including ski-jackets, wind-cheaters, wind-jackets and similar articles, such as three-quarter coats, greatcoats, hooded capes, duffel coats, trench coats, gabardines, parkas, padded waistcoats.

The provisions of EN 61.14 apply, *mutatis mutandi*, to heading 6211, HTSUS.

EN 61.14 provides, in pertinent part, as follows:

> This heading covers knitted or crocheted garments which are not included more specifically in the preceding headings of this Chapter.

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[1] The AATCC 35 standard, published by the American Association of Textile Chemist and Colorists ("AATCC"), is a test method applied to textile fabric that claims to be water-resistant. The test method measures the fabric's resistance to water to penetration. *AATCC Water Resistance: Rain Test*, EUROLAB Laboratory Services, https://www.denetim.com/en/covid-19/medikal-onluk-ve-giysi-testleri/aatcc-35-suya-dayaniklilik-yagmur-testi/#:~:text=The%20AATCC%2035%20standard%2C%20published,penetrate%20by%20impact%20is%20measured (last visited Nov. 6, 2024).

> The heading includes, *inter alia* :
>
> ...
>
> (5) Special articles of apparel, whether or not incorporating incidentally protective components such as pads or padding in the elbow, knee or groin areas, used for certain sports or for dancing or gymnastics (e.g., fencing clothing, jockeys' silks, ballet skirts, leotards) . . . .
>
> * * * * *

In HQ 964512, CBP stated that the classification of the subject men's vest rested on whether the garment's marketing, design, and construction rendered it exclusively suitable for use as a jacket or as a vest. The decision in HQ 964512 reasoned that the *eo nomine* reference to men's padded sleeveless jackets within heading 6201, HTSUS, precluded classification of the subject men's vest because the men's vest, although sleeveless, was not padded. CBP further stated that the plain language within the parenthetical of heading 6211, HTSUS, which states "including padded, sleeveless jackets" limited classification of sleeveless jackets to those which are padded or otherwise insulated. Additionally, CBP explained that the language of the parenthetical "was unambiguous to the type of outerwear vests" that are included in heading 6201, HTSUS. The fact that padded sleeveless vests are *prima facie* classified in heading 6201, HTSUS, is not disputed. *See e.g.*, NY 084041, dated June 16, 1989, and HQ 965989, dated December 19, 2002 (CBP classified padded sleeveless jackets under heading 6201, HTSUS). Upon further consideration, we find that the determination in HQ 964512 that only padded sleeveless jackets are classified in heading 6201, HTSUS, is incorrect.

The term "including" means "containing as part of the whole being considered"[2] and is "used for saying that a person or thing is part of a particular group or amount."[3] The term "including" does not limit the group or whole to the specific item or thing referenced. Instead, the term "including" means that something, in this case sleeveless vests, is an item which is included in a larger group of items to be considered. Thus, the phrase "including padded sleeveless vests" is exemplary of the types of sleeveless vests, which are included but does not preclude classification of other sleeveless articles that might meet the terms of heading 6201, HTSUS. For example, in NY N295141, dated March 26, 2018, CBP classified a non-padded men's hip-length vest under heading 6201, HTSUS. The men's vest was constructed from 100% polyester woven fabric containing a 600 mm polyurethane coating. The garment featured a full front opening with a zipper closure, which extended through a stand-up collar; a polyester mesh lining; zippered pockets; an interior mesh pocket with a hook and loop closure; and reflective details on the back body. It also had an elastic drawcord which was threaded through the bottom hem for tightening. The vest in NY N295141 was not insulated or padded but instead had several of the features and characteristics of a rain jacket and was eligible for classification as water resistant if it met the requirements specified in Additional U.S. Note 2 to Chapter 62, HTSUS. Likewise, in HQ 967926, dated January 3, 2006, CBP classified a short-sleeved windshirt in heading 6201, HTSUS, despite the fact that it did

[2] Including, Oxford English Dictionary, https://www.oed.com/view/Entry/93571?rskey=OjQTu8&result=1#eid (last visited Nov. 6, 2024).

[3] Including, Cambridge Dictionary, https://dictionary.cambridge.org/us/dictionary/english/including (last visited Nov. 6, 2024).

not have all the features of a jacket. The windshirt in HQ 967926 was described as short-sleeved, made of a lightweight woven dobby fabric and was water-resistant. The decision in HQ 967926 reasoned that the windshirt was *ejusdem generis* to the articles of heading 6201, HTSUS. Finally, even if *in arguendo* the heading is limited to only padded sleeveless jackets, the decisions in NY N295141 and HQ 967926 evidence the fact that it does not preclude other types of sleeveless jackets from being classified as windbreakers, raincoats, or other "similar articles" under heading 6201, HTSUS.

The question of whether the subject men's vest is classified under heading 6201, HTSUS, as a sleeveless jacket or under heading 6211, HTSUS, as a vest, rests in part, on whether it meets the definition of a jacket or similar article. Likewise, its classification under heading 6201, HTSUS, requires that the subject article provides protection against the elements (i.e., it is padded or insulated, is water resistant or otherwise has the capacity to guard against various weather conditions). EN 61.01, which applies *mutatis mutandis* to the articles of heading 6201, HTSUS, states: "[T]his heading covers ... garments for men or boys, characterised by the fact that that they are generally worn over all other clothing for protection against the weather." *See* HQ 957382, dated February 23, 1995.

In classifying a garment that is not *per se* an enumerated item under heading 6201, HTSUS the first step is to determine the shared characteristics or purpose of the listed items. *See* HQ 967926 (discussed *supra*, noting that a certain windshirt was *ejusdem generis* to the articles of heading 6201, HTSUS). In previous CBP rulings we examined the factors and characteristics that distinguish between garments that were classifiable as jackets from garments that were classifiable as a shirt in heading 6205, HTSUS. As shall be discussed, one consistent purpose of articles enumerated *eo nominee* in heading 6201, HTSUS, is the capacity to protect against various weather conditions. While another consistent characteristic is the garment's capacity to be worn over or atop other garments. For example, in HQ 960626, dated July 25, 1997, CBP addressed the difference between a jacket of heading 6201, HTSUS, and a shirt of heading 6205, HTSUS. This decision noted that in order for the garment to be classified as a jacket, the garment must have at least three of the features set out in the *Guidelines for the Reporting of Imported Products in Various Textile and Apparel Categories*, CIE 13/88 (Nov. 23, 1988) (*hereinafter*, "Textile Guidelines"). The garments in HQ 960626 were determined to be designed and constructed to be worn over all other garments. Moreover, in HQ 960626, CBP reasoned that the heavy-duty zipper was of a heavier gauge not typically associated with a shirt worn against the skin and that the material of the jacket added warmth (i.e., protection against weather conditions). *See also*, HQ 959085, dated November 26, 1996 (CBP distinguished between a jacket and a shirt; finding that the garments were jackets of heading 6201, HTSUS, because they possessed the characteristics of a jacket or coat).

Additionally, CBP has long held that certain physical characteristics, designs, and features were essential for an article to be defined as a jacket for tariff classification purposes. In HQ 950651, dated December 31, 1991, CBP noted that the garment at issue had several characteristics that indicated the article was defined and therefore properly classifiable as a jacket. In particular, HQ 950651 noted that: (1) The sample had "applied cuffs which are often found on jackets and not on shirts;" (2) The "garment had a rib-knit waistband;" and (3) "The extremely generous cut of the article is similar to the

proportions of a jacket." HQ 950651 further noted that the armholes and sleeves were extraordinarily large, and the blouson silhouette enabled this garment to easily accommodate jerseys and other shirts underneath. Likewise, the decision in HQ 950651 noted that while thick or heavily weighted fabric is common among jackets, that lightweight fabric did not preclude the garment at issue from classification as a jacket because "jackets may come in various weights." Similarly, in HQ 966053, dated May 24, 2004, CBP determined that a garment was classified as a jacket because: (1) it was constructed with a "tailored" fit, and therefore had "the structured styling or tailoring generally found in garments used as jackets"; and (2) because the garment was designed to be "worn over other apparel." Likewise, in HQ 952024, dated September 15, 1992, in distinguishing between shirts and jackets, CBP noted that garments with "pockets below the waist", with "ribbed waistbands" and a "means of tightening at the bottom of the garment" were excluded from heading 6205, HTSUS, by the General Explanatory Notes to Chapter 62, but were however, characteristics which were generally associated with jackets of heading 6201, HTSUS.

Although the subject men's vest is sleeveless, it consists of several features designated for jackets as previously determined by CBP. For instance, it has a full inner lining, which is made of a knit mesh, features patch pockets on the exterior of the vest, which are positioned at the waist, it also features a heavy-duty zipper and a ribbed waist band. The fact that the vest possesses the aforementioned features supports a finding that it is designed to be worn over other garments for protection against weather conditions. Most importantly, the subject merchandise has the characteristics and features of a jacket when using the criteria set forth in previous CBP rulings.

Lastly, we address the Ash City's assertion that the subject men's vest is water-resistant. According to the reconsideration request, the vest has a woven nylon shell that is treated with a 600 mm polyurethane clear coat finish. The 600 mm polyurethane clear coat finish is said to pass the AATCC Test Method as required by U.S. Note 2 to Chapter 62, HTSUS. Whether or not the polyurethane clear coat is able to pass the AATCC Test Method was not confirmed or dispelled by the CBP Laboratory at the time HQ 964512 was issued. However, a visual inspection of images taken of the men's vest reveals that it does feature a nylon shell with a shiny clear coating. While the water-resistant capacity was not examined by the CBP Laboratory, outerwear with a (shiny) polyurethane clear coat is consistent with material designed to provide protection from the rain. *See* HQ H159096, dated September 9, 2013 (CBP classified women's raincoats in heading 6202, HTSUS, primarily because they featured a thermoplastic polyurethane ("TPU") waterproof plastic coating on top of the underlying fabric. Note that the water-resistance of the TPU was not tested by the CBP Laboratory). Much like the raincoats in HQ H159096, the instant men's vests have the capacity to provide protection against the rain. Additionally, the men's vest also features a knit mesh lining which is consistent with garments used for outdoor or other exercise activities such as swimming, jogging, etc. CBP has previously classified men's jackets featuring mesh lining in heading 6201, HTSUS. *See* NY A85432, dated July 5, 1996; *see also*, NY B89665, dated October 3, 1997.

Additionally, mesh lining helps let air circulate to increase ventilation so that the wearer can cool down and get rid of sweat.[4]

Furthermore, the design of the men's vest is consistent with the criteria set forth in the ENs to heading 6201, HTSUS. For example, a visual inspection of the garment indicates that it is designed to be worn over another garment with the purpose of offering protection against the elements. The nylon shell and polyurethane clear coat finish has the appearance and construction of a jacket rather than a shirt. Likewise, the mesh lining and heavy-duty zipper do not appear to be the type of material suitable for wearing against the skin as a shirt. It does not have the appearance of a vest designed to be worn over a dress shirt either. Moreover, it covers the upper body from the neck area to the waist area. It has a full front opening that is performed by its heavy-duty zipper that zips from the waist to the chin area forming a stand-up collar, which can provide additional warmth to the neck area. The construction of the ribbed waist band appears to have the capacity to provide protection against the wind or other elements. Lastly, Ash City markets its nylon shell vests alongside its collection of cold weather coats, jackets, and vests.[5] It is substantially similar in purpose, design, and construction to the cold weather coats, jackets, and vests marketed by Ash City. Hence, much like the unpadded vest in NY N295141 and the short sleeved windshirt in HQ 967926, we find that the subject men's sleeveless vest is *ejusdem generis* to the articles enumerated in heading 6201, HTSUS. In particular, we find that the subject men's vest possesses the same characteristics and purpose which unites the coats, jackets, windbreakers and similar articles enumerated *eo nomine* under heading 6201, HTSUS.

HOLDING:

By application of GRI 1, the subject men's vest is classified as a jacket in heading 6201, HTSUS. Specifically, if the men's vest meets the water resistant requirements as specified in Additional U.S. Note 2 to Chapter 62, HTSUS, the applicable subheading will be 6201.40.7000, HTSUSA, which provides for: "Men's or boys' overcoats, carcoats, capes, cloaks, anoraks (including ski-jackets), windbreakers and similar articles (including padded, sleeveless jackets), other than those of heading 6203: Anoraks (including ski-jackets), windbreakers and similar articles (including padded, sleeveless jackets): Of man-made fibers: Other: Other: Other: Other: Water resistant." The column one rate of duty is 7.1% *ad valorem*.

Alternatively, if the men's vest does not meet the water resistant requirements, the applicable subheading will be 6201.40.7511, HTSUSA, which provides for: "Men's or boys' overcoats, carcoats, capes, cloaks, anoraks (including ski-jackets), windbreakers and similar articles (including padded, sleeveless jackets), other than those of heading 6203: Anoraks (including ski-jackets), windbreakers and similar articles (including padded, sleeveless jackets): Of man-made fibers: Other: Other: Other: Other, Other, Men's." The column one rate of duty is 27.7% *ad valorem*.

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[4] "All About Mesh Lining and Panels," Debbie Kosy (July 14, 2015) https://www.olorunsports.com/blogs/news/49190531-all-about-mesh-lining-and-panels (last visited, Nov. 6, 2024).

[5] Ash City's Men's Cold Weather Coats, Jackets and Vests, https://www.walmart.com/browse/clothing/men-s-cold-weather-coats-jackets-vests/5438_639019_9781608_9123654/YnJhbmQ6QXNoIENpdHkie (Last visited Nov. 6, 2024).

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

EFFECT ON OTHER RULINGS:

NY G80065, dated August 15, 2019, is MODIFIED and HQ 964512, dated January 30, 2001, is hereby REVOKED.

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

Sincerely,

YULIYA A. GULIS,
Director
Commercial and Trade Facilitation Division

19 CFR PART 177

MODIFICATION OF ONE RULING LETTER AND REVOCATION OF TREATMENT RELATING TO THE TARIFF CLASSIFICATION OF STEEL ASSEMBLY HARDWARE SETS FROM VIETNAM

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

ACTION: Notice of modification of one ruling letter and of revocation of treatment relating to the tariff classification of steel assembly hardware from Vietnam.

SUMMARY: Pursuant to section 625(c), Tariff Act of 1930 (19 U.S.C. § 1625(c)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that U.S. Customs and Border Protection (CBP) is modifying one ruling letter concerning tariff classification of steel assembly hardware under the Harmonized Tariff Schedule of the United States (HTSUS). Similarly, CBP is revoking any treatment previously accorded by CBP to substantially identical transactions. Notice of the proposed action was published in the *Customs Bulletin*, Vol. 58, No. 36, on September 11, 2024. No comments were received in response to that notice.

EFFECTIVE DATE: This action is effective for merchandise entered or withdrawn from warehouse for consumption on or after March 8, 2025.

FOR FURTHER INFORMATION CONTACT: Nicholas Horne, Chemicals, Petroleum, Metals, and Miscellaneous Classification Branch, Regulations and Rulings, Office of Trade, at (202) 325–7941.

SUPPLEMENTARY INFORMATION:

BACKGROUND

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

enter, classify and value imported merchandise, and to provide any other information necessary to enable CBP to properly assess duties, collect accurate statistics, and determine whether any other applicable legal requirement is met.

Pursuant to 19 U.S.C. § 1625(c)(1), a notice was published in the *Customs Bulletin*, Vol. 58, No. 36, on September 11, 2024, proposing to modify one ruling letter pertaining to the tariff classification of steel assembly hardware. Any party who has received an interpretive ruling or decision (i.e., a ruling letter, internal advice memorandum or decision, or protest review decision) on the merchandise subject to this notice should have advised CBP during the comment period.

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

In New York Ruling Letter ("NY") N331989, dated April 26, 2023, CBP classified steel assembly hardware sets in heading 7318, HTSUS, specifically in subheading 7318.16.0085, HTSUSA ("Annotated"), which provides for "Screws, bolts, nuts, coach screws, screw hooks, rivets, cotters, cotter pins, washers (including spring washers) and similar articles, of iron or steel: Threaded articles: Nuts, Other: Other." CBP has reviewed NY N331989 and has determined the ruling letter to be erroneous. It is now CBP's position that steel assembly hardware sets are properly classified, in heading 7318, HTSUS, specifically in subheading 7318.15.5056, HTSUSA, which provides for "Screws, bolts, nuts, coach screws, screw hooks, rivets, cotters, cotter pins, washers (including spring washers) and similar articles, of iron or steel: Threaded articles: Other screws and bolts, whether or not with their nuts or washers: Studs: Other: Continuously threaded rod: Other."

Pursuant to 19 U.S.C. § 1625(c)(1), CBP is modifying NY N331989 and revoking or modifying any other ruling not specifically identified to reflect the analysis contained in Headquarters Ruling Letter ("HQ") H332598, set forth as an attachment to this notice. Additionally, pursuant to 19 U.S.C. § 1625(c)(2), CBP is revoking any treatment previously accorded by CBP to substantially identical transactions.

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

Dated:

YULIYA A. GULIS,
Director
Commercial and Trade Facilitation Division

Attachment

HQ H332598
December 19, 2024
OT:RR:CTF:CPMMA H332598 NAH
CATEGORY: Classification
TARIFF NO: 7318.15.5056

MS. ANGIE COURTEAU
LA-Z-BOY CASEGOODS, INC.
240 PLEASANT HILL RD.
HUDSON, NC 28638

RE: Modification of NY N331989; tariff classification of steel assembly hardware sets from Vietnam

DEAR MS. COURTEAU:

This letter is in reference to New York Ruling Letter (NY) N331989, issued to you on April 26, 2023, concerning the tariff classification of steel assembly hardware sets from Vietnam. In a letter dated May 24, 2023, you requested partial reconsideration of NY N331989. In NY N331989, U.S. Customs and Border Protection (CBP) classified five different steel assembly hardware sets, identified respectively as item RP76–065–007, RP090–1140–007, RP95–300–001, RP860–744–001, and RP863–910–005, under the Harmonized Tariff Schedule of the United States (HTSUS). Items RP76–065–007 and RP090–1140–007 were classified under subheading 7318.15.8045, HTSUSA (Annotated), which provides for "Screws, bolts, nuts, coach screws, screw hooks, rivets, cotters, cotter pins, washers (including spring washers) and similar articles, of iron or steel: Threaded articles: Other screws and bolts, whether or not with their nuts or washers: Other: Having shanks or threads with a diameter of 6 mm or more: Other: Socket screws: Other." Items RP95–300–001, RP860–744–001, and RP863–910–005 were classified under subheading 7318.16.0085, HTSUSA, as "Screws, bolts, nuts, coach screws, screw hooks, rivets, cotters, cotter pins, washers (including spring washers) and similar articles, of iron or steel: Threaded articles: Nuts, Other: Other." We have reviewed NY N331989 and determined that the ruling is partially in error with respect to the tariff classification of items RP95–300–001 and RP860–744–001. Accordingly, for the reasons set forth below, CBP is modifying NY N331989.

Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. §1625(c)(1)), as amended by section 623 of Title VI, notice proposing to modify NY N331989 was published on September 11, 2024, in Volume 58, Number 36, of the Customs Bulletin. No comments were received in response to that notice.

FACTS:

Items RP95–300–001 and RP860–744–001 were described in NY N331989 as follows:

> The third set under consideration is identified as item RP95–300–001. It includes eight 5/16" x 88 mm threaded rods with slotted heads, eight 5/16" curved slotted washers, and one 12 mm combination open-end and box wrench. After examination of the photographs of the eight 5/16" curved slotted washers, it is determined that they are a type of wedge nut. Each has a freely rotating nut attached to a flat piece of metal angled at both

ends which allows it to anchor in place. You state this hardware set is used for assembling the side rails to the headboard and footboard of a sleigh bed item number 95–150.

The fourth set under consideration is identified as item RP860–744–001. It includes twelve 5/16" flat washers, twelve 5/16" lock washers, twelve 5/16" x 38 mm bolts which have socket heads, one 4 mm Allen wrench, four 5/16" x 88 mm threaded rods which have slotted heads, four 5/16" curved slotted washers, and one 12 mm combination open-end and box wrench. After examination of the photographs of the four 5/16" curved slotted washers, it is determined that they are a type of wedge nut. Each has a freely rotating nut attached to a flat piece of metal angled at both ends which allows it to anchor in place. You state this hardware set is used for assembling finished trestle tables, item numbers 860–744 and 860–745.

ISSUE:

Whether the specific steel assembly hardware sets from Vietnam, designated as items RP95–300–001 and RP860–744–001, are classified under subheading 7318.15.5056, HTSUSA, which provides for, "Screws, bolts, nuts, coach screws, screw hooks, rivets, cotters, cotter pins, washers (including spring washers) and similar articles, of iron or steel: Threaded articles: Other screws and bolts, whether or not with their nuts or washers: Studs; Other: Continuously threaded rod: Other," or under subheading 7318.16.0085, HTSUSA, as "Screws, bolts, nuts, coach screws, screw hooks, rivets, cotters, cotter pins, washers (including spring washers) and similar articles, of iron or steel: Threaded articles: Nuts: Other: Other."

LAW AND ANALYSIS:

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

GRI 3 provides, in pertinent part, that when goods are *prima facie* classifiable under two or more headings, classification shall be effected by the following:

> (a) [t]he heading which provides the most specific heading shall be preferred to headings providing a more general description. However, ... when two or more headings each refer to part only of the items in a set, those headings are to be regarded as equally specific, even if one of them gives a more complete or precise description of the goods. (b) ... goods put up in sets for retail sale, which cannot be classified by reference to 3(a), shall be classified as if they consisted of the material or component which gives them their essential character ... (c) [w]hen goods cannot be classified by reference to 3(a) or 3(b), they shall be classified under the heading which occurs last in numerical order among those which equally merit consideration.

GRI 6 provides that for legal purposes, classification of goods in the subheadings of a heading shall be determined according to the terms of those

subheadings and any related subheading notes and, *mutatis mutandis*, to the above rules, on the understanding that only subheadings at the same level are comparable.

* * * * * *

The 2024 HTSUS subheadings under consideration are the following:

7318	Screws, bolts, nuts, coach screws, screw hooks, rivets, cotters, cotter pins, washers (including spring washers) and similar articles, of iron or steel:
	Threaded articles:
7318.15	Other screws and bolts, whether or not with their nuts or washers:
7318.15.50	Studs:
	Other:
7318.15.5056	Continuously threaded rod:
	Other.
* * *	
7318	Screws, bolts, nuts, coach screws, screw hooks, rivets, cotters, cotter pins, washers (including spring washers) and similar articles, of iron or steel:
	Threaded articles:
7318.16.00	Nuts:
	Other:
7318.16.0085	Other.

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

EN VII to GRI 3(b) states that:

> The factor which determines essential character will vary as between different kinds of goods. It may, for example, be determined by the nature of the material or component, its bulk, quantity, weight or value, or by the role of a constituent material in relation to the use of the goods.

EN 73.18 states, in pertinent part, as follows:

> Bolts and nuts (including bolt ends), screw studs and other screws for metal, whether or not threaded or tapped, screws for wood and coach-screws are threaded (in the finished state) and are used to assemble or fasten goods so that they can readily be disassembled without damage.
>
> **Bolts and screws for metal** are cylindrical in shape, with a close and only slightly inclined thread; they are rarely pointed, and may have slotted heads or heads adapted for tightening with a spanner or they may be recessed. A bolt is designed to engage in a nut, whereas screws for metal are more usually screwed into a hole tapped in the material to be fastened and are therefore generally threaded throughout their length whereas bolts usually have a part of the shank unthreaded.

> The heading includes all types of fastening bolts and metal screws regardless of shape and use, including **U-bolts**, **bolt ends** (i.e., cylindrical rods threaded at one end), **screw studs** (i.e., short rods threaded at both ends), and **screw studding** (i.e., rods threaded throughout).
>
> **Nuts** are metal pieces designed to hold the corresponding bolts in place. They are usually tapped throughout but are sometimes blind. The heading includes wing nuts, butterfly nuts, etc. Lock nuts (usually thinner and castellated) are sometimes used with bolts.
>
> ***
>
> **Washers** are usually small, thin discs with a hole in the centre; they are placed between the nut and one of the parts to be fixed to protect the latter. They may be plain, cut, split (e.g., Grower's spring washers), curved, cone shaped, etc.

* * * * *

As a preliminary matter, there is no dispute concerning the appropriate classification of items RP95–300–001 and RP860–744–001 under heading 7318, HTSUS. As such GRI 6 directs the GRI analysis be repeated in each subsequent subheading.

In NY N331989, CBP determined items RP95–300–001 and RP860–744–001 were sets for the purposes of tariff classification and required a GRI 3(b) analysis to properly determine the appropriate subheading classifications. In NY N331989, in both sets, the "5/16" curved slotted washers were determined to provide the essential function and impart the essential character to items RP95–300–001 and RP860–744–001 because the curved slotted washers predominated by value. Furthermore, the curved slotted washers were determined to encompass the essential function and character of a "nut," and therefore, pursuant to GRI 3(b) and EN VII to GRI 3(b), items RP95–300–001 and RP860–744–001 were classified in subheading 7318.16, HTSUS, as "Screws, bolts, nuts, coach screws, screw hooks, rivets, cotters, cotter pins, washers (including spring washers) and similar articles, of iron or steel: Threaded articles: Nuts." In your May 24, 2023, reconsideration request, you note that the number of threaded rods is equal to the number of curved slotted washers in items RP95–300–001 and RP860–744–001. You argue that the curved slotted washers cannot be viewed separately from the threaded rods present when determining which component imparts the essential character of items RP95–300–001 and RP860–744–001. CBP partially agrees. The correct classification of items RP95–300–001 and RP860–744–001 is determined by GRI 3(b) and GRI 3(c).

In Structural Industries, Inc. v. United States, 360 F. Supp. 2d 1330, 1336 (Ct. Int'l Trade, 2005), the Court of International Trade (CIT) noted that the essential character of an article is "that which is indispensable to the structure, core or condition of the article, i.e., what it is." The CIT further explained that the essential character of an item is imparted by the item or component which is indispensable to carrying out the item's primary objective. *Id* at 1338. Similarly, the decision in *Better Home Plastics Corp. v. United States*, 20 CIT 221; 916 F. Supp. 1265 (Ct. Int'l Trade, 1996), found that the essential character is not necessarily the component which creates the item's "retail lure." *In Better Home*, a textile shower curtain which provided the desirable decorative characteristics and thus created the retail lure for the shower curtain set was not the item which imparted the essential

character. *Id*. at 1267–1269. Instead, the CIT determined that it was the inner plastic liner which imparted the essential character. The CIT reasoned that it was the inner plastic liner that was indispensable to prevent water from escaping from the shower. *Id*. at 1269.

CBP continues to find the steel assembly hardware sets from Vietnam, designated as items RP95–300–001 and RP860–744–001, are composed of unique items, such as screws, washers, curved slotted washers, box wrenches, etc., packaged together to assemble a specific and separate product - but the sets are not designed for general use in other products or, even other substantially similar products. Both sets contain the curved slotted washers, threaded rods, and a wrench.

Washers are defined in the EN 73.18 (E) as "small, thin discs with a hole in the center; they are placed between the nut and one of the parts to be fixed to protect that latter." Nuts are defined in the EN 73.18 (A) as "metal pieces designed to hold the corresponding bolts in place. They are usually tapped throughout but are sometimes blind." Here the curved slotted washers are placed in a specifically shaped hole in the relevant furniture where it is held in place so that the steel threaded rod, contained in the set, can be fastened into the nut component. The wrench is used to tighten the curved slotted washer to the threaded rod. As such, CBP continues to find that the curved slotted washers function as nuts even though the item contains features not generally found on traditional nuts. *See* HQ H195840, dated August 18, 2015 (affirming the subheading 7318.16, HTSUS, as an *eo nomine* provision per the guidance of *Carl Zeiss, Inc. v. United States*, 195 F.3d 1375, 1379 (Fed. Cir. 1999) and affirming the definition of 'nut' as "a type of fastener which is internally threaded and often but not always used opposite a mating bolt which fastens the materials together").

The definition of fasteners and the myriad forms included in that definition are described in EN 73.18. Here the threaded rods appearing in items RP95–300–001 and RP860–744–001 are threaded across their entire length and intended to have one end anchored or fixed in place, within a component of furniture, to provide a projection to which another component of furniture may be attached and secured by the curved slotted washer/nut. Additionally, the "bolts" also appearing in item RP860–744–001 are fasteners because the "bolts" secure a component of furniture to another component of furniture via preformed holes.[1]

The overarching purpose of items RP95–300–001 and RP860–744–001 is to fasten components of furniture together. As such, the fasteners (the threaded rods and "bolts") impart the essential character to both sets because the fasteners are indispensable to carrying out the items' primary objective. The furniture components may contain slots specifically designed to accommodate the unique shape of the curved slotted washers but the curved slotted washer is not designed to be used in any other way but to ensure specific objects are fastened by the accompanying threaded rods. On the other hand, the threaded rods can still fasten the furniture components together without the

[1] Item RP860–744–001 designates the fastener as a bolt. Item RP860–744–001 does not contain corresponding nuts for the fasteners and assembly instructions demonstrate the fastener is intended to be torqued into a preformed hole. The fastener is a screw. The fastener will continue to be described as a "bolt" in this rule to avoid confusion with the items promotional material and to highlight that the fastener is not, strictly speaking, a bolt. The distinction between a bolt and screw has no impact upon the classification of this item.

curved slotted washers securing them in place. The fastening role of the item sets is even more apparent when considering the components designed to work with the "bolts" in item RP860–744–001, flat washers, lock washers, and an Allen key. Each component in the item sets is included to allow or enhance the function of the fasteners. Therefore, the conclusion of the GRI 3(b) analysis is that the fasteners, not the curved slotted washers, impart the essential character of items RP95–300–001 and RP860–744–001. The correct classification of the items is under subheading 7318.15, HTSUS, "Screws, bolts, nuts, coach screws, screw hooks, rivets, cotters, cotter pins, washers (including spring washers) and similar articles, of iron or steel: Threaded articles: Other screws and bolts, whether or not with their nuts or washers." *See also* HQ H268650, dated September 18, 2019; HQ 955744, dated May 20, 1994; HQ 951870, dated January 29, 1993; these rulings reflect CBP's consistent determination that the fastener component imparts the essential character to sets designed to join two separate objects.

GRI 6 requires further consideration of the subheadings under 7318.15, HTSUS. EN 73.18 describes screw studs as "short rods threaded at both ends" and screw studding as "rods threaded throughout." Therefore, the threaded rods imparting the essential character of item RP95–300–001 are correctly classified under 7318.15.5056, HTSUSA, which provides for, "Screws, bolts, nuts, coach screws, screw hooks, rivets, cotters, cotter pins, washers (including spring washers) and similar articles, of iron or steel: Threaded articles: Other screws and bolts, whether or not with their nuts or washers: Studs; Other: Continuously threaded rod: Other." However, item RP860–744–001 contains "bolt" fasteners, which do not meet the definition of "studs,"[2] in addition to the threaded rod fasteners.

In item RP860–744–001 both fastener sets (flat washers, lock washers, bolts, and an Allen key (the bolt fastening) and the threaded rods, curved slotted washers, and combination wrench (the stud fastening)) perform the same fastening function but between different components of the same furniture. As such, both fastening sets are equally essential to item RP860–744–001 and CBP must look to GRI 3(c) to determine the correct classification under subheading 7318.15, HTSUS. *See* HQ H268650, dated September 18, 2019 (relying on a GRI 3(c) analysis where a wood fence post bracket made of steel with corresponding locknut and plastic bobbin, each of which, if imported separately, would be classifiable under different tariff headings, carry equally essential roles to the aggregate composite good.) GRI 3(c) requires "[w]hen goods cannot be classified by reference to 3(a) or 3(b), they shall be classified under the heading which occurs last in numerical order among those which equally merit consideration." The applicable subheadings are 7318.15.20, HTSUS, "Bolts and bolts and their nuts or washers entered or exported in the same shipment"; 7318.15.40, HTSUS, "Machine screws 9.5 mm or more in length and 3.2 mm or more in diameter (not including cap screws)"; and 7318.15.50, HTSUS, "Studs." As such, GRI 3(c) requires classification under 7318.15.50, HTSUS, "Studs." The correct classification of item RP860–744–001 is also 7318.15.5056, HTSUSA, which provides for, "Screws, bolts, nuts, coach screws, screw hooks, rivets, cotters, cotter pins, washers (including spring washers) and similar articles, of iron or steel: Threaded articles: Other screws and bolts, whether or not with their nuts or washers: Studs; Other: Continuously threaded rod: Other."

[2] *See* Footnote 1, *supra*.

HOLDING:

By application of GRIs 1, 3(b), 3(c), and 6, the specific steel assembly hardware sets from Vietnam, designated as items RP95–300–001 and RP860–744–001, are classified in heading 7318, HTSUS, and specifically in subheading 7318.15.5056, HTSUSA, which provides for, "Screws, bolts, nuts, coach screws, screw hooks, rivets, cotters, cotter pins, washers (including spring washers) and similar articles, of iron or steel: Threaded articles: Other screws and bolts, whether or not with their nuts or washers: Studs; Other: Continuously threaded rod: Other." The 2024 column one general rate of duty is free.

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

EFFECT ON OTHER RULINGS:

N331989, dated April 26, 2023, is hereby MODIFIED.

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

Sincerely,

YULIYA A. GULIS,
Director
Commercial and Trade Facilitation Division

AGENCY INFORMATION COLLECTION ACTIVITIES:

Revision; Importation Bond

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

ACTION: 60-Day notice and request for comments.

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

DATES: Comments are encouraged and must be submitted (no later than February 21, 2025) to be assured of consideration.

ADDRESSES: Written comments and/or suggestions regarding the item(s) contained in this notice must include the OMB Control Number 1651–0050 in the subject line and the agency name. Please submit written comments and/or suggestions in English. Please use the following method to submit comments:
Email. Submit comments to: *CBP_PRA@cbp.dhs.gov*.

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

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

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

Overview of This Information Collection

Title: Importation Bond.

OMB Number: 1651–0050.

Form Number: 301 & 5297.

Current Actions: Revision.

Type of Review: Revision.

Affected Public: Businesses.

Abstract: CBP proposes to update the CBP Form 301 instructions to add reference to a new collection, under activity code 21, for a Low Value Shipment Safekeeping (LVSS) bond. The LVSS bond will be required by the Commissioner and Notice of Specific Instruction will be published in the Customs Bulletin. The CBP Form 301 will not be used to collect the bond information, however the instructions will point the public to the Customs Bulletin where they can find the approved bond terms, conditions, and form.

All arriving air carriers and parties who currently or who seek to operate a facility other than an Express Consignment Carrier Facilities that is or will be used to process shipments for which the Section 321 exemption is claimed, either through the submission of Type 86 entries or for entry by presenting the manifest under 19 CFR 143.23(j){3) and 143.26(b), are required to have an LVSS bond on file in the Automated Commercial Environment (ACE). This bond also will be a requirement for all applicants for newly established facilities used to process shipments for which the Section 321 exemption is claimed.

The bond will be transmitted to CBP electronically, via email, to the Office of Finance—Revenue Division and be manually entered into ACE eBond.

There are no changes being made to the CBP Form 5297.

Type of Information Collection: 5297 Power of Attorney.

Estimated Number of Respondents: 500.
Estimated Number of Annual Responses per Respondent: 1.
Estimated Number of Total Annual Responses: 500.
Estimated Time per Response: 15 minutes.
Estimated Total Annual Burden Hours: 125.

Type of Information Collection: 301 Customs Bond.

Estimated Number of Respondents: 609,392.
Estimated Number of Annual Responses per Respondent: 1.
Estimated Number of Total Annual Responses: 609,392.
Estimated Time per Response: 15 minutes.
Estimated Total Annual Burden Hours: 152,348.

Type of Information Collection: LVSS Specific Instruction Bond.

Estimated Number of Respondents: 700.
Estimated Number of Annual Responses per Respondent: 1.
Estimated Number of Total Annual Responses: 700.
Estimated Time per Response: 15 minutes.
Estimated Total Annual Burden Hours: 175.

Dated: December 18, 2024.

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

U.S. Court of International Trade

Slip Op. 24–147

ASHLEY FURNITURE INDUSTRIES, LLC; ASHLEY FURNITURE TRADING COMPANY; WANEK FURNITURE CO., LTD.; MILLENNIUM FURNITURE CO., LTD.; AND COMFORT BEDDING COMPANY LIMITED, Plaintiffs, v. UNITED STATES, Defendant, and BROOKLYN BEDDING, LLC; CORSICANA MATTRESS COMPANY; ELITE COMFORT SOLUTIONS; FXI, INC.; INNOCOR, INC.; KOLCRAFT ENTERPRISES INC.; LEGGETT & PLATT, INCORPORATED; INTERNATIONAL BROTHERHOOD OF TEAMSTERS; AND UNITED STEEL, PAPER AND FORESTRY, RUBBER, MANUFACTURING, ENERGY, ALLIED INDUSTRIAL AND SERVICE WORKERS INTERNATIONAL UNION, AFL-CIO, Defendant-Intervenors.

Before: Timothy M. Reif, Judge
Court No. 21–00283

[Sustaining Commerce's final remand redetermination and relevant portions of its final determination in the antidumping duty investigation and order on mattresses from the Socialist Republic of Vietnam.]

Dated: December 20, 2024

Kristin H. Mowry and *Jeffrey S. Grimson*, Mowry & Grimson, PLLC, of Washington, D.C., argued for plaintiffs Ashley Furniture Industries, LLC; Ashley Furniture Trading Company; Wanek Furniture Co., Ltd.; Millennium Furniture Co., Ltd.; and Comfort Bedding Company Limited. With them on the briefs were *Jill A. Cramer*, *Sarah M. Wyss* and *Jacob M. Reiskin*.

Kara M. Westercamp, Trial Counsel, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, D.C., argued for defendant United States. With her on the briefs were *Brian M. Boynton*, Principal Deputy Assistant Attorney General, *Patricia M. McCarthy*, Director and *L. Misha Preheim*, Assistant Director. Of counsel was *Vania Y. Wang*, Senior Attorney, Office of the Chief Counsel for Trade Enforcement and Compliance, U.S. Department of Commerce, of Washington, D.C.

Yohai Baisburd and *Chase J. Dunn*, Cassidy Levy Kent (USA) LLP, of Washington, D.C., argued for defendant-intervenors Brooklyn Bedding, LLC; Corsicana Mattress Company; Elite Comfort Solutions; FXI, Inc.; Innocor, Inc.; Kolcraft Enterprises Inc.; Leggett & Platt, Incorporated; International Brotherhood of Teamsters; and United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, AFL-CIO. With them on the briefs was *Nicole Brunda*.

OPINION

* * *

Reif, Judge:

Before the court is the remand redetermination of the U.S. Department of Commerce ("Commerce") issued pursuant to the Court's order

in *Ashley Furniture Indus., LLC v. United States* ("*Ashley Furniture I*," or the "Remand Order"), 46 CIT __, 607 F. Supp. 3d 1210 (2022). *See* Final Results of Redetermination Pursuant to Court Remand ("Remand Results"), ECF No. 73–1.

In *Ashley Furniture I*, the Court sustained in part and remanded in part Commerce's final determination in its antidumping duty ("AD") investigation and order on mattresses from the Socialist Republic of Vietnam ("Vietnam"). 46 CIT at __, 607 F. Supp. 3d at 1245; *see Mattresses from the Socialist Republic of Vietnam: Final Affirmative Determination of Sales at Less than Fair Value* ("*Final Determination*"), 86 Fed. Reg. 15,889 (Dep't of Commerce Mar. 25, 2021) and accompanying Issues and Decision Memorandum ("IDM") (Dep't of Commerce Mar. 18, 2021); *Mattresses from the Socialist Republic of Vietnam: Preliminary Affirmative Determination of Sales at Less than Fair Value, Postponement of Final Determination, and Extension of Provisional Measures* ("*Preliminary Determination*"), 85 Fed. Reg. 69,591 (Dep't of Commerce Nov. 3, 2020) and accompanying Preliminary Decision Memorandum ("PDM") (Dep't of Commerce Oct. 27, 2020); *Mattresses from Cambodia, Indonesia, Malaysia, Serbia, Thailand, the Republic of Turkey, and the Socialist Republic of Vietnam: Antidumping Duty Orders and Amended Final Affirmative Antidumping Determination for Cambodia*, 86 Fed. Reg. 26,460 (Dep't of Commerce May 14, 2021).

The Court remanded Commerce's selection of the financial statements of Emirates Sleep Systems Private Limited ("ES") to calculate surrogate financial ratios in the AD investigation. *Ashley Furniture I*, 46 CIT at __, 607 F. Supp. 3d at 1233. In addition, the Court stated that it would "reserve examination" of plaintiffs' claim regarding the remaining surrogate value selection criteria and Commerce's use of the Cohen's *d* test until after Commerce issued the Remand Results. *Id.* at __, 607 F. Supp. 3d at 1233, 1244.

On remand, Commerce provided explanation and analysis for its selection of the ES financial statements to calculate surrogate financial ratios. *See* Remand Results. Commerce also provided explanation and analysis for its decision to reject the financial statements of Sheela Foam Limited ("SF"). *See id.* at 22–25. Commerce on remand did not address the remaining surrogate value selection criteria or its use of the Cohen's *d* test. *See id.*

Ashley Furniture Industries, LLC ("AFI"), Ashley Furniture Trading Company ("AFTC"), Wanek Furniture Co., Ltd. ("Wanek"), Millennium Furniture Co., Ltd. ("Millennium") and Comfort Bedding Company Limited ("Comfort Bedding") (collectively, the "Ashley

Respondents," or "plaintiffs") challenge certain aspects of the Remand Results.

Defendant United States and Brooklyn Bedding, LLC, Corsicana Mattress Company, Elite Comfort Solutions, FXI, Inc., Innocor, Inc., Kolcraft Enterprises Inc., Leggett & Platt, Incorporated, International Brotherhood of Teamsters and United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, AFL-CIO (collectively, "petitioners," or "defendant-intervenors") support the Remand Results.

For the reasons discussed below, the court sustains the Remand Results and the relevant portions of the *Final Determination*.

BACKGROUND

The court presumes familiarity with the facts as set out in *Ashley Furniture I* and recounts only those facts relevant to the issues before the court on remand.

On November 28, 2022, the Court sustained in part and remanded in part the *Final Determination*. *See Ashley Furniture I*, 46 CIT at __, 607 F. Supp. 3d at 1245. The Court ordered Commerce on remand to explain further or reconsider its selection of the ES financial statements to calculate surrogate financial ratios in the AD investigation. *See id.*

The Court held that a remand was required for Commerce to explain further or reconsider: (1) its conclusions that the ES financial statements were complete and publicly available; and (2) its selection of the ES financial statements and rejection of the SF financial statements. *Id.* at 1227.

Moreover, the Court concluded that it would reserve examination of the remaining surrogate value selection criteria — i.e., (1) the noncontemporaneity of the ES financial statements; (2) whether the ES financial statements were representative of the business operations of Wanek, Millennium and Comfort Bedding; and (3) whether the ES financial statements contained evidence of the receipt of countervailable subsidies — until after Commerce published the Remand Results. *Id.* at 1233. The Court explained that "[i]t is possible that Commerce's reconsideration of whether ES' financial statements were complete and publicly available will lead Commerce to reevaluate the remaining selection criteria." *Id.* The Court also stated that it would "reserve examination" of plaintiffs' claim regarding Commerce's use of the Cohen's *d* test in calculating AD margins in the instant case "until Commerce reconsiders, consistent with this decision, the Final Determination," as "[i]t is possible that Commerce will reconsider on remand its use of the Cohen's *d* test." *Id.* at 1244.

On January 4, 2023, Commerce reopened the record and issued a supplemental questionnaire to the petitioners in which Commerce requested "further explanation of the source and process by which [the petitioners] retrieved [ES'] financial statements and how this process, as well as the financial statements themselves, constituted publicly available information." Remand Results at 3.

On January 11, 2023, the petitioners filed their response to Commerce's supplemental questionnaire. *Id.; see* Letter on Behalf of Pet'rs to Dep't of Commerce re: Mattress Pet'rs' Resp. Commerce's Section D Suppl. Questionnaire (Jan. 11, 2023), PRR 2, JA Tab 6.

On January 18, 2023, the Ashley Respondents filed their rebuttal comments to the petitioners' response. *See* Letter on Behalf of Ashley Respondents to Dep't of Commerce re: Rebuttal Comments to Pet'rs' Section D Suppl. Questionnaire Resp. at 5–6 (Jan. 18, 2023) ("Ashley Rebuttal 2023"), PRR 3, JA Tab 7.

On January 31, 2023, Commerce published the draft remand results. *See* Remand Results at 4.

On February 7, 2023, the Ashley Respondents and the petitioners provided comments on Commerce's draft remand results. *See* Letter on Behalf of Ashley Respondents to Dep't of Commerce re: Comments on Draft Results of Redetermination Pursuant to Ct. Remand (Feb. 7, 2023), PRR 9, JA Tab 9; Letter on Behalf of Mattress Pet'rs to Dep't of Commerce re: Mattress Pet'rs' Comments on Commerce's Draft Results of Redetermination Pursuant to Ct. Remand (Feb. 7, 2023), PRR 10, JA Tab 10.

On February 23, 2023, Commerce published the Remand Results. *See* Remand Results.

On March 1, 2023, the court granted defendant's consent motion to correct the remand cover letter. Ct's Order Granting Def.'s Consent Mot. to Correct Errata, ECF No. 76.

On March 27, 2023, plaintiffs filed comments in opposition to the Remand Results. *See* Pls. AFI, AFTC, Wanek, Millennium and Comfort Bedding Comments on Final Remand Redetermination ("Pls. Br."), ECF No. 80.

On April 26, 2023, defendant-intervenors filed comments in support of the Remand Results. *See* Mattress Pet'rs' Comments Supp. Remand Redetermination ("Def.-Intervenors Br."), ECF No. 84.

On April 26, 2023, the court granted defendant's motion for an extension of time for defendant and defendant-intervenors to file their responses in support of the Remand Results. Ct.'s Order Granting Def.'s Mot. Extension of Time, ECF No. 85.

On April 28, 2023, defendant filed comments in support of Commerce's Remand Results. *See* Def.'s Resp. to Pls.' Comments on Dep't of Commerce's Remand Redetermination ("Def. Br."), ECF No. 86.

On January 18, 2024, the court heard oral argument. *See* Oral Arg. Tr., ECF No. 97.

JURISDICTION AND STANDARD OF REVIEW

The court exercises jurisdiction pursuant to 28 U.S.C. § 1581(c). Plaintiffs bring this action pursuant to sections 516A(a)(2)(A)(i)(II) and (a)(2)(B)(iii) of the Tariff Act of 1930, as amended, 19 U.S.C. § 1516a(a)(2)(A)(i)(II) and (a)(2)(B)(iii) (2018).[1]

On remand, the Court will sustain Commerce's determinations "if they are in accordance with the remand order, are supported by substantial evidence, and are otherwise in accordance with law." *MacLean-Fogg Co. v. United States*, 39 CIT __, __, 100 F. Supp. 3d 1349, 1355 (2015) (citing 19 U.S.C. § 1516a(b)(1)(B)(i)); *see Prime Time Com. LLC v. United States*, 45 CIT __, __, 495 F. Supp. 3d 1308, 1313 (2021) ("The results of a redetermination pursuant to court remand are also reviewed 'for compliance with the court's remand order.'") (quoting *Xinjiamei Furniture (Zhangzhou) Co. v. United States*, 38 CIT 189, 190, 968 F. Supp. 2d 1255, 1259 (2014)), *aff'd*, No. 2021–1783, 2022 WL 2313968 (Fed. Cir. June 28, 2022); *see also Jiangsu Zhongji Lamination Materials Co., (HK) v. United States*, 44 CIT __, __, 435 F. Supp. 3d 1273, 1276 (2020).

Substantial evidence constitutes "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion," but it requires "more than a mere scintilla." *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477 (1951) (quoting *Consol. Edison Co. of N.Y. v. NLRB*, 305 U.S. 197, 229 (1938)). Moreover, "[t]he substantiality of evidence must take into account whatever in the record fairly detracts from its weight." *Id.* at 488.

For a reviewing court to "fulfill [its] obligation" to determine whether a determination of Commerce is supported by substantial evidence and in accordance with law, Commerce is required to "examine the record and articulate a satisfactory explanation for its action." *CS Wind Viet. Co. v. United States*, 832 F.3d 1367, 1376 (Fed. Cir. 2016) (quoting *Yangzhou Bestpak Gifts & Crafts Co. v. United States*, 716 F.3d 1370, 1378 (Fed. Cir. 2013)).

Further, "the Court will not disturb an agency determination if its factual findings are reasonable and supported by the record as a whole, even if there is some evidence that detracts from the agency's

[1] References to the U.S. Code are to the 2018 edition. Further citations to the Tariff Act of 1930, as amended, are to the relevant portions of Title 19 of the U.S. Code.

conclusion." *Shandong Huarong Gen. Corp. v. United States*, 25 CIT 834, 837, 159 F. Supp. 2d 714, 718 (2001) (citing *Heveafil Sdn. Bhd. v. United States*, 25 CIT 147, 149 (2001)), *aff'd sub nom. Shandong Huarong Gen. Grp. Corp. v. United States*, 60 F. App'x 797 (Fed. Cir. 2003). "[T]he possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence." *Altx, Inc. v. United States*, 370 F.3d 1108, 1116 (Fed. Cir. 2004) (quoting *Matsushita Elec. Indus. Co. v. United States*, 750 F.2d 927, 933 (Fed. Cir. 1984)).

In addition, "an agency's action must be upheld, if at all, on the basis articulated by the agency itself." *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins.*, 463 U.S. 29, 50 (1983) (citing *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962); *SEC v. Chenery Corp.*, 332 U.S. 194, 196 (1947); *Am. Textile Mfrs. Inst., Inc. v. Donovan*, 452 U.S. 490, 539 (1981)).

However, the court will "uphold a decision of less than ideal clarity if the agency's path may reasonably be discerned." *State Farm*, 463 U.S. at 43 (quoting *Bowman Transp., Inc. v. Ark.-Best Freight Sys., Inc.*, 419 U.S. 281, 286 (1974)); *see also NMB Sing. Ltd. v. United States,* 557 F.3d 1316, 1319 (Fed. Cir. 2009) ("Commerce must explain the basis for its decisions; while its explanations do not have to be perfect, the path of Commerce's decision must be reasonably discernable to a reviewing court.").

Finally, "when a party properly raises an argument before an agency, that agency is required to address the argument in its final decision." *Fine Furniture (Shanghai) Ltd. v. United States*, 40 CIT __, __, 182 F. Supp. 3d 1350, 1371 (2016) (citing *SKF USA Inc. v. United States*, 630 F.3d 1365, 1374 (Fed. Cir. 2011)).

DISCUSSION

The court addresses first whether Commerce's selection of the ES financial statements to calculate surrogate financial ratios is supported by substantial evidence and in compliance with the Remand Order. The court then addresses plaintiffs' claims regarding Commerce's remaining surrogate valuation criteria and Commerce's use of the Cohen's *d* test.

I. Commerce's selection of the ES financial statements to calculate surrogate financial ratios

A. Background

In the *Final Determination*, Commerce determined to select the ES financial statements to calculate surrogate financial ratios for respondents. IDM at cmt. 2; Remand Results at 2–3.

The Court concluded in *Ashley Furniture I* that "a remand is required for Commerce to explain further or reconsider its conclusions that ES' financial statements were: (1) complete and (2) publicly available." 46 CIT at __, 607 F. Supp. 3d at 1227.

On remand, Commerce "continued to determine that [ES'] 2018–2019 audited financial statements are complete and publicly available, and . . . continued to use [ES'] 2018–2019 audited financial statements to derive surrogate financial ratios." Remand Results at 2. Commerce also continued to reject the SF financial statements. *See id.* at 22–25.

B. Legal framework

19 U.S.C. § 1677b(c)(1) provides that Commerce "shall determine the normal value of the subject merchandise" in an AD investigation that involves a non-market economy ("NME") country "on the basis of the value of the factors of production utilized in producing the merchandise and to which shall be added an amount for general expenses and profit plus the cost of containers, coverings, and other expenses." *See Juancheng Kangtai Chem. Co. v. United States*, Slip Op. 15–93, 2015 WL 4999476, at *2 (CIT Aug. 21, 2015).

In administrative proceedings that involve an NME country such as Vietnam, Commerce calculates the "normal value" of the subject merchandise by selecting surrogate data from one or several market economy countries that Commerce determines constitute the "best available information" in the record. 19 U.S.C. § 1677b(c)(1); *Heze Huayi Chem. Co. v. United States*, 45 CIT __, __, 532 F. Supp. 3d 1301, 1309–10 (2021). The "best available information" standard involves "a comparison of the competing data sources" in the record. *Weishan Hongda Aquatic Food Co. v. United States*, 917 F.3d 1353, 1367 (Fed. Cir. 2019).

19 U.S.C. § 1677b(c)(1) does not define "best available information," which means that Commerce has "broad discretion" to evaluate information on the record. *Zhejiang DunAn Hetian Metal Co. v. United States*, 652 F.3d 1333, 1341 (Fed. Cir. 2011). In determining the "best available information" on the record, Commerce selects, "to the extent practicable," data that meet Commerce's surrogate value selection criteria — e.g., data that are complete, publicly available, "product-specific" and "contemporaneous with the period of [investigation]." *Nantong Uniphos Chems. Co. v. United States*, 43 CIT __, __, 415 F. Supp. 3d 1345, 1353–54 (2019) (alteration in original) (quoting *Qingdao Sea-Line Trading Co. v. United States*, 766 F.3d 1378, 1386 (Fed. Cir. 2014)); *see CP Kelco US, Inc. v. United States*, Slip Op. 16–36, 2016 WL 1403657, at *3 (CIT Apr. 8, 2016).

When reviewing a determination by Commerce, the "court's duty is 'not to evaluate whether the information Commerce used was the best available, but rather whether a *reasonable mind* could conclude that Commerce chose the best available information.'" *Zhejiang DunAn Hetian Metal*, 652 F.3d at 1341 (emphasis supplied) (quoting *Goldlink Indus. Co. v. United States*, 30 CIT 616, 619, 431 F. Supp. 2d 1323, 1327 (2006)).

"There is no hierarchy for applying the surrogate value selection criteria." *Carbon Activated Tianjin Co. v. United States*, 46 CIT __, __, 586 F. Supp. 3d 1360, 1366 (2022) (citing *United Steel & Fasteners, Inc. v. United States*, 44 CIT __, __, 469 F. Supp. 3d 1390, 1398–99 (2020)); *Hangzhou Spring Washer Co. v. United States*, 29 CIT 657, 672, 387 F. Supp. 2d 1236, 1250–51 (2005). Moreover, the weight "accorded to a factor varies depending on the facts of each case." *Xiamen Int'l Trade & Indus. Co. v. United States*, 37 CIT 1724, 1728, 953 F. Supp. 2d 1307, 1313 (2013).

In an AD investigation involving an NME country, Commerce calculates the "normal value" for factory overhead, selling, general and administrative expenses and profit with reference to "financial ratios derived from financial statements of producers of comparable merchandise in the surrogate country." *Changzhou Trina Solar Energy Co. v. United States*, 44 CIT __, __, 450 F. Supp. 3d 1301, 1314–15 (2020) (quoting *Ad Hoc Shrimp Trade Action Comm. v. United States*, 618 F.3d 1316, 1319–20 (Fed. Cir. 2010)).

"When presented with multiple imperfect potential" financial statements, Commerce is required to "faithfully compare the strengths and weaknesses of each before deciding which to use." *CP Kelco US, Inc. v. United States*, Slip Op. 15–27, 2015 WL 1544714, at *7 (CIT Mar. 31, 2015) (citing *Blue Field (Sichuan) Food Indus. Co. v. United States*, 37 CIT 1619, 1635–40, 949 F. Supp. 2d 1311, 1328–31 (2013)).

C. Whether the ES financial statements were complete

The court concludes that Commerce explained adequately its determination that the ES financial statements were complete.

In *Ashley Furniture I*, the Court held that "Commerce did not explain adequately its conclusion that ES' financial statements were complete within the meaning of Commerce's surrogate data selection practice." 46 CIT at __, 607 F. Supp. 3d at 1227. In particular, Commerce failed to explain adequately its determination that the missing Annexure 5 of the ES financial statements "did not contain information related to ES' potential receipt of subsidies that would have

distorted Commerce's surrogate financial ratio calculations." *Id.* at __, 607 F. Supp. 3d at 1230.

Commerce on remand continued to determine that the ES financial statements were complete. *See* Remand Results at 5–8.

Plaintiffs present four arguments to support their position that Commerce's determination that the ES financial statements were complete is not supported by substantial evidence. *See* Pls. Br. at 3–9.

1. Evidence of potentially countervailable subsidies

Plaintiffs' first argument is that "Commerce cannot reasonably conclude that [ES'] financial statements do not contain any receipt of countervailable subsidies because Annexure 5 remains missing from the record." *Id.* at 4. Plaintiffs argue that Commerce's determination that Annexure 5 "cannot categorically contain any evidence of potentially countervailable subsidies received by [ES]" is speculative. *Id.* (quoting Remand Results at 6).

Note 13 of the ES financial statement reads "[b]alances with government authorities (Refer Annexure - 5)." Letter on Behalf of Pet'rs to Dep't of Commerce re: Pet'rs' Surrogate Values Submission (July 30, 2020) ("Pet'rs' SV Comments") at Ex. 11, PR 276–277, JA Tab 1.

On remand, Commerce maintained that "the balance sheet clearly identifies Note 13 . . . as an asset, [and that] any loans or advances contained therein must be *from* [ES] *to* government authorities, as loans given are classified as assets and loans received are classified as liabilities." Remand Results at 6. Commerce explained that Annexure 5 "could not potentially demonstrate receipt of a countervailable subsidy because Note 13, and thereby Annexure 5, pertain to loans or advances given, not received." *Id.* Commerce explained further that "Annexure 5 does not detail receipt of anything from government authorities; therefore, no potential subsidization would be revealed by the inclusion of Annexure 5 on the record." *Id.*

Commerce's explanation that the items in Note 13, and thereby Annexure 5, were loans from ES to the government and not the other way around is adequate. *See id.*

Plaintiffs object that this Court rejected previously Commerce's explanation with respect to Note 13 in *Best Mattresses Int'l Co. v. United States*, 47 CIT __, 622 F. Supp. 3d 1347 (2023). Pls. Br. at 5.

Best Mattresses is unavailing. In that case, importers challenged the same *Final Determination* at issue in *Ashley Furniture I*. *See Best Mattresses*, 47 CIT at __, 622 F. Supp. 3d at 1356–57. The *Best Mattresses* Court held that "Commerce's conclusion that the [ES]

statements are complete is . . . unsupported by substantial evidence." *Id.* at __, 622 F. Supp. 3d at 1396.

Specifically, the *Best Mattresses* Court concluded that "Commerce erred in summarily stating that any asset plausibly qualifying as a '[b]alance with government authorities' cannot be an indicator of government subsidies." *Id.* (alteration in original). The Court reasoned that if, for example, "Annexure 5 revealed that [ES] had an Indian tax credit receivable on its books, that would potentially be evidence of a 'financial contribution' required to establish the existence of a countervailable subsidy." *Id.* The Court explained that "[t]he missing annexure may have deprived Commerce of key information regarding the viability of [ES'] financial statements — specifically, the existence of government subsidies recorded as assets — and Commerce does not appear to dispute that such government subsidies would impact the profit and selling expense calculations." *Id.*

However, Commerce on remand in the instant case explained that "any balance(s) listed in Annexure 5 would reflect the loan principal, not any conferred benefit." Remand Results at 16. Commerce noted that a financial contribution of that kind would appear elsewhere on a financial statement. *Id.* For that reason, Commerce's explanation on remand is adequate and is factually distinct from the *Final Determination* explanation rejected in *Best Mattresses*.[2]

2. The auditor's note

Plaintiffs' second argument is that "Commerce erred in finding that [ES] may have provided loans or advances to the government authorities" during the financial year ending on March 31, 2019. Pls. Br. at 6. Plaintiffs allege that "the auditor of [ES'] financial statements as well as information provided by the company in the Annexure to the Independent Auditor's Report expressly indicate that [ES] 'has not granted any loans or provided any guarantees or given any security' to any companies, firms, or other parties during the financial year ending on March 31, 2019." *Id.* (quoting Pet'rs' SV Comments at Ex. 11).

[2] The court notes that Commerce on remand in *Best Mattresses* reconsidered and determined that the ES financial statements were "incomplete." *Best Mattresses Int'l Co. v. United States* ("*Best Mattresses II*"), 48 CIT __, __, 703 F. Supp. 3d 1382, 1387 (2024). The court has before it a different record; further, the remand results in the instant case preceded those in *Best Mattresses II*. *See* Remand Results (dated February 23, 2023); *Best Mattresses II*, 48 CIT at __, 703 F. Supp. 3d at 1386 ("Commerce filed the *Remand Redetermination* with the court on July 17, 2023.").

Commerce does not address plaintiffs' argument on remand. *See* Remand Results. Even so, plaintiffs' argument regarding the auditor's note is precluded. Plaintiffs failed to raise this argument in the remand proceedings. *See id.*; *see also* Letter on Behalf of Ashley Respondents to Dep't of Commerce re: Comments on Draft Results of Redetermination Pursuant to Ct. Remand (Feb. 7, 2023), PRR 9, JA Tab 9.

"[T]he Court of International Trade shall, where appropriate, require the exhaustion of administrative remedies." 28 U.S.C. § 2637(d); 19 C.F.R. § 351.309(c)(2) (explaining that "[t]he case brief must present all arguments that continue in the submitter's view to be relevant to the Secretary's final determination or final results"); *see Mittal Steel Point Lisas Ltd. v. United States*, 548 F.3d 1375, 1383–84 (Fed. Cir. 2008) (holding that party failed to exhaust administrative remedies by not raising an issue in its comments on the draft remand results); *Taian Ziyang Food Co. v. United States*, 37 CIT 947, 963, 918 F. Supp. 2d 1345, 1361 (2013) ("The prescribed avenue for challenging remand results requires that a party first file comments on the draft results at the administrative level, setting forth the party's objections.").

"The requirement that invocation of exhaustion be 'appropriate,' however, requires that it serve some practical purpose when applied. Inquiry into the purposes served by requiring exhaustion in the particular case, and any harms caused by requiring such exhaustion, is needed to determine appropriateness." *Itochu Bldg. Prods. v. United States*, 733 F.3d 1140, 1145 (Fed. Cir. 2013).

The exhaustion requirement "can protect [Commerce's] interest in being the initial decisionmaker in implementing the statutes defining its tasks." *Id.* Moreover, the requirement "can serve judicial efficiency by promoting development of an agency record that is adequate for later court review and by giving [Commerce] a full opportunity to correct errors and thereby narrow or even eliminate disputes needing judicial resolution." *Id.*

Here, the invocation of exhaustion is appropriate to "protect administrative agency authority and promote judicial efficiency." *Id.* By failing to raise the argument regarding the auditor's note in the remand proceeding, plaintiffs denied Commerce the opportunity to be the "initial decisionmaker" with respect to that issue. *Id.* Further, it would be inappropriate for the court to respond to an argument that Commerce did not have the opportunity to consider on remand. *Id.*

Plaintiffs have not demonstrated that the requirement of exhaustion would be inappropriate here.[3] For the above reasons, plaintiffs' argument concerning the auditor's note is precluded.

3. The financial ratio calculations

Plaintiffs' third argument is that "Commerce improperly determined that the amounts listed under Note 13(b) of [ES'] financial statements 'have no impact on [Commerce's] financial ratio calculation.'" Pls. Br. at 7 (quoting Remand Results at 7). Plaintiffs object to Commerce's explanation that the missing information "is not considered in the 'surrogate overhead, selling, general, and administrative . . . expenses, and profit ratio[] calculations.'" *Id.* (quoting Remand Results at 7).

On remand, Commerce determined that "because Note 13 pertains to loans and advances *from* [ES] *to* other entities not affiliated with [ES], any quantities enumerated therein have no impact on our financial ratio calculations." Remand Results at 7. Commerce explained that "[w]hen calculating the surrogate overhead, selling, general, and administrative (SG&A) expenses, and profit ratios, we look to the income statement to derive a total of materials, labor, and energy, as well as total overhead expenses, SG&A expenses, and reported profit." *Id.*

Commerce explained further that "Current Assets, as Note 13 is classified, are not considered in any of the[se] . . . calculations." *Id.* Moreover, "[c]urrent assets are not classified as revenue, and none of the [enumerated] revenue categories evince receipt of subsidies from the government." *Id.* (citing Pet'rs' SV Comments at Ex. 11). Commerce concluded that "[t]he magnitude of [ES'] loans and advances it lent to government authorities does not factor into the company's revenue, profit, or cost of manufacturing, and is thereby immaterial to our calculation of surrogate overhead, SG&A, and profit ratios." *Id.* at 7–8.

Plaintiffs argue that "the Court has previously rejected Commerce's decision to use financial statements that were missing certain information even though Commerce stated that the information has no bearing on its surrogate values . . . calculation." Pls. Br. at 7 (citing *Dongguan Sunrise Furniture Co. v. United States*, 36 CIT 860, 886,

[3] Courts have recognized "several recurring circumstances" in which institutional interests do not justify the invocation of exhaustion. *Itochu Bldg. Prods. v. United States*, 733 F.3d 1140, 1146 (Fed. Cir. 2013) (explaining that the requirement of exhaustion may be inappropriate where there is, for example, futility in raising the issue before the agency or a pure question of law).

865 F. Supp. 2d 1216, 1242 (2012)). Plaintiffs assert that in *Dongguan Sunrise*, the Court determined that Commerce did not explain adequately its decision to "use[] a surrogate financial statement that did not include a line item for taxes." *Id.* (citing *Dongguan Sunrise*, 36 CIT at 886, 865 F. Supp. 2d at 1242).

The *Dongguan Sunrise* Court determined that "[a]lthough Commerce does not use taxes directly when calculating surrogate values, Commerce sometimes relies on notes to the tax line to determine whether the entity received disqualifying subsidies." *Dongguan Sunrise*, 36 CIT at 886, 865 F. Supp. 2d at 1242.

However, plaintiffs' reliance on *Dongguan Sunrise* is not availing. As discussed above, Commerce on remand explained adequately its determination that Annexure 5 "cannot categorically contain any evidence of potentially countervailable subsidies received by [ES] from the government." *See supra* Section I.C.1; Remand Results at 6–7, 15–17. Accordingly, Commerce's explanation with respect to the financial ratio calculations is accurate.

4. The size of the amount listed under Note 13

Plaintiffs' fourth argument is that "contrary to the Court's direction, Commerce failed to explain the significance of the size of the amount listed [by ES] under '[b]alances with government authorities' to the surrogate financial ratios calculation." Pls. Br. at 8. Plaintiffs explain that "Commerce has no insight into the nature of the amounts contained in Note 13, and any attempts to downplay the potential distortions of this amount are purely speculative." *Id.* at 9.

In *Ashley Furniture I*, the Court concluded that Commerce did not address plaintiffs' arguments concerning the size of the balance associated with the line item under Note 13 associated with Annexure 5 ("Balances with government authorities") in concluding that this item was not distortive. *See* 46 CIT at __, 607 F. Supp. 3d at 1231. The Court noted that "[b]ased on record evidence, this balance amounted to more than 12% of ES' revenue." *Id.*

On remand, Commerce acknowledged that ES "provides a large principal of loans/advances to government authorities," but explained that "the relevant size of income earned on sales to, or interest income received from, government authorities is not a factor that Commerce considers as part of its analysis of surrogate financial statements." Remand Results at 18

Commerce maintained that "[b]ecause the record contains adequate evidence to reasonably conclude that Annexure 5 could not contain evidence of countervailable subsidies, it is unnecessary to hypothesize as to the potential distortion of a countervailable subsidy

contained therein." *Id.* Commerce noted that "parties have not provided evidence of where Commerce has found a loan or advance by the respondent to the government to be a countervailable subsidy program" and that "the parties have not explained how a loan or advance provided to a government would constitute a financial contribution or benefit as defined within sections 771(5)(D) and (E) of the Act, respectively." *Id.* at 24.

Commerce's explanation addresses adequately plaintiffs' arguments concerning the size of the balance associated with Note 13. Commerce's discussion of the nature of the amounts contained in Note 13 demonstrated that it was reasonable for Commerce to conclude that distortion is unlikely. *See id.* at 6–7, 18.

In sum, Commerce explained adequately its determination that the ES financial statements were complete. Accordingly, Commerce's explanation on remand complies with the Remand Order and is supported by substantial evidence.

D. Whether ES' financial statements were publicly available

The court concludes that Commerce explained adequately its conclusion that the ES financial statements were publicly available. *See id.* at 8–14, 19–21.

In *Ashley Furniture I*, the Court concluded that Commerce did not explain adequately its "determination that ES' financial statements were . . . publicly available with respect to Commerce's selection of financial statements to calculate surrogate financial ratios" because Commerce failed to address: (1) "whether the version of the statements that was available in the subscription database was complete"; and (2) "the record evidence to which the Ashley Respondents referred with respect to their alleged efforts to obtain ES' financial statements." 46 CIT at __, 607 F. Supp. 3d at 1233, 1245. The Court remanded for further explanation or reconsideration. *Id.* at __, 607 F. Supp. 3d at 1245.

Plaintiffs argue that Commerce's conclusion on remand that ES' statements were "publicly available" on two websites, the Indian Ministry of Corporate Affairs ("MCA") website and the Zauba Corp. website, is "speculative and unsupported by substantial evidence." Pls. Br. at 9–10.

1. Completeness

With respect to the first remand instruction, the court has concluded above that the ES financial statements were complete for the

purposes of the surrogate value calculation. *See supra* Section I.C. Moreover, plaintiffs do not argue that the version of the statements available on the two websites differed from the version before the court. *See* Pls. Br. Accordingly, Commerce complied with the Remand Order on this point.

2. Evidence of efforts

"[T]he bar that Commerce has reasonably set for public availability" is that "other interested parties [must] be able to independently access the information." *Yantai Xinke Steel Structure Co. v. United States,* 38 CIT 478, 497 (2014).

Plaintiffs argue that "not all members of the public are able to access and download [ES'] financial statements from the MCA website" because "a user is required to supply an 'Income Tax PAN' . . . which is an Indian taxpayer registration number issued to an individual, company or firm." Pls. Br. at 10.

Plaintiffs also argue that the fact that the ES financial statements "were obtained by an Indian consultant[] further establish[es] that the financial statements are not publicly available but instead only a person or firm with PAN [sic] are [sic] able to obtain access through the MCA website." *Id.*

On remand, Commerce "reopened the record and issued a supplemental questionnaire, requesting the petitioners demonstrate how they obtained [ES'] financial statements, including narrative explanations and screenshots of each step in the process, as well as an explanation of how such a retrieval method constitutes publicly available information." Remand Results at 8. Commerce explained that "the petitioners responded by providing explanations and screenshot evidence for its [sic] retrieval of [ES'] financial statements from two separate sources, [MCA] and Zauba Corp." *Id.*

After reviewing the step-by-step instructions, Commerce determined reasonably that "in this case, all interested parties are capable of obtaining the financial statements and commenting on reliability and relevance of the information." *Id.* at 9. Commerce explained that "[o]nce an account is created at either website, a user may retrieve and download [ES'] financial statements from various years." *Id.* at 10.

Commerce concluded that "because the public can access th[e] information with or without a PAN, Commerce considers the MCA website to be public." *Id.* at 10. Commerce explained that:

> When applying for a new user account, an applicant must first select the user category of "Registered User" or "Business User,"

> then select a "User Role," and finally enter an "Income Tax PAN." Whether the PAN is mandatory depends on the selected category, *i.e.*, an asterisk (*) appears next to the "Income Tax PAN" field when the "Business User" category is selected but no asterisk appears next to the "Income Tax PAN" field when the "Registered User" category is selected. As the website notes, "[a]ll fields marked in * are to be mandatorily filled." Because the PAN is not a requirement for registration as a "Registered User," the MCA website is not "only reserved for Indian citizens or residents and not the public," as Ashley claims.

Id. (footnotes omitted).

In addition, Commerce determined reasonably that the ES financial statements "are available, clearly labeled, and ready for download once a user pays a small fee" on the Zauba Corp. website. *Id.* at 11. Commerce addressed the Ashley Respondents' argument in the remand proceeding that the ES financial statements were not downloadable on the Zauba Corp. website because "petitioners incorrectly highlighted" a document that did not contain the ES financial statements. *Id.*; Ashley Rebuttal 2023 at 6–7.

Commerce conceded that "petitioners incorrectly identified the appropriate document," but explained that "[t]wo items below the incorrectly identified document on the list of documents downloaded from Zauba Corp.'s website is a document titled 'Copy of Financial Sta[t]ements duly authenticated as per section 134 (Including Boards report, auditors report and other documents)-16122019' and dated December 16, 2019." Remand Results at 11 (footnote omitted) (second alteration in original).

Further, Commerce noted that the Ashley Respondents were "able to download the incorrectly identified document, demonstrating that [ES'] information is obtainable from Zauba Corp.'s website." *Id.* Commerce explained that because plaintiffs "w[ere] able to . . . download the document incorrectly identified by the petitioners, it is reasonable to conclude that Ashley Group could have just as easily retrieved and downloaded the clearly labeled financial statements also located on the website." *Id.* at 11–12. Commerce determined that "for the foregoing reasons and because '[t]he information on Zauba Corp. is all a matter of public record, is sourced from the official registers, and is from published government data,' we find that Zauba Corp.'s website is also a publicly available source of information, provided users pay a small fee." *Id.* at 12 (footnote omitted) (quoting Ashley Rebuttal 2023 at 3, Ex. 5).

Commerce also responded to the Ashley Respondents' argument that "the record still lacks evidence that the financial statements were publicly available at the time of the investigation." *Id.* at 13, 20–21. However, the court need not consider this argument here given that plaintiffs abandoned it in their briefing. *See* Pls. Br.

In sum, Commerce explained adequately that the ES financial statements were publicly available because "other interested parties may . . . be able to independently access the information." *Yantai Xinke*, 38 CIT at 497. Accordingly, Commerce's explanation on remand complies with the Remand Order and is supported by substantial evidence.

E. Commerce's rejection of the SF financial statements

The court concludes that Commerce explained adequately its rejection of the SF financial statements. *See* Remand Results at 22–25.

In *Ashley Furniture I*, the Court ordered Commerce "on remand to explain further or reconsider its decision . . . to reject SF's statements in view of the deficiencies identified in this decision with respect to ES' statements." 46 CIT at __, 607 F. Supp. 3d at 1245. The Court noted that Commerce on remand was not required "'to choose any particular financial statement or [to] reject' ES' statements" but that "Commerce must . . . fairly weigh the available options and explain its decision in light of its selection criteria, addressing any shortcomings." *Id.* at __, 607 F. Supp. 3d at 1227 (alteration in original) (quoting *Carbon Activated*, 46 CIT at __, 586 F. Supp. 3d at 1381).

Plaintiffs argue that "Commerce's continued decision on remand to reject [SF's] financial statements as the best available information to calculate the surrogate financial ratios is also unsupported by substantial evidence" because: (1) the ES financial statements "remain incomplete"; and (2) "Commerce's conclusion that [SF] received countervailable subsidies during the period of investigation ("POI") is not supported by the record evidence." Pls. Br. at 11.

The court has already concluded that the ES financial statements were complete for the purposes of the surrogate value calculation. *See supra* Section I.C. With respect to plaintiffs' second argument, the court concludes that Commerce explained adequately that the SF financial statements "clearly evince money received during the POI under identifiable programs that Commerce has previously found to be countervailable." Remand Results at 23.

Plaintiffs argue that "Commerce . . . erred in rejecting [SF's] financial statements because there is no conclusive evidence that [SF's] financial statements reference a specific government assistance program." Pls. Br. at 12.

On remand, Commerce explained that "when financial statements contain a reference to a program or programs that Commerce has previously found to be countervailable, Commerce may consider that the financial ratios derived from that company's financial statements are less representative of the financial experience of the relevant industry than the ratios derived from financial statements of a company that do not contain evidence of subsidization." Remand Results at 22–23 (citing *Certain Steel Nails from the People's Republic of China: Final Results of the First Antidumping Duty Administrative Review* ("*Steel Nails from China*"), 76 Fed. Reg. 16379 (Dep't of Commerce Mar. 23, 2011) and accompanying IDM (Dep't of Commerce Mar. 14, 2011) at 11).

As a result, "Commerce does not rely on financial statements that contain references to programs previously found to be countervailable when there are other sufficiently usable and representative data on the record for purposes of calculating the surrogate financial ratios." *Id.* at 23 (citing *Steel Nails from China* IDM at 11).

Commerce explained that the SF financial statements "clearly evince money received during the POI under identifiable programs that Commerce has previously found to be countervailable." *Id.* Commerce did not state explicitly what these "identifiable programs" were.[4] *See id.* However, defendant explains that Note 31 ("Revenue from Operations") of the SF financial statements showed a "duty drawback" and Note 32 ("Other Income") showed an "[i]nvestment [s]ubsidy received." Def. Br. at 17.

Commerce cited to the countervailing duty ("CVD") investigation of certain quartz surface products from India in which Commerce determined that the duty drawback scheme of the Government of India was a countervailable subsidy. Remand Results at 23 n.130 (citing *Certain Quartz Surface Products from India: Final Affirmative Countervailing Duty Determination and Final Affirmative Determination of Critical Circumstances, In Part*, 85 Fed. Reg. 25,398 (Dep't of Commerce May 1, 2020) and accompanying IDM (Dep't of Commerce Apr. 27, 2020) at cmt. 6).

Commerce also cited to "Comment 8" of the IDM for *Circular Welded Carbon-Quality Steel Pipe from India: Final Affirmative Countervailing Duty Determination* ("*Steel Pipe from India*"), 77 Fed. Reg. 64,468 (Dep't of Commerce Oct. 22, 2012) and accompanying IDM (Dep't of Commerce Oct. 15, 2012). Remand Results at 23 n.130. However, the court notes that the cited IDM does not contain a

[4] But Commerce did cite to the SF financial statements and two prior proceedings. *See* Remand Results at 23 n.130; Letter on Behalf of Ashley Respondents to Dep't of Commerce re: Surrogate Value Comments (July 30, 2020) ("Ashley Group Letter") at Ex. SV-4, 103, 119–120, 177, PR 278–81, JA Tab 2.

"Comment 8." *See Steel Pipe from India* IDM. Even so, Commerce explained adequately that the SF financial statements showed evidence of "money received during the POI under [an] identifiable program[] that Commerce has previously found to be countervailable," namely the duty drawback. Remand Results at 23.

Plaintiffs also argue that "there was no specific information in [SF's] financial statements that described the nature of the programs that would meet Commerce's 'specific information' standard" and justify the rejection of the SF financial statements. Pls. Br. at 13. In determining whether a financial statement includes subsidies, Commerce has developed the following guideposts:

> (1) If a financial statement contains a reference to a specific subsidy program found to be countervailable in a formal CVD determination, Commerce will exclude that financial statement from consideration. (2) If a financial statement contains only a mere mention that a subsidy was received, and for which there is no additional information as to the specific nature of the subsidy, Commerce will not exclude the financial statement from consideration.

Clearon Corp. v. United States, 35 CIT 1685, 1688, 800 F. Supp. 2d 1355, 1359 (2011).

Moreover, this Court has recognized that: "[Commerce's] determination of whether to use the financial statements of a producer that potentially received a countervailable subsidy cannot be, nor is it intended to be, a full investigation of the subsidy program in question . . ." *GGB Bearing Tech. (Suzhou) Co. v. United States*, 39 CIT __, __, 279 F. Supp. 3d 1233, 1239 (2017).

Instead, "[Commerce's] practice is to review the financial statements to determine whether the evidence indicates that the company received a countervailable subsidy during the relevant period from a program previously investigated by [Commerce]." *Id.* (quoting *Tapered Roller Bearings and Parts Thereof, Finished and Unfinished from the People's Republic of China: Final Results of Antidumping Duty New Shipper Review*, 77 Fed. Reg. 65,668 (Dep't of Commerce Oct. 30, 2012) and accompanying IDM (Dep't of Commerce Oct. 19, 2012) at 7).

Plaintiffs insist that "there is no specific information as to the nature of the 'investment subsidy' and 'duty drawback subsidy' programs in [SF's] financial statements that were alleged by Commerce to be countervailable subsidies" and that "[a] mere mention of 'invest-

ment subsidy' and 'duty drawback' does not meet the 'specific information' standard." Pls. Br. at 13 (citing Ashley Group Letter at Ex. SV-4).

However, Commerce explained in the *Final Determination* that "the names of the programs found in the [SF] financial statements are the same names Commerce previously found countervailable." IDM at cmt. 2. Commerce noted also that each of the programs "reflected money received during the POI." *Id.*

The court concludes that the SF financial statements contain a "reference" to the duty drawback scheme, "a specific subsidy program found to be countervailable in a formal CVD determination." *Clearon Corp.*, 35 CIT at 1688, 800 F. Supp. 2d at 1359.[5]

Plaintiffs argue additionally that "there is no evidence on the record that the 'investment subsidy' and 'duty drawback' programs in [SF's] financial statements were distortive." Pls. Br. at 14. Plaintiffs note that the amounts corresponding to "investment subsidy" and "duty drawback subsidy" are "*de minimis* amounts" and that it was "unreasonable for Commerce to have rejected [SF's] financial statements due to potential receipt of government subsidies given the miniscule amounts at issue." *Id.*

On remand, Commerce explained that "although Commerce may have found it appropriate in a past case, it is not Commerce's practice to consider the amount of the benefit received when analyzing surrogate financial statements." Remand Results at 23. Commerce cited to *OCTG from Vietnam*, a proceeding in which Commerce rejected a proposed financial statement that reflected a "small" countervailable subsidy amount. *See Certain Oil Country Tubular Goods from the Socialist Republic of Vietnam: Final Results of Antidumping Duty Administrative Review; 2014–2015* ("*OCTG from Vietnam*"), 82 Fed. Reg. 18,611 (Dep't of Commerce Apr. 20, 2017) and accompanying IDM (Dep't of Commerce Apr. 12, 2017) at 9. Commerce explained in that proceeding that "[b]ecause the[] financial statements show receipt of subsidies previously found by the Department to be countervailable, we must consider whether there is better information on the record." *Id.*

Here, Commerce weighed the evidence and determined that the ES financial statements constituted the "better information on the record." *Id.*; *see* Remand Results at 22–25.

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[5] The court declines to reach the same conclusion with respect to the investment subsidy because Commerce on remand failed to cite properly to a proceeding in which that subsidy was found to be countervailable. *See* Remand Results at 23.

The court concludes that Commerce explained adequately its rejection of the SF financial statements. Commerce's explanation complies with the Remand Order and is supported by substantial evidence.

F. Commerce's remaining selection criteria

In *Ashley Furniture I,* the Court did not "'consider it necessary . . . to rule on the other grounds' that the parties address with respect to Commerce's selection of financial statements." 46 CIT at __, 607 F. Supp. 3d at 1233 (quoting *Fine Furniture*, 40 CIT at __, 182 F. Supp. 3d at 1361). The Court noted the possibility "that Commerce's reconsideration of whether ES' financial statements were complete and publicly available will lead Commerce to reevaluate the remaining selection criteria in selecting the financial statements with which to calculate surrogate financial ratios." *Id.* The remaining selection criteria are: (1) whether ES' financial statements were contemporaneous with the POI; and (2) "whether ES' financial statements were representative of the business operations of Wanek, Millennium and Comfort Bedding." *Id.*

Commerce has not altered the remaining selection criteria in its Remand Results. *See* Remand Results. Accordingly, the court will rule on the criteria as presented in the *Final Determination*.[6]

1. Contemporaneity of ES' financial statements

The court concludes that Commerce explained adequately its selection of the non-contemporaneous ES financial statements.

In *Ashley Furniture I*, the Court declined to rule on the non-contemporaneity of the ES financial statements and noted the possibility "that Commerce's reconsideration of whether ES' financial statements were complete and publicly available [could] lead Commerce to reevaluate the remaining selection criteria in selecting the financial statements with which to calculate surrogate financial ratios." 46 CIT at __, 607 F. Supp. 3d at 1233.

Plaintiffs argue that "Commerce improperly relied on [ES'] financial statements despite Commerce's acknowledgement that [ES'] financial statements were not contemporaneous with the POI." Mem. Points and Auths. Supp. R. 56.2 Mot. J. Agency Record of Pls. AFI, AFTC, Wanek, Millennium and Comfort Bedding ("Pls. MJAR Br.") at 13, ECF No. 39–40.

Plaintiffs explain that "Commerce's practice is to calculate surrogate financial ratios based on POI-contemporaneous financial statements" and that "Commerce regularly rejects non-contemporaneous

[6] From this point forward, all citations to docket entries will reflect the joint appendices filed in connection with *Ashley Furniture I*. *See* Confidential Joint Appendix, ECF No. 51; Public Joint Appendix, ECF No. 52.

financial statements." *Id.* at 13–14. Moreover, plaintiffs argue that "[c]ontemporaneity is a 'yes' or 'no' characteristic and the degree to which the financial statements are stale is of no moment." Reply Br. Supp. R. 56.2 Mot. J. Agency Record of Pls. AFI, AFTC, Wanek, Millennium and Comfort Bedding ("Pls. MJAR Reply Br.") at 3, ECF No. 49–50.

In the *Final Determination*, Commerce "acknowledge[d] that the [ES] fiscal year does not match the POI." IDM at 30. However, Commerce explained that "[i]n choosing surrogate financial ratios, it is Commerce's practice to use data from [market economy] surrogate companies based on the 'specificity, contemporaneity, and quality of the data.'" *Id.* (quoting *Silicon Metal from the People's Republic of China: Final Results and Partial Rescission of Antidumping Duty Administrative Review*, 75 Fed. Reg. 1,592 (Dep't of Commerce Jan. 12, 2010) and accompanying IDM (Dep't of Commerce Jan. 5, 2010) at 36). Commerce added that it will "consider *all* record evidence in its analysis of the best [surrogate values] to use in its margin calculations." *Id.* (emphasis supplied).

Further, it is notable that Commerce has opted previously to select a non-contemporaneous financial statement over a contemporaneous, flawed financial statement. In *QVD Food. Co. v. United States*, the Court sustained Commerce's selection of financial statements that were non-contemporaneous by six years because they "contain[ed] more reliable pricing data." 34 CIT 1166, 1169–71, 721 F. Supp. 2d 1311, 1315–18 (2010). The Court explained that "Commerce was left with a choice between imperfect alternatives" and "exercised its prerogative to choose the best available information after applying its selection criteria." *Id.* at 1173, 721 F. Supp. 2d at 1318; *see Qingdao Sea-Line Trading*, 766 F.3d at 1386–87 (sustaining Commerce's selection of a non-contemporaneous product data source because its specificity outweighed its non-contemporaneity); *see also US Magnesium LLC v. United States*, 39 CIT __, __, 72 F. Supp. 3d 1341, 1358 (2015) (concluding that a data source "although not contemporaneous with the [period of review], . . . was nonetheless the 'best available information' because it was best approximated" to the production process under consideration), *aff'd*, 839 F.3d 1023 (Fed. Cir. 2016).

Commerce determined reasonably that the ES financial statements constituted the "best available information" on the record. 19 U.S.C. § 1677b(c)(1). Commerce acknowledged the non-contemporaneity of the ES financial statements but noted that they "show a profit, are publicly available and show production of subject merchandise." IDM at 31; *see also* PDM at 34. Commerce noted also that the ES financial statements are only "non-contemporaneous by a single fiscal year."

IDM at 31. By contrast, Commerce explained that "the only other financial statement on the record, [SF], has evidence of countervailable subsidies." *Id.* at 30; *see supra* Section I.E.

Accordingly, Commerce's explanation of its decision to use the non-contemporaneous ES financial statements is reasonable and supported by substantial evidence.

2. Whether ES' financial statements were representative of the business operations of Wanek, Millennium and Comfort Bedding

The court concludes that Commerce determined reasonably that the ES financial statements were representative of the business operations of Wanek, Millennium and Comfort Bedding.

"'[A] surrogate value must be as representative of the situation in the NME country as is feasible,' [but] Commerce need not 'duplicate the exact production experience of the [foreign] manufacturers at the expense of choosing a surrogate value" for that value to constitute the "best available information." *Nation Ford Chem. Co. v. United States*, 166 F.3d 1373, 1377 (Fed. Cir. 1999) (quoting *Nation Ford Chem. Co. v. United States*, 21 CIT 1371, 1375, 985 F. Supp. 133, 137 (1997)). Moreover, "[t]he 'best available information' concerning the valuation of a particular factor of production may constitute information from the surrogate country that is directly analogous to the production experience of the NME producer . . . or it may not." *Id.*

Plaintiffs argue that the ES financial statements were not representative for three reasons. *See* Pls. MJAR Br. at 20–24.

a. Difference in size of business operations

Plaintiffs argue first that the ES financial statements were not representative of the business operations of Wanek, Millennium and Comfort Bedding in Vietnam because of the difference in size between the business operations of ES and those of Wanek, Millennium and Comfort Bedding. *Id.* at 20–21. Plaintiffs assert that "[t]he disparity in revenue shows that [ES] is a much smaller company than either [SF] or Wanek, and Commerce should not base the surrogate financial ratios on [ES'] financial statements because they do not represent the actual business size of the Ashley Respondents." *Id.* at 21.

In the *Final Determination*, Commerce explained that its "practice is to disregard the magnitude of a company's revenue when choosing the appropriate surrogate financial statements to calculate ratios." IDM at 31. Commerce cited two prior proceedings in which it stated that its practice is to disregard company size as a basis upon which to determine the representative nature of a company's financial statements, unless specific record evidence indicates otherwise. *Id.* at 31

n.219 (citing *Wooden Bedroom Furniture from the People's Republic of China: Final Results of Antidumping Duty Administrative Review and New Shipper Reviews*, 74 Fed. Reg. 41,374 (Dep't of Commerce Aug. 17, 2009) and accompanying IDM (Dep't of Commerce Aug. 10, 2009) at 39); *Certain Steel Threaded Rod from the People's Republic of China: Final Determination of Sales at Less than Fair Value*, 74 Fed. Reg. 8,907 (Dep't of Commerce Feb. 27, 2009) and accompanying IDM (Dep't of Commerce Feb. 20, 2009) at 12 (finding that "without additional record evidence" to suggest that financial statements are not representative, "the company's size alone is . . . not a sufficient basis upon which to exclude financial statements from consideration."); *see also Lifestyle Enter., Inc. v. United States*, 35 CIT 158, 176–77, 768 F. Supp. 2d 1286, 1306 (2011) ("Commerce can rely on certain financial surrogate companies' financial statements even where distortions based on economies of scale exist ..... ").

Commerce explained that "there is no information that establishes that using [ES'] financial statements, which show less revenues than Ashley Group, would lead to distortive financial ratios due to this difference in revenue." IDM at 31. Accordingly, Commerce's determination to not consider company size in its "analysis of the appropriate financial statements to use for the final determination" was reasonable. *Id.*

b. Difference in nature of business operations

Plaintiffs argue next that the differences in the nature of ES' business operations and those of Wanek, Millennium and Comfort Bedding render unreasonable Commerce's selection of the ES financial statements. Pls. MJAR Br. at 20–22. Specifically, plaintiffs insist that the business operations of ES focus primarily on retail "with miniscule manufacturing," whereas the operations of Wanek, Millennium and Comfort Bedding focus primarily on manufacturing. *Id.* at 22.

Plaintiffs also allege that ES' registered volume of "import purchases from its foreign holding company," Dubai Manufacturing Company LLC ("Dubai Manufacturing"), suggest that ES "is primarily engaged in resale of imported merchandise and retail rather than manufacturing." *Id.* at 21. In this regard, plaintiffs explain that some of ES' showroom retail expenses are five times greater than its factory rent, "indicating significantly greater involvement in retail than production." *Id.* at 20.

In the *Final Determination*, Commerce explained that the ES financial statements do not "identify the nature of the[] purchases from Dubai Manufacturing" and that plaintiffs "failed to cite to record evidence showing that import purchases relate to mattresses pur-

chases [sic] from Dubai Manufacturing." IDM at 32. Accordingly, Commerce did "not consider[] sundry expenses illustrative with regards to [ES] business practices." *Id.*

Further, Commerce stated that "Note 1 to the [ES] financial statements explains that [ES] is involved in the manufacturing of all types and kinds of mattresses." *Id.* at 34. Indeed, Note 1 describes ES as "a manufacturing company basically into the manufacturing of all types and kinds of mattresses." Pet'rs' SV Comments at Ex. 11.

In view of the foregoing, Commerce determined reasonably that ES is involved in manufacturing operations.

c. Retail activities

Plaintiffs argue also that "Commerce's reliance on [ES] is further discredited" because "Wanek, Millennium and Comfort Bedding do not own or operate any showrooms nor engage in any retail activities in Vietnam." Pls. MJAR Br. at 22.

In the *Final Determination*, Commerce maintained that the ES financial statements were reflective of the Ashley Respondents' business operations because, like ES, "record evidence demonstrates that Ashley Group in Vietnam does incur showroom expenses." IDM at 31. Commerce explained that "petitioners provided an Ashley Furniture HomeStore in Ho Chi Minh City, Vietnam webpage along with its [sic] claim that Ashley HomeStore has at least one showroom in Vietnam." *Id.* Commerce noted that "[t]he webpage has a section called 'About the Store,' in which Ashley HomeStore explains that it has a showroom for customers to visit." *Id.*

Plaintiffs argue that "[u]nrebutted evidence submitted in the earliest stages of the investigation directly contradict [sic] the Petitioner's [sic] false accusation." Pls. MJAR Br. at 22; *see* Pls. MJAR Reply Br. at 8–9. Plaintiffs allege that "[d]espite clear evidence on the record to the contrary, Commerce accepted Petitioners' allegation at face value." Pls. MJAR Br. at 22.

In the original proceeding, petitioners claimed that "Ashley Furniture has at least one showroom in Vietnam and, as noted, also produces mattresses in Vietnam." *See* Other from Cassidy Levy Kent (USA) LLP to Sec'y of Commerce Pertaining to Mattress Pet'rs Suppl. Questionnaire to Petition (Apr. 8, 2020) ("Pet'rs' Suppl. Questionnaire Resp.") at Ex. I-Supp-5, PR 23–24, PJA Tab 3 (footnote omitted).

The Ashley Respondents filed a rebuttal pursuant to 19 C.F.R. § 351.301(c)(1)(v) in which they stated that "[p]etitioners erroneously asserted that Ashley owns Homestore Ho Chi Minh, a licensee store located in Vietnam." *See* Letter from Mowry & Grimson PLLC to Sec'y of Commerce Pertaining to Ashley Resp. to Comments (Apr. 17, 2020)

("Ashley Rebuttal 2020"), PR 41, PJA Tab 4. The Ashley Respondents explained that "Homestore Ho Chi Minh is not owned by Ashely [sic] or any Vietnam factory related to Ashley." *Id.*

Defendant argues that the Ashley Respondents' rebuttal was "unsupported" and notes that the "webpage for Ashley Furniture HomeStore stated, 'Visit your nearest Ashley HomeStore showroom today.'" Def.'s Mot. Partially Dismiss and Resp. Pls.' Mot. J. Agency Record ("Def. MJAR Br.") at 18–19, ECF No. 45–46 (quoting Pet'rs' Suppl. Questionnaire Resp. at Ex. IX-Supp-9).

At oral argument, defendant explained that "[t]here's a presumption . . . that Commerce reviews all of the record evidence" and that Commerce explained in the IDM that it believed that Ashley owned the showroom described on the webpage. MJAR Oral Arg. Tr. at 16:12–18, ECF No. 65.

Plaintiffs argued that "the idea that Commerce actually weighed those two facts is entirely post hoc information from the brief." *Id.* at 16:19–21.

The court is unable to conclude whether plaintiffs' allegation is true. Plaintiffs' rebuttal is not accompanied by factual support of any kind. Rather, it is a flat assertion against Commerce's explanation in the IDM. *See* Ashley Rebuttal 2020.

Even so, the indeterminacy of this issue is not outcome-determinative. Commerce has otherwise demonstrated that the ES financial statements are reflective of the business operations of Wanek, Millennium and Comfort Bedding. *See supra* Sections I.F.2.a-b; *Shandong Huarong*, 25 CIT at 837, 159 F. Supp. 2d at 718 (2001) ("[T]he Court will not disturb an agency determination if its factual findings are reasonable and supported by the record as a whole, even if there is some evidence that detracts from the agency's conclusion."); *Altx*, 370 F.3d at 1116 ("[T]he possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence.").

Even if the SF financial statements *are* more representative of the mix of business activities in which the Ashley Respondents are involved, Commerce's conclusion that they are not the "best available information" given their reference to subsidies that Commerce has found previously to be countervailable is reasonable. *See supra* Section I.E; 19 U.S.C. § 1677b(c)(1).

Accordingly, Commerce's explanation that the ES financial statements are representative of the business operations of Wanek, Millennium and Comfort Bedding is supported by substantial evidence.

II. Commerce's use of the Cohen's *d* test

A. Background

In the *Preliminary Determination*, Commerce determined that "the differential pricing analysis used in recent investigations may be instructive for purposes of examining whether to apply an alternative comparison method in this investigation." PDM at 25.

Commerce stated that "the differential pricing analysis used in this preliminary determination examines whether there exists a pattern of export prices for comparable merchandise that differ significantly among purchasers, regions, or time periods." *Id.* at 25–26. Commerce explained that "[i]n the first stage of the differential pricing analysis used here, the 'Cohen's *d* test' is applied." *Id.* at 26. Commerce determined to apply its differential pricing analysis despite the objections of the Ashley Respondents. *See id.* at 27–28. Commerce's differential pricing analysis was left unchanged in the *Final Determination*. *See Final Determination*.

In *Ashley Furniture I*, the Court reserved examination of plaintiffs' claim regarding Commerce's use of the Cohen's *d* test because of the possibility that Commerce would reconsider its use on remand. 46 CIT at __, 607 F. Supp. 3d at 1244.

Commerce on remand did not discuss its use of the Cohen's *d* test, nor do parties refer to it in their comments on the Remand Results. *See* Remand Results*;* Pls. Br.; Def. Br.; Def.-Intervenors Br. Accordingly, the court will rule on Commerce's use of the Cohen's *d* test as presented in the *Preliminary Determination*.[7]

B. Legal framework

After calculating normal value in an AD proceeding, Commerce will then determine the "weighted average dumping margin." *Best Mattresses*, 47 CIT at __, 622 F. Supp. 3d at 1360. To do so, Commerce "will use the average-to-average method unless the Secretary determines another method is appropriate in a particular case." 19 C.F.R. § 351.414(c)(1). The average-to-average method "involves a comparison of the weighted average of the normal values with the weighted average of the export prices (and constructed export prices) for comparable merchandise." *Id.* § 351.414(b)(1).

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[7] Nor did Commerce mention its use of the Cohen's *d* test in the final results. *See Final Determination*. Instead, Commerce affirmed the differential pricing analysis in the Final Analysis Memorandum. *See* Mem. from Dep't of Commerce to File Pertaining to Ashley Group Final Analysis Mem. (Mar. 28, 2021) ("Final Analysis Memorandum") at 5–6, CR 694, CJA Tab 14. For that reason, the court will treat Commerce's use of the Cohen's *d* test as unchanged in the final results.

Commerce is authorized to use the average-to-transaction method as an alternative "only if 'there is a pattern of export prices (or constructed export prices) for comparable merchandise that differ significantly among purchasers, regions, or periods of time,' and if Commerce 'explains why such differences cannot be taken into account' using alternative methods." *Best Mattresses*, 47 CIT at __, 622 F. Supp. 3d at 1361 (quoting 19 U.S.C. § 1677f-1(d)(1)(B)).

Commerce will conduct a differential pricing analysis to determine whether to use the average-to-transaction method rather than the average-to-average method. *Id.*; *Stupp Corp. v. United States*, 5 F.4th 1341, 1346.

Commerce first "segments export sales into subsets based on region, purchasers, and time periods." *Best Mattresses*, 47 CIT at __, 622 F. Supp. 3d at 1361; *Differential Pricing Analysis; Request for Comments* ("*Differential Pricing Analysis*"), 79 Fed. Reg. 26,720, 26,722–23 (Dep't of Commerce May 9, 2014). After that, Commerce applies the Cohen's *d* test, a "generally recognized statistical measure of the extent of the difference in the means between a test group and a comparison group." *Differential Pricing Analysis* at 26,722; *see Best Mattresses*, 47 CIT at __, 622 F. Supp. 3d at 1361.

C. Analysis

The court concludes that plaintiffs do not have standing to challenge Commerce's use of the Cohen's *d* test.[8]

Plaintiffs argue that "Commerce's determination to apply the Cohen's *d* test to the Ashley Respondents was . . . unreasonable and not in accordance with law." Pls. MJAR Br. at 47. Specifically, plaintiffs assert that the "results of Commerce's Cohen's *d* test are unreasonable as applied to the Ashley Respondents' sales data" because "Commerce's analysis . . . includes data which [sic] violate the assumptions present in the Cohen's *d* test, generates incorrect or misleading results, and is thus inappropriate for application to the Ashley Respondents' sales." *Id.* at 44.

In response, defendant raises two arguments. First, defendant argues that plaintiffs do not have standing. Defendant explains that plaintiffs have not suffered an injury resulting from Commerce's use of the Cohen's *d* test because Commerce in fact used the average-to-

[8] The fact that plaintiffs have standing to challenge other aspects of the IDM and the Remand Results does not mean that plaintiffs also have standing to challenge Commerce's use of the Cohen's *d* test. "[S]tanding is not dispensed in gross." *Lewis v. Casey*, 518 U.S. 343, 358 n.6 (1996). "Rather, a plaintiff must demonstrate standing for each claim he seeks to press and for each form of relief that is sought." *Davis v. FEC*, 554 U.S. 724, 734 (quoting *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 352 (2006)) (internal quotation marks omitted) (collecting cases).

average method to determine the margin of dumping. *See* Def. MJAR Br. at 34. Second, defendant argues that plaintiffs have failed to exhaust administrative remedies with respect to this claim. *Id.*

Defendant asserts that "plaintiffs do not possess standing" because they "have failed to show an injury-in-fact or an actual case or controversy arising from Commerce's use of the average-to-average methodology." *Id.*

The "irreducible constitutional minimum of standing" requires three elements: (1) plaintiffs must have suffered an injury in fact; (2) there must be a causal connection between the injury and the conduct objected to; and (3) it must be likely that the injury will be redressed by a favorable judicial decision. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992); *Spokeo, Inc. v. Robins*, 578 U.S. 330, 338 (2016).

The Supreme Court has defined an "injury in fact" as "an invasion of a legally protected interest which is (a) concrete and particularized . . . and (b) actual or imminent, not conjectural or hypothetical." *Lujan*, 504 U.S. at 560 (internal quotation marks omitted) (quoting *Whitmore v. Arkansas*, 495 U.S. 149, 155 (1990)).

Defendant argues that "plaintiffs have not alleged an 'injury-in-fact' with respect to Commerce's application of differential pricing because Commerce used the 'average-to-average' method and not the 'average-to-transaction' method." Def. MJAR Br. at 39. Moreover, defendant explains that "the results of the Cohen's *d* test did not change Commerce's calculation of a weighted-average dumping margin" for the Ashley Respondents. *Id.* Defendant insists that "there is no injury that would be redressed by a favorable decision." *Id.*

In the *Preliminary Determination*, Commerce determined that although "75.60 percent of [plaintiffs'] export sales pass the Cohen's *d* test, and . . . [there is] a pattern of export prices (or constructed export prices) for comparable merchandise that differ significantly among purchasers, regions, or time periods," the average-to-average method was nonetheless appropriate. PDM at 28.

Further, Commerce determined that "there is not a meaningful difference in the weighted-average dumping margins when calculated using the average-to-average method and an alternative method based on the average-to-transaction method applied to the U.S. sales which pass the Cohen's *d* test." *Id.*

Plaintiffs rely on *Stupp*, a case in which the U.S. Court of Appeals for the Federal Circuit (the "Federal Circuit") explained that the violation of the assumptions that the data groups being compared are normally distributed, have equal variability and are equally numerous "can subvert the usefulness of the interpretative cutoffs, transforming what might be a conservative cutoff into a meaningless com-

parator." *Stupp,* 5 F.4th at 1360. Plaintiffs argue that, like in *Stupp*, Commerce here "failed to explain whether the Ashley Respondents' sales data conformed with the underlying assumptions necessary for the Cohen's *d* test, specifically whether the test and comparison groups were normally distributed, equally variable, and equally numerous." Pls. MJAR Br. at 46–47.

Plaintiffs' reliance on *Stupp* is misguided. There, the Federal Circuit examined Commerce's use of a "hybrid approach in which it applie[d] the alternative average-to-transaction method to those transactions passing the Cohen's *d* test and the average-to-average method to the remainder of the transactions." *Stupp*, 5 F.4th at 1347. Here, Commerce applied the average-to-average method exclusively. *See* Final Analysis Memorandum at 5–6.

The court concludes that plaintiffs did not suffer an injury in fact. Commerce employs the differential pricing analysis, and thereby the Cohen's *d* test, to determine whether to select an alternative comparison methodology. *See Differential Pricing Analysis*. Because Commerce's use of the test here did *not* result in the selection of an alternative comparison methodology, there is nothing more than a "conjectural" or "hypothetical" injury here. *Lujan*, 504 U.S. at 560; *see* PDM at 25–28. Accordingly, plaintiffs have failed to establish the "irreducible constitutional minimum" of standing.[9] *Lujan*, 504 U.S. at 560.

CONCLUSION

For the foregoing reasons, the court sustains the Remand Results and the relevant portions of the *Final Determination*. Judgment will enter accordingly.

Dated: December 20, 2024
New York, New York

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

[9] The court need not reach defendant's second argument that "plaintiffs have failed to exhaust their administrative remedies" with respect to this claim because plaintiffs have not established standing to challenge Commerce's use of the Cohen's *d* test. Def. MJAR Br. at 34.

Slip Op. 24–148

BGH EDELSTAHL SIEGEN GMBH, Plaintiff, v. UNITED STATES, Defendant, and ELLWOOD CITY FORGE COMPANY, et al., Defendant-Intervenors

Before: Claire R. Kelly, Judge
Court No. 21–00080

[Sustaining Commerce's Fourth Remand Redetermination.]

Dated: December 26, 2024

Marc E. Montalbine, *Gregory S. Menegaz*, *Alexandra H. Salzman*, and *Merisa A. Horgan*, and *James K. Horgan*, deKieffer & Horgan, PLLC, of Washington, D.C., for plaintiff BGH Edelstahl Siegen GmbH.

Kelly M. Geddes, Trial Attorney, and *Sarah E. Kramer*, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington D.C., for defendant United States. Also on the brief were *Patricia M. McCarthy*, Director, and *Brian M. Boynton*, Principal Deputy Assistant Attorney General. Of Counsel were *Ayat Mujais*, Senior Attorney, and *Joseph Grossman-Trawick*, Attorney, Office of the Chief Counsel for Trade Enforcement & Compliance, U.S. Department of Commerce.

Thomas M. Beline, *Nicole Brunda*, *Chase J. Dunn*, and *Myles S. Getlan*, Cassidy Levy Kent (USA) LLP, of Washington, D.C., for defendant-intervenors Ellwood City Forge Company, Ellwood National Steel Company, Ellwood Quality Steels Company, and A. Finkl & Sons.

OPINION

Kelly, Judge:

Before the Court is the U.S. Department of Commerce's ("Commerce") remand redetermination pursuant to the Court's fourth remand order, *see BGH Edelstahl Siegen GmbH v. United States*, 704 F.Supp.3d 1372 (Ct. Int'l Trade 2024) ("*BGH IV*"), on Commerce's final determination in its countervailing duty ("CVD") investigation of forged steel fluid end blocks ("fluid end blocks" or "FEB") from the Federal Republic of Germany ("FRG" or "Germany" or "GOG"). *See generally* Final Results of Redetermination Pursuant to Fourth Court Remand, Sept. 17, 2024, ECF No. 79–1 ("Fourth Remand Results"); *see generally* [*Fluid End Blocks*] *from the People's Republic of China, [FRG], India, and Italy*, 86 Fed. Reg. 7,535 (Dep't Commerce Jan. 29, 2021) ([CVD] orders and am. final determination) and accompanying issues and decision memo. ("Final Decision Memo."); [*Fluid End Blocks] from the People's Republic of China, [FRG], India, and Italy*, 86 Fed. Reg. 10,244 (Dep't Commerce Feb. 19, 2021) (correction to [CVD] orders). For the following reasons, the Court sustains Commerce's redetermination.

BACKGROUND

The Court presumes familiarity with the facts of this case as set out in its previous opinions ordering remand to Commerce, *see BGH Edelstahl Siegen GmbH v. United States*, 600 F.Supp.3d 1241 (Ct. Int'l Trade 2022) ("*BGH I*"); *BGH Edelstahl Siegen GmbH v. United States*, 639 F.Supp.3d 1237 (Ct. Int'l Trade 2023) ("*BGH II*"); *BGH Edelstahl Siegen GmbH v. United States*, 663 F.Supp.3d 1378 (Ct. Int'l Trade 2023) ("*BGH III*"), and *BGH IV*, and now recounts only those facts relevant to the Court's review of the Fourth Remand Results. On December 19, 2019, the FEB Fair Trade Coalition, Ellwood Group, and Finkl Steel (collectively "Ellwood")[1] filed a petition with Commerce seeking the imposition of CVDs on imports of FEBs from the People's Republic of China, the FRG, India, and Italy, as well as antidumping duties on dumped imports of FEBs from the FRG, India, and Italy. *See* Antidumping and [CVD] Pets. at 1, PD 1, bar code 3921764–01 (Dec. 19, 2019). Commerce selected BGH Edelstahl Siegen GmbH ("BGH") as a mandatory respondent[2] during its CVD investigation of FEBs from the FRG between the period of January 1, 2018 to December 31, 2018. Resp't Selection Memo. at 1, PD 55, bar code 3938855–01 (Feb. 4, 2020). The investigation concluded that the FRG offered countervailable subsidies through multiple programs, including the Konzessionsabgabenverordung Program ("KAV Program").[3] Final Decision Memo. at 6–8; *see also* Post-Prelim. Analysis [CVD] Investigation: [Fluid End Blocks] from [FRG] at 6–19, PD 271, bar code 4043279–01 (Oct. 21, 2020); Decision Mem. Prelim. Affirmative Determination [CVD] Investigation of [Fluid End Blocks] from [FRG] at 19–27, PD 220, bar code 3975458-01 (May 18, 2020). Among its determinations, Commerce concluded that the KAV program was specific as a matter of law. Final Decision Memo. at 37–39. BGH filed its complaint and sought judgment on the agency record, challenging Commerce's final determination. *See generally* Compl., Mar. 29, 2021, ECF No. 7; *see also* [BGH] Mot. J. Agency R., Oct. 26, 2021, ECF No. 21. The Court sustained in part and remanded in part Commerce's

[1] Petitioners are the Defendant-Intervenors in the matter, but now challenge Commerce's latest redetermination.

[2] BGH is the Plaintiff in the matter, but now supports Commerce's latest redetermination.

[3] BGH had challenged Commerce's determination that the following programs are countervailable: 1. Stromsteuergesetz ("Electricity Tax Act"), 2. Energiesteuergesetz ("the Energy Tax Act"), 3. Erneuerbare-Energien-Gesetz ("EEG Program"), 4. Kraft-Wärme-Kopplungsgesetz ("KWKG Program"), 5. The European Union's ("EU") Emissions Trading System ("ETS Program"), 6. The EU ETS Compensation of Indirect CO2 Costs Program ("CO2 Compensation Program"), and 7. the KAV Program. [BGH] Rule 56.2 Mem. Supp. Mot. J. Agency R. at 7, 21, 30, 39–40, Oct. 26, 2021, ECF No. 22.

final determination after briefing. *BGH I*, 600 F.Supp.3d at 1269–70. With respect to the KAV program, the Court held that Commerce's finding of de jure specificity was unsupported by the record because Commerce did not explain how the program limits usage to certain industries or enterprises and failed to consider its economic and horizontal properties and application. *BGH I*, 600 F.Supp.3d at 1269. The Court also remanded Commerce's CVD rate calculation for the Electricity Tax Act and the Energy Tax Act. *BGH I*, 600 F.Supp.3d at 1258.

Commerce filed its Remand Results in January 2023. *See generally* Final Results of Redetermination Pursuant to Court Remand, Jan. 10, 2023, ECF No. 48–1 ("First Remand Results"). After briefing was complete, the Court sustained in part and remanded in part. *BGH II*, 639 F.Supp.3d at 1239. The Court again concluded Commerce's determination that the KAV Program was specific as a matter of law was unsupported by the record. *BGH II*, 639 F.Supp.3d at 1243. The Court remanded for further explanation or reconsideration as to the economic and horizontal nature of the subsidy. *BGH II*, 639 F.Supp.3d at 1244.

Commerce filed its second redetermination results on August 7, 2023, again finding the KAV Program was a de jure specific subsidy. *See generally* Final Results of Redetermination Pursuant to Court Remand, Aug. 7, 2023, ECF No. 60–1 ("Second Remand Results"). The Court again remanded Commerce's redetermination, concluding Commerce's position that "where the 'implementing legislation expressly limit[s] access to the "group" that the legislation itself created' the subsidy is de jure specific" was contrary to law.[4] *BGH III*, 663 F.Supp.3d at 1384. The Court remanded to Commerce for further consideration or explanation. *BGH III*, 663 F.Supp.3d at 1384.

Commerce filed its Third Remand Results on February 12, 2024. *See generally* Final Results of Redetermination Pursuant to Court Remand, Feb. 12, 2024, ECF No. 71–1 ("Third Remand Results"). In the third redetermination, Commerce reconsidered its determination

[4] More specifically, the Court explained that a subsidy may "be limited to fewer than all enterprises or industries in an economy" without being de jure specific so long as the limiting criteria is objective. *BGH III*, 663 F. Supp. 3d at 1384. The Court explained that criteria may create objective categories of industries or enterprises which may benefit from the subsidy to the exclusion of others. *Id.* (citing Statement of Administration Action for the Uruguay Round Agreements Act, H.R. Rep. No. 103316 (1994), *as reprinted* in 1994 U.S.C.C.A.N. 4040, 4243 ("SAA")). "Objective" in this context means neutral, i.e., it "must not favor certain enterprises or industries over others, and must be economic in nature and horizontal in application, such as the number of employees or the size of the enterprise." *Id.* at 1382 (citing SAA at 4243). Therefore, "criteria based on size or the number of employees could exclude entire categories of enterprises and industries, but such criteria would not render the subsidy de jure specific because it is horizontal (operating throughout the economy), and is economic in nature." *Id.* at 1384 (citing the SAA at 4243).

and, under respectful protest,[5] found that the KAV Program was not de jure specific. Third Remand Results at 2. Further, it found no basis to consider whether the KAV Program was de facto specific. Third Remand Results at 2.

In *BGH IV* the Court concluded the statute required Commerce to analyze whether the subsidy was de facto specific as there was reason to believe the program was specific. *BGH IV*, 704 F.Supp.3d at 1378 (citing 19 U.S.C. § 1677(5A)(D)(iii)). The legislation in question limited the number of recipients, and Commerce in its post preliminary analysis had concluded that the KAV Program was de facto specific, but, had abandoned its analysis after it concluded that the KAV Program was specific as a matter of law. Although BGH argued that the record lacked information concerning the de facto use of the program, the Court noted that Commerce had tools at its disposal to conduct its analysis where the record lacked information. *BGH IV*, 704 F.Supp.3d at 1380 (citing 19 U.S.C. § 1677e).

On July 11, 2024, Commerce issued a supplemental questionnaire requesting additional information from the GOG regarding whether the KAV program is de facto specific. Fourth Remand Results at 6. Specifically, Commerce asked that the GOG:

> Explain in detail what steps it took to obtain data from network operators (NOs) regarding concession fees paid by final consumers;
>
> Explain whether the relevant GOG authorities collect any statistical information or data, including aggregate data, regarding the implementation of the reduced concession fees under the Energy Industry Act and section 2(4) of the KAV, e.g., with respect to the number and types of entities claiming reduced concession fees;
>
> Clarify whether NOs are required to provide any statistical data or information, including aggregated data, to the relevant GOG authorities regarding the collection and/or implementation of the concession fees; and
>
> Provide any available alternative information and/or data concerning the program's use that could inform our de facto analysis, including from GOG or third-party studies.

Fourth Remand Results at 6–7. The GOG responded to the questionnaire, explaining that it could not provide the data on concession fees, as it is not involved in "administering the process towards the final consumer" and that it lacks the legal authority to acquire such infor-

[5] Commerce files under respectful protest in order to preserve its right to appeal. *See Viraj Grp., Ltd. v. United States*, 343 F.3d 1371, 1376 (Fed. Cir. 2003).

mation due to trade secret laws. Re: Forged Steel Fluid End Blocks from the Federal Republic of Germany: Response to Supplemental Questionnaire at 2–4, bar code 4604630–01 (Jul. 26, 2024) ("GOG Supp. QR"). The GOG provided an excerpt of a 2018 monitoring report showing aggregate concession fees paid by industrial customers as well as statistical data related to electricity sales and revenues of electricity supply companies. GOG Supp. QR at 6, Ex. Remand-04, Ex. Remand-05. On August 2, 2024, Defendant-Intervenors submitted factual information in an attempt to rebut, clarify, or correct the information contained in the GOG Supp. QR. *See generally* Re: Forged Steel Fluid End Blocks from the Federal Republic of Germany: Petitioners' RFI and Comments on GOG SQR, bar code 4607918–01 (Aug. 2, 2024) ("Cmts. on GOG Supp. QR").

Commerce issued its Fourth Remand Results on September 17, 2024, concluding that the KAV program does not constitute a countervailable subsidy. *See generally* Final Results of Redetermination Pursuant to Fourth Court Remand, Sept. 17, 2024, ECF No. 79–1 ("Fourth Remand Results"). Plaintiff filed its comments on the Fourth Remand Results on October 17, 2024, requesting the Court sustain the Fourth Remand Results. *See generally* Plaintiff BGH Edelstahl Siegen GMBH Comments on Fourth Remand Redetermination, Oct. 17, 2024, ECF No. 81 ("Pl. Cmts."). Defendant-Intervenors filed their comments on the Fourth Remand Results on October 17, 2024, arguing that the Court should remand Commerce's determination that the KAV program is not de facto specific. *See generally* Defendant-Intervenors' Comments in Opposition to Commerce's Fourth Remand Redetermination, Oct. 17, 2024, ECF No. 82 ("Def-Interv. Cmts.").

JURISDICTION AND STANDARD OF REVIEW

This Court has jurisdiction pursuant to section 516A of the Tariff Act,[6] as amended, 19 U.S.C. § 1516a(a)(2)(A)(i)(II), and 28 U.S.C. § 1581(c), which grant the Court authority to review actions contesting the final determination in an administrative review of a CVD order. "The court shall hold unlawful any determination, finding, or conclusion found . . . to be unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B)(i). "The results of a redetermination pursuant to court remand are also reviewed for compliance with the court's remand order." *Xinjiamei Furniture (Zhangzhou) Co. v. United States*, 968 F.Supp.2d 1255, 1259 (Ct. Int'l Trade 2014) (internal citations and quotations omitted).

[6] Further citations to the Tariff Act of 1930, as amended, are to the relevant provisions of Title 19 of the U.S. Code, 2018 edition.

DISCUSSION

In its Fourth Remand Results, Commerce determined that the KAV Program does not constitute a countervailable subsidy. Fourth Remand Results at 19. Plaintiff argues that the Court should sustain Commerce's determination because, based on record evidence, Commerce reasonably concluded that the KAV Program was not de facto specific pursuant to 19 U.S.C. § 1677(5A)(D)(iii). Pl. Cmts. at 4. Plaintiff also argues that Commerce correctly concluded that the GOG acted to the best of its ability to comply with Commerce's request for information and thus, Commerce properly declined to apply facts otherwise available with an adverse inference under 19 U.S.C. § 1677e(b). Pl. Cmts. at 4. Defendant-Intervenors argue that Commerce's determination is unsupported by substantial evidence because facts otherwise available support a finding of de facto specificity. Def-Interv. Cmts. at 3–7. For the reasons that follow Commerce's Fourth Remand Results are sustained.

A domestic subsidy is countervailable if it is specific as a matter of law ("de jure specific") or specific as a matter of fact ("de facto specific"). 19 U.S.C. § 1677(5A)(D). To determine whether a subsidy is specific as a matter of fact or specific as a matter of law, Congress has provided guidelines through the Tariff Act of 1930. See 19 U.S.C. § 1677(5A)(D). A de jure specific subsidy is one that "expressly limits access to the subsidy to an enterprise or industry." 19 U.S.C. § 1677(5A)(D)(i).

A subsidy is de facto specific if Commerce finds the existence of at least one of the following factors:

> (I) The actual recipients of the subsidy, whether considered on an enterprise or industry basis, are limited in number.
> (II) An enterprise or industry is a predominant user of the subsidy.
> (III) An enterprise or industry receives a disproportionately large amount of the subsidy.
> (IV) The manner in which the authority providing the subsidy has exercised its discretion in the decision to grant the subsidy indicates that an industry is favored over others.

19 U.S.C. § 1677(5A)(D)(iii). Commerce examines these factors sequentially. See 19 C.F.R. § 351.502; *see also Gov't of Quebec v. United States*, 105 F.4th 1359, 1374 (Fed. Cir. 2024). The Statement of Administration Action for the Uruguay Round Agreements Act ("SAA"), which is the authoritative expression by the United States concerning the interpretation of the statute, further explains:

> [t]he Administration intends that Commerce seek and consider information relevant to all of these factors. However, given the purpose of the specificity test as a screening mechanism, the weight accorded to particular factors will vary from case to case. For example, where the number of enterprises or industries using a subsidy is not large, the first factor alone would justify a finding of specificity. . . . . On the other hand, where the number of users of a subsidy is very large, the predominant use and disproportionality factors would have to be assessed.

Statement of Administration Action for the Uruguay Round Agreements Act, H.R. Rep. No. 103–316 (1994), *as reprinted* in 1994 U.S.C.C.A.N. 4040, 4243.

If necessary information is not available on the record, Commerce shall "use the facts otherwise available in reaching the applicable determination. 19 U.S.C. § 1677e(a)(1). If Commerce finds that an interested party has failed to cooperate by not acting to the best of its ability, Commerce "may use an inference that is adverse to the interests of that party in selecting from among the facts otherwise available." 19 U.S.C. § 1677e(b)(1)(A).

Here, Commerce explained the KAV Program does not constitute a countervailable subsidy because, using facts otherwise available, Commerce determines the KAV Program is not specific as a matter fact.[7] Fourth Remand Results at 8–13. Although Commerce did not collect the aggregate data requested by petitioners, Fourth Remand Results at 6–8, it did obtain aggregate information from the Federal Statistical Office which indicated that special contract customers consumed more than half of the electricity consumed by all customers. Fourth Remand Results at 9 (citing GOG Supp. QR at 6, Ex. Remand-05). Commerce could not determine, based on record evidence, whether any subset of recipients is a predominant user or receives a disproportionately large amount of the subsidy because the GOG's report did not categorize special contract customers on an enterprise or industry basis, and did not provide the number of enterprises or industries considered special contract customers. Fourth Remand Results at 9 (discussing Section 1677(5A)(D)(iii)(II)—(III)). Although Defendant-Intervenors claim Commerce "cited no record evidence" supporting its determination, Def-Interv. Cmts. at 3, it is reasonably discernible that Commerce relied upon the information regarding special contract customers as shown in the aggregate data regarding concession fees paid, as facts otherwise available. Fourth

[7] Commerce previously determined, under respectful protest, that the KAV Program was not specific as a matter of law. Third Remand Results at 6.

Remand Results at 9. This evidence led Commerce to conclude that, without more information, the recipients were too numerous to render the KAV Program de facto specific. Remand Results at 9. Thus, Commerce pointed to the lack of facts otherwise available that would support a finding of specificity. Fourth Remand Results at 8–9.[8] The Court cannot say that Commerce's determination is unreasonable. *See Maverick Tube Corp. v. United States*, 857 F.3d 1353, 1359 (Fed. Cir. 2017) (citing *Consol. Edison Co. of N.Y. v. NLRB*, 305 U.S. 197, 229 (1938)) (a determination by Commerce is supported by substantial evidence "if a reasonable mind might accept the evidence as sufficient to support the finding.") Even if two inconsistent conclusions may be drawn from the evidence, Commerce's findings may still be supported by substantial evidence. *Viet I–Mei Frozen Foods Co. v. United States*, 839 F.3d 1099, 1106 (Fed. Cir. 2016) (citing *Consolo v. Fed. Mar. Comm'n*, 383 U.S. 607, 620 (1966).

Commerce also reasonably concluded, although necessary information was missing from the record and it would use facts otherwise available, it lacked a basis to employ an adverse inference when selecting among facts otherwise available. Fourth Remand Results at 10 (explaining that the GOG could not provide certain information, including evidence that special contract customers were limited in number, because of its inability to collect that information). Due to Germany's trade secret laws, the GOG does not maintain or collect actual usage information on reduced concession fees under the KAV Program, and thus could not provide such information to Commerce. Fourth Remand Results at 10. Since the GOG is not involved in administering the KAV Program, it could not provide evidence regarding whether network operators exercised discretion or favored any enterprise or industry over others.[9] Fourth Remand Results at

[8] Defendant-Intervenors claim facts otherwise available demonstrate that the KAV Program is de facto specific. Def-Interv. Cmts. at 4–5. They point to the limiting language of the program. Id. However, Defendant-Intervenors' argument proves too much. Def-Interv. Cmts. at 4–5. If all that was needed was limiting language, any program with any limitation would be de facto specific. This Court already rejected essentially the same argument when it rejected Commerce's position that the limitations contained with the enabling provisions of the KAV Program were specific as a matter of law. *BGH III*, 663 F.Supp.3d at 1384.

[9] Defendant-Intervenors assert:

> By contrast, with regard to other information, such as the aggregate number and types of companies eligible for reduced 3 concession fees, the GOG simply failed to provide the requested information without explanation. Id. at 4–6 (failing to cite TPSA, or any other legal prohibition, as explanation for its failure to provide aggregate data requested by Commerce in questions 3 and 4).

Def-Interv. Cmts. at 2–3. However, the GOG submitted excerpts of a report showing the aggregate concession fees paid by industrial consumers during the period of investigation, as well as statistical data published by the GOG's Federal Statistical Office. GOG Supp. QR at 6, Ex. Remand-04, Ex. Remand-05.

10. Commerce therefore reasonably concludes that the application of adverse facts was not appropriate because the gap in the record was not attributable to the GOG. Fourth Remand Results at 13. Thus, Commerce's determination is reasonable based on this record.

CONCLUSION

Commerce's determination is sustained. Judgment will be entered accordingly.

Dated: December 26, 2024
New York, New York

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

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