U.S. Customs and Border Protection

PROPOSED MODIFCATION OF ONE RULING LETTER AND PROPOSED REVOCATION OF TREATMENT RELATING TO THE TARIFF CLASSIFICATION OF ALUMINUM FOIL LIDDING STOCK

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

ACTION: Notice of proposed modification of one ruling letter and proposed revocation of treatment relating to the tariff classification of aluminum foil lidding stock.

SUMMARY: Pursuant to section 625(c), Tariff Act of 1930 (19 U.S.C. § 1625(c)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that U.S. Customs and Border Protection (CBP) intends to modify one ruling letter concerning tariff classification of aluminum foil lidding stock 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 August 18, 2023.

ADDRESS: Written comments are to be addressed to U.S. Customs and Border Protection, Office of Trade, Regulations and Rulings, Attention: Monique Moore, 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. Monique Moore at (202) 325–1826.

FOR FURTHER INFORMATION CONTACT: Ms. Arim J. Kim, Chemicals, Petroleum, Metals and Miscellaneous Articles Branch, Regulations and Rulings, Office of Trade, at (202) 325–0266.

SUPPLEMENTARY INFORMATION:

BACKGROUND

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

Pursuant to 19 U.S.C. § 1625(c)(1), this notice advises interested parties that CBP is proposing to modify one ruling letter pertaining to the tariff classification of aluminum foil lidding stock. Although in this notice, CBP is specifically referring to New York Ruling Letter (NY) N316780, dated February 4, 2021 (Attachment A), this notice also covers any rulings on this merchandise which may exist, but have not been specifically identified. CBP has undertaken reasonable efforts to search existing databases for rulings in addition to the one ruling 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 N316780, CBP classified aluminum foil lidding stock in heading 7607, HTSUS, specifically in subheading 7607.11.60, HTSUS, which provides for "Aluminum foil (whether or not printed, or

backed with paper, paperboard, plastics or similar backing materials) of a thickness (excluding any backing) not exceeding 0.2 mm: Not backed: Rolled but not further worked: Of a thickness not exceeding 0.15 mm: Of a thickness exceeding 0.01 mm." CBP has reviewed NY N316780 and has determined the ruling letter to be in error. It is now CBP's position that the aluminum foil lidding stock is properly classified in heading 7607, HTSUS, specifically in subheading 7607.20.50, HTSUS, which provides for "Aluminum foil (whether or not printed, or backed with paper, paperboard, plastics or similar backing materials) of a thickness (excluding any backing) not exceeding 0.2 mm: Backed: Other."

Pursuant to 19 U.S.C. § 1625(c)(1), CBP is proposing to modify NY N316780 and to revoke or modify any other ruling not specifically identified to reflect the analysis contained in the proposed HQ H318471, set forth as Attachment B to this notice. Additionally, pursuant to 19 U.S.C. § 1625(c)(2), CBP is proposing to revoke any treatment previously accorded by CBP to substantially identical transactions.

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

YULIYA A. GULIS,
Director
Commercial and Trade Facilitation Division

Attachments

N316780
February 4, 2021
CLA-2–76:OT:RR:NC:N1:116
CATEGORY: Classification and Country of Origin
TARIFF NO.: 7607.11.6090

MR. DAVID J. CRAVEN
CRAVEN TRADE LAW, LLC.
3744 N ASHLAND AVENUE
CHICAGO, IL 60613

RE: The classification and country of origin of heat-sealable lidding stock

DEAR MR. CRAVEN:

In your letter dated December 17, 2020, on behalf of your client, Winpak Heat Seal Corporation of Pekin, Illinois, you requested a tariff classification and country of origin determination for ordinary Customs duties. Representative samples were included with an earlier submission and will be retained by this office.

The product under consideration is heat-sealable lidding stock that is made using an aluminum foil base upon which other materials are added. You have described the product as a three-layered lidding stock. The inner side of the aluminum, the surface that will be in contact with food, is coated with a polymeric layer that provides sealability to a rigid container. The outer layer is coated with a thinner polymeric layer that protects the foil from corrosion and provides adherence for printed inks.

According to your submission, the foil base is imported into Canada in various thicknesses of less than 0.2 mm. You have stated that the foil will be sourced from various countries, but for the purposes of this ruling, you have requested that we consider foil that originates specifically in Luxembourg. The remaining materials are imported into Canada from Norway, Mexico, and the United States (U.S.) and are used to produce both the outer layer and the inner layer of the final product. In Canada, the bare foil is unwound and, in a continuous process line, the foil goes through a coating station where a liquid coating is applied to the outer side of the foil. The semi-finished heat-sealable lidding stock is then subjected to a hot air drying system which removes any residual solvent or water and dries the coating. You state the inner layer is made from a solid material which is melted and then applied to the middle (foil) layer in a molten form. The resultant product is then imported into the U.S. where it is shipped to the lid producer for production of heat-sealable lids from this heat-sealable lidding stock.

Based on the information provided, the heat-sealable lidding stock is properly classified in subheading 7607.11.6090, Harmonized Tariff Schedule of the United States (HTSUS), which provides for aluminum foil (whether or not printed, or backed with paper, paperboard, plastics or similar backing materials) of a thickness (excluding any backing) not exceeding 0.2 mm: not backed: rolled but not further worked: of a thickness not exceeding 0.15 mm: of a thickness exceeding 0.01 mm: other. The rate of duty will be 5.3 percent ad valorem.

In addition to classification, you are requesting a country of origin determination for ordinary Customs duties for the lidding stock. There is no test to determine country of origin for ordinary Customs duties because ordinary Customs duty does not depend on the country of origin but rather on the tariff

classification. You have specifically stated that you are not requesting a country of origin for eligibility under the U.S.-Mexico-Canada Agreement (“USMCA”), nor are you requesting a country of origin determination for purposes of applicability of trade remedies. To allow for a more seamless transition period, at this time CBP continues to utilize the marking rules in 19 C.F.R. Part 102, with the exception of 19 C.F.R. § 102.19, for purposes of country of origin with respect to goods of those countries that are party to the “USMCA”. See 19 C.F.R. § 102.11. Applied in sequential order, the required hierarchy establishes that the country of origin of a good is the country in which:

> (a)(1) The good is wholly obtained or produced;
>
> (a)(2) The good is produced exclusively from domestic materials; or
>
> (a)(3) Each foreign material incorporated in that good undergoes an applicable change in tariff classification set out in § 102.20 and satisfies any other applicable requirements of that section, and all other applicable requirements of these rules are satisfied.

Sections 102.11(a)(1) and 102.11(a)(2) do not apply to the facts presented in this case because the aluminum foil is neither wholly obtained or produced nor is it produced exclusively from “domestic” materials. Because the analysis of sections 102.11(a)(1) and 102.11(a)(2) does not yield a country of origin determination, we look to section 102.11(a)(3). Pursuant to 19 C.F.R. §102.11(a)(3), the country of origin of a good is the country in which each foreign material incorporated in that good undergoes an applicable change in tariff classification as set forth in 19 C.F.R. §102.20, and satisfies any other applicable requirements of that section. In this case, because the aluminum foil imported into Canada is classified under heading 7607, HTSUS, the change in tariff classification must be made in accordance with section 102.20(n), Section XV: Chapters 72 through 83, heading 7607, HTSUS, which requires “A change to heading 7607 from any other heading.” The aluminum foil that is shipped to Canada for processing (i.e., unwound, coated, etc.) is classified in heading 7607, HTSUS. Upon importation into the U.S., the lidding stock remains classified under heading 7607, HTSUS. As such, the tariff shift requirement of section 102.11(a)(3) is not met. Since an analysis of section 102.11(a) has not produced a country of origin determination, we turn to section 102.11(b) of the regulations. Section 102.11(b)(1) provides as follows:

> (b) Except for a good that is specifically described in the Harmonized System as a set, or is classified as a set pursuant to General Rule of Interpretation 3, where the country of origin cannot be determined under paragraph (a) of this section:
>
> (1) The country of origin of the good is the country or countries of origin of the single material that imparts the essential character to the good, or . . .

The rule of interpretation set forth in 19 C.F.R. § 102.18(b)(1)(iii) states that if there is only one material that is classified in a tariff provision from which a change in tariff classification is not allowed under the 19 C.F.R. § 102.20 specific rule or other requirements applicable to the good, then that material will represent the single material that imparts the essential character to the good under 19 C.F.R. § 102.11. In this case, the material that does not undergo the applicable tariff shift is the aluminum foil. Therefore, the

aluminum foil is the material that imparts the essential character. As the country of origin of the single material that imparts the essential character is Luxembourg, the country of origin of the heat-sealable lidding stock is Luxembourg.

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 Angelia Amerson at angelia.m.amerson@cbp.dhs.gov.

Sincerely,

Steven A. Mack
Director
National Commodity Specialist Division

HQ H318471
OT:RR:CTF:CPMMA H318471 AJK
CATEGORY: Classification
TARIFF NO: 7607.20.50

Mr. Randy Rucker
Faegre Drinker Biddle & Reath LLP
191 N. Wacker Drive, Suite 3700
Chicago, IL 60606

RE: Modification of NY N316780; Classification of Aluminum Foil Lidding Stock

Dear Mr. Rucker:

This letter is in response to your correspondence, dated May 4, 2021, on behalf of Winpak Heat Seal Corporation (Winpak), in which you request reconsideration of New York Ruling Letter (NY) N316780, issued on February 4, 2021, concerning the classification of aluminum foil lidding stock under the Harmonized Tariff Schedule of the United States (HTSUS). In NY N316780, U.S. Customs and Border Protection (CBP) classified the aluminum foil lidding stock in subheading 7607.11.6090, HTSUSA (Annotated), as aluminum foil that is not backed and is rolled but not further worked. In your reconsideration request, however, you assert that the merchandise is properly classified in subheading 7607.20.5000, HTSUSA, as backed aluminum foil, and you corrected the information regarding the manufacturing process of the subject merchandise. We have reviewed NY N316780, together with the information in your request for reconsideration, and found the ruling letter to be incorrect only with respect to the classification of the subject merchandise.

FACTS:

The subject merchandise was described in NY N316780 as follows:

> The product under consideration is heat-sealable lidding stock that is made using an aluminum foil base upon which other materials are added. You have described the product as a three-layered lidding stock. The inner side of the aluminum, the surface that will be in contact with food, is coated with a polymeric layer that provides sealability to a rigid container. The outer layer is coated with a thinner polymeric layer that protects the foil from corrosion and provides adherence for printed inks.
>
> According to your submission, the foil base is imported into Canada in various thicknesses of less than 0.2 mm. You have stated that the foil will be sourced from various countries, but for the purposes of this ruling, you have requested that we consider foil that originates specifically in Luxembourg. The remaining materials are imported into Canada from Norway, Mexico, and the United States (U.S.) and are used to produce both the outer layer and the inner layer of the final product. In Canada, the bare foil is unwound and, in a continuous process line, the foil goes through a coating station where a liquid coating is applied to the outer side of the foil. The semi-finished heat-sealable lidding stock is then subjected to a hot air drying system which removes any residual solvent or water and dries the coating. You state the inner layer is made from a solid material which is melted and then applied to the middle (foil) layer in a molten form. The resultant product is then imported into the U.S.

> where it is shipped to the lid producer for production of heat-sealable lids from this heat-sealable lidding stock.

On January 27, 2021, Winpak's former counsel participated in a call with CBP's National Commodity Specialist Division (NCSD) and explained that the inner layer was applied to the foil in a molten form. In your reconsideration request, however, you describe the co-extrusion process of the inner layer as follows:

> Unlike the outer layer (further discussed below), the inner layer is applied to the aluminum foil base as a solid form *(i.e.*, a solid plastic film) by a co-extrusion process. During this process, plastic resin is subjected to heat and pressure inside the barrel/cylinder of an extruder to become molten and then forced by the extruder screw through the narrow slit of the extrusion die. The slit in the exclusion die is straight, so the molten resin emerges from the extruder as a solid film prior to application onto the aluminum foil. The adhesive that is co-extruded with the inner layer film is also solid (consisting of an ethylene acrylic acid copolymer).

Due to this conflicting information about the co-extrusion process, CBP requested additional information from Winpak on April 4, 2022. On May 27, 2022, you submitted additional evidence to support your claim that the inner layer is applied in solid, not molten, form.

ISSUE:

Whether the aluminum foil lidding stock is classified in subheading 7607.11.60, HTSUS, as "Aluminum foil (whether or not printed, or backed with paper, paperboard, plastics or similar backing materials) of a thickness (excluding any backing) not exceeding 0.2 mm: Not backed: Rolled but not further worked: Of a thickness not exceeding 0.15 mm: Of a thickness exceeding 0.01 mm"; or subheading 7607.20.50, HTSUS, as "Aluminum foil (whether or not printed, or backed with paper, paperboard, plastics or similar backing materials) of a thickness (excluding any backing) not exceeding 0.2 mm: Backed: 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 that the goods cannot be classified solely on the basis of GRI 1, and if the headings and legal notes do not otherwise require, the remaining GRIs 2 through 6 may then be applied in order.

* * * * * *

The HTSUS provisions at issue are as follows:

7607	Aluminum foil (whether or not printed, or backed with paper, paperboard, plastics or similar backing materials) of a thickness (excluding any backing) not exceeding 0.2 mm:
	Not backed:
7607.11	Rolled but not further worked:
	Of a thickness not exceeding 0.15 mm:
7607.11.60	Of a thickness exceeding 0.01 mm

7607.20 Backed:
7607.20.50 Other

Note 9(d) to section XV, which includes chapter 76, HTSUS, provides as follows:

9. For the purposes of chapters 74 to 76 and 78 to 81, the following expressions have the meanings hereby assigned to them:

* * * * * *

(d) *Plates, sheets, strip and foil*

Flat-surfaced products (other than the unwrought products), coiled or not, of solid rectangular (other than square) cross section with or without rounded corners (including “modified rectangles” of which two opposite sides are convex arcs, the other two sides being straight, of equal length and parallel) of a uniform thickness, which are:

-of rectangular (including square) shape with a thickness not exceeding one-tenth of the width;

...

Headings for plates, sheets, strip, and foil apply, *inter alia*, to plates, sheets, strip, and foil with patterns (for example, grooves, ribs, checkers, tears, buttons, lozenges) and to such products which have been perforated, corrugated, polished or coated, provided that they do not thereby assume the character of articles or products of other headings.

* * * * * *

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

The General ENs to chapter 72 provides, in pertinent part:

(C) **Subsequent manufacture and finishing**

The finished products may be subjected to further finishing treatments or converted into other articles by a series of operations such as:

...

(2) **Surface treatments** or other operations, including cladding, to improve the properties or appearance of the metal, protect it against rusting and corrosion, etc. Except as otherwise provided in the text of certain headings, such treatments do not affect the heading in which the goods are classified. They include:

...

(d) Surface finishing treatment, including;

...

(v) coating with non-metallic substances, e.g., enamelling, varnishing, lacquering, painting, surface printing, coating with ceramics or plastics, including special processes such as glow

> discharge, electrophoresis, electrostatic projection and immersion in an electrostatic fluidised bath followed by radiation firing, etc.

The General ENs to chapter 76 provides, in pertinent part:

> Products and articles of aluminium are frequently subjected to various treatments to improve the properties or appearance of the metal, to protect it from corrosion, etc. These treatments are generally those referred to at the end of the General Explanatory Note to Chapter 72, and do not affect the classification of the goods.

EN 76.07 provides, in pertinent part:

> This heading covers the products defined in Note 9(d) to Section XV, when of a thickness not exceeding 0.2 mm.
>
> The provisions of the Explanatory Note to heading 74.10 relating to copper foil apply, *mutatis mutandis*, to this heading.

EN 74.10, HTSUS, provides, in pertinent part, as follows:

> Other foil, such as that used for making fancy goods, is often backed with paper, paperboard, plastics or similar backing materials, either for convenience of handling or transport, or in order to facilitate subsequent treatment, etc.

* * * * * *

There is no dispute that the subject aluminum foil lidding stocks—which contain layers of polymer—are properly classified in heading 7607, HTSUS, which is an *eo nominee* provision that provides for aluminum foil of a thickness not exceeding 0.2 mm. *See* ENs to chapter 76; ENs to chapter 72; EN 76.07; Note 9(d) to section XV; EN 74.10. Accordingly, the classification analysis herein is applicable only at the 8-digit subheading level.

In NY N316780, CBP classified the subject aluminum foil lidding stock in subheading 7607.11.60, HTSUS, as not backed, rolled but not further worked aluminum foil. We disagree. We find that this incorrect classification, however, resulted in part due to Winpak's submission of erroneous information regarding the manufacturing process of the merchandise. First, Winpak's former counsel incorrectly stated that the outer layer of the merchandise is coated with a polymeric layer and that the inner layer of polymer is also applied to the foil in a molten form. Based on this information, CBP concluded in NY N316780 that both sides of the foil are coated and thus, do not constitute "backing" for classification purposes. Second, CBP held that the subject merchandise was an aluminum foil that was "not further worked." This finding, however, is inconsistent with past CBP practice and case law from the Court of International Trade (CIT). In accordance with the CIT's finding in *Winter-Wolff, Inc. v. United States*, 22 CIT 70, 78 (1998), CBP held in HQ 965999, dated December 19, 2002, that coatings on aluminum foil constitute "further working." *See also*, HQ 966004, dated Dec. 19, 2002; HQ 965976, dated Dec. 19, 2002. Accordingly, the classification of the subject aluminum foil lidding stock under subheading 7607.11.6090, HTSUSA, as aluminum foil that is not backed and is rolled but not further worked, was incorrect.

In your reconsideration request, you contend that that the subject merchandise is properly classified in subheading 7607.20.50, HTSUS, because the plastic film, which forms the inner side of the aluminum foil, is applied to the foil in a solid—not solvent—form. You also state that the plastic film

strengthens and supports the aluminum foil by limiting the tearability and facilitating further processing of the merchandise. Upon our review of the new information provided, we agree. Neither the HTSUS nor the ENs define the terms "backed" and "backing." In *Amcor Flexibles Singen GMBH v. United States*, however, the CIT held that "in the context of Heading 7607, 'backed' is most appropriately construed to mean 'supporting.'" 425 F. Supp. 3d 1287, 1298 (Ct. Int'l Trade 2020). As evidenced by the functions and purpose of the inner layer of plastic film, we find that the solid plastic film provides sufficient support to the aluminum foil and thus, constitutes "backing" for classification purposes. By application of GRI 6, therefore, the subject aluminum foil lidding stocks are classified under subheading 7607.20.50, HTSUS, as backed aluminum foil.

HOLDING:

In accordance with the above analysis and by application of GRI 1, the aluminum foil lidding stock is classified in heading 7607, HTSUS, and, by application of GRI 6, is specifically classified in subheading 7607.20.50, HTSUS, which provides for "Aluminum foil (whether or not printed, or backed with paper, paperboard, plastics or similar backing materials) of a thickness (excluding any backing) not exceeding 0.2 mm: Backed: Other." The 2023 column one, general rate of duty is free.

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

EFFECT ON OTHER RULINGS:

NY N316780, dated February 4, 2021, is hereby modified in part with respect to the classification of aluminum foil lidding stock only.

Sincerely,

YULIYA A. GULIS,
Director
Commercial and Trade Facilitation Division

PROPOSED REVOCATION OF ONE RULING LETTER AND PROPOSED REVOCATION OF TREATMENT RELATING TO THE TARIFF CLASSIFICATION OF A FROZEN BURI FISH COLLAR

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

ACTION: Notice of proposed revocation of one ruling letter and proposed revocation of treatment relating to the tariff classification of a frozen buri fish collar.

SUMMARY: Pursuant to section 625(c), Tariff Act of 1930 (19 U.S.C. § 1625(c)), as amended by section 623 of title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that U.S. Customs and Border Protection (CBP) intends to revoke one ruling letter concerning tariff classification of a frozen buri fish collar under the Harmonized Tariff Schedule of the United States Annotated (HTSUSA). 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 August 18, 2023.

ADDRESS: Written comments are to be addressed to U.S. Customs and Border Protection, Office of Trade, Regulations and Rulings, Attention: Monique Moore, 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. Monique Moore at (202) 325–1826.

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

SUPPLEMENTARY INFORMATION:

BACKGROUND

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

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

Pursuant to 19 U.S.C. § 1625(c)(1), this notice advises interested parties that CBP is proposing to revoke one ruling letter pertaining to the tariff classification of a frozen buri fish collar. Although in this notice CBP is specifically referring to New York Ruling Letter ("NY") NY N306583, dated November 18, 2019 (Attachment A), this notice also covers any rulings on this merchandise which may exist, but have not been specifically identified. CBP has undertaken reasonable efforts to search existing databases for rulings in addition to the one identified. No further rulings have been found. Any party who has received an interpretive ruling or decision (i.e., a ruling letter, internal advice memorandum or decision, or protest review decision) on the merchandise subject to this notice should advise CBP during the comment period.

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

In NY N306583, CBP classified the frozen buri fish collar at issue in heading 0304, HTSUS, specifically in subheading 0304.99.9190, HTSUSA, which provides for "Fish fillets and other fish meat (whether or not minced), fresh, chilled or frozen: Other, frozen: Other: Other: Ocean." CBP has reviewed NY N306583 and has determined the ruling letter to be in error. It is now CBP's position that the subject frozen buri fish collar is properly classified in heading 0303, HTSUS, specifically in subheading 0303.89.0080, HTSUSA, which provides for "Fish, frozen, excluding fish fillets and other fish meat of heading 0304: Other fish, excluding edible fish offal of subheadings 0303.91 to 0303.99: Other: Other."

Pursuant to 19 U.S.C. § 1625(c)(1), CBP is proposing to revoke NY N306583 and to revoke or modify any other ruling not specifically identified to reflect the analysis contained in the proposed Headquarters Ruling Letter ("HQ") H330112, set forth as Attachment B to this notice. Additionally, pursuant to 19 U.S.C. § 1625(c)(2), CBP is proposing to revoke any treatment previously accorded by CBP to substantially identical transactions.

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

YULIYA A. GULIS,
Director
Commercial and Trade Facilitation Division

Attachments

N306583
November 18, 2019
CLA-2–03:OT:RR:NC:N2:231
CATEGORY: Classification
TARIFF NO.: 0304.99.9190

MS. ASHLEY HONG
NISSIN INTERNATIONAL TRANSPORT USA, INC.
1540 W. 190TH STREET
TORRANCE, CA 90501

RE: The tariff classification of Frozen Fish Collar from Japan

DEAR MS. HONG:

This is a response to your letter dated October 8, 2019, requesting a tariff classification ruling on behalf of your client, Wismettac Asian Foods, Inc. (Santa Fe Springs, CA). You provided pictorial representation of the product at issue.

The subject merchandise is the frozen collar of the fish Buri, also known as, Japanese Amberjack or Yellowtail (Seriola quinqueradiata). According to the manufacturing process, the fish will be beheaded, eviscerated, the collar retrieved, rinsed, cooled, wiped dry, packaged, vacuum sealed, labeled, measured and frozen. The finished product, “Frozen Buri Collar” will be imported in bulk quantities of 12 pieces per each airtight bag and sold to the food service industry.

The applicable subheading for the Frozen Buri Collar will be 0304.99.9190, Harmonized Tariff Schedule of the United States (HTSUS), which provides for “Fish fillets and other fish meat (whether or not minced), fresh, chilled or frozen: Other, frozen: Other: Other: Ocean.” The rate of duty will 6 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 the World Wide Web at https://hts.usitc.gov/current.

Please note that seafood is subject to the Mandatory Country of Origin Labeling (“COOL”) requirements administered by the USDA’s Agricultural Marketing Service (AMS), we advise you to check with that agency for their further guidance on your scenario. Contact information for AMS is as follows:

USDA-AMS-LS-SA
Room 2607-S, Stop 0254
1400 Independence Avenue, SW
Washington, DC 20250–0254
Tel. (202) 720–4486
Website: www.ams.usda.gov/COOL
Email address for inquiries: COOL@usda.gov

This merchandise is subject to The Public Health Security and Bioterrorism Preparedness and Response Act of 2002 (The Bioterrorism Act), which is regulated by the Food and Drug Administration (FDA). Information on the Bioterrorism Act can be obtained by calling the FDA at 301–575–0156, or at the Web site, www.fda.gov/oc/bioterrorism/bioact.html.

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 Ekeng Manczuk at ekeng.b.manczuk@cbp.dhs.gov.

Sincerely,

STEVEN A. MACK
Director
National Commodity Specialist Division

HQ H330112
OT:RR:CTF:FTM H330112 TSM
CATEGORY: Classification
TARIFF NO: 0303.89.0080

MS. ASHLEY HONG
NISSIN INTERNATIONAL TRANSPORT USA, INC.
1540 W. 190TH STREET
TORRANCE, CA 90501

RE: Revocation of NY N306583; Tariff Classification of Frozen Buri Fish Collar

DEAR MS. HONG:

This letter is to inform you that U.S. Customs and Border Protection (“CBP”) has reconsidered New York Ruling Letter (“NY”) N306583, which was issued to Wismettac Asian Foods, Inc. on November 18, 2019. In NY N306583, CBP classified frozen collar of the fish buri, also known as Japanese amberjack or yellowtail (Seriola quinqueradiata), under subheading 0304.99.9190, Harmonized Tariff Schedule of the United States Annotated (“HTSUSA”), which provides for: “Fish fillets and other fish meat (whether or not minced), fresh, chilled or frozen: Other, frozen: Other: Other: Ocean.” We have reviewed NY N306583 and found it to be incorrect. For the reasons set forth below, we are revoking this ruling.

FACTS:

In NY N306583, the merchandise was described as follows:

> The subject merchandise is the frozen collar of the fish Buri, also known as, Japanese Amberjack or Yellowtail (Seriola quinqueradiata). According to the manufacturing process, the fish will be beheaded, eviscerated, the collar retrieved, rinsed, cooled, wiped dry, packaged, vacuum sealed, labeled, measured and frozen. The finished product, “Frozen Buri Collar” will be imported in bulk quantities of 12 pieces per each airtight bag and sold to the food service industry.

ISSUE:

What is the tariff classification of the frozen buri fish collar 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 2023 HTSUS headings at issue are as follows:

0302 Fish, fresh or chilled, excluding fish fillets and other fish meat of heading 0304

* * *

0303 Fish, frozen, excluding fish fillets and other fish meat of heading 0304

* * *

0304 Fish fillets and other fish meat (whether or not minced), fresh, chilled or frozen

* * *

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 03.03 states, in pertinent part, the following:

> The provisions of the Explanatory Note to heading 03.02 apply, *mutatis mutandis*, to the products of this heading.

* * *

EN 03.02 states, in pertinent part, the following:

> This heading covers fish, fresh or chilled, whether whole, headless, gutted, or in cuts containing bones or cartilage. However, the heading **does not include** fish fillets and other fish meat of **heading 03.04**. The fish may be packed with salt or ice or sprinkled with salt water as a temporary preservative during transport.
>
> Fish slightly sugared or packed with a few bay leaves remains in this heading.
>
> Edible fish offal separated from the rest of the body of the fish (e.g., skins, tails, maws (swim bladders), heads and halves of heads (with or without the brains, cheeks, tongues, eyes, jaws, or lips), stomachs, fins, tongues), as well as livers, roes and milt, fresh or chilled, are also classified in this heading.

* * *

EN 03.04 states, in pertinent part, the following:

> This heading covers:
>
> (1) **Fish fillets.**
>
> For the purposes of this heading the term **fish fillets** means the strips of meat cut parallel to the backbone of the fish and constituting the right or left side of a fish insofar as the head, guts, fins (dorsal, anal, caudal, ventral, pectoral) and bones (spinal column or main backbone, ventral or costal bones, branchial bone or stapes, etc.) have been removed and the two sides are not joined together, for example by the back or belly.
>
> The classification of these products is not affected by the possible presence of the skin, sometimes left attached to the fillet to hold it together or to facilitate subsequent slicing. Classification is similarly

unaffected by the presence of pin bones or other minor bones which may not have been completely removed.

Fillets cut in pieces are also classified as fillets in this heading.

Cooked fillets, and fillets merely covered with batter or bread crumbs, whether or not frozen, are classified in **heading 16.04**.

(2) **Other fish meat** (whether or not minced), i.e., fish meat from which the bones have been removed. As in the case of fish fillets, classification of fish meat is unaffected by the presence of minor bones which may not have been completely removed.

* * *

This heading covers fish fillets and other fish meat (whether or not minced) in the following states only:

(i) Fresh or chilled, whether or not packed with salt or ice or sprinkled with salt water as a temporary preservative during transport.

(ii) Frozen, often presented in the form of frozen blocks.

Fish fillets and other fish meat (whether or not minced) slightly sugared or packed with a few bay leaves remain in this heading.

* * *

EN 03.04 states in relevant part that heading 0304 covers "fish fillets," which are strips of meat cut parallel to the backbone of the fish, constituting the right or left side of fish, insofar as the head, guts, fins, and bones have been removed and the sides are not joined together. EN 03.04 further provides for "other fish meat" from which the bones have been removed. Additionally, EN 03.04 explains that classification of "fish fillets" and "other fish meat" in heading 0304 is unaffected by the presence of minor bones which may not have been completely removed.

We note that the term "minor" is not defined by the HTSUS or within the ENs. When a term is not defined within the HTSUS, then the common and commercial meaning may be determined by consulting dictionaries to ascertain its meaning.[1] The *Merriam-Webster Dictionary* defines "minor" as "inferior in importance, size, or degree comparatively unimportant."[2] The *Cambridge Dictionary* defines "minor" as "having little importance, influence, or effect, especially when compared with other things of the same type."[3] *Dictionary.com* defines "minor" as "lesser, as in size, extent, or importance, or

[1] 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.

[2] *Minor*, Merriam-Webster, *https://www.merriam-webster.com/dictionary/minor* (last visited February 17, 2023).

[3] *Minor*, Cambridge Dictionary, *https://dictionary.cambridge.org/us/dictionary/english/*minor (last visited February 17, 2023).

being or noting the lesser of two" and "not serious, important, etc."[4] The above dictionary definitions demonstrate that the term "minor" describes objects that are inferior in size, importance, and effect. Consistent with these definitions, we conclude that in reference to fish bones, "minor bones" are bones that are of little significance due to their size. The referenced definitions are also consistent with EN 03.04, which refers to "minor bones" as "bones which may not have been completely removed," thereby describing them as small fractions of bones left over after bone removal.

EN 03.04 defines "fish fillets" and "other fish meat" as fish meat from which the bones have been removed, with the exception of minor bones which have not been completely removed. Upon review, we find that the frozen buri fish collar at issue in NY N306583, is not "fish fillet" or "other fish meat," as defined in EN 03.04. In contrast, the manufacturing process for the frozen buri fish collar at issue is described in relevant part as follows: the fish will be beheaded, eviscerated, the collar retrieved, rinsed, cooled, wiped dry, packaged, vacuum sealed, labeled, measured and frozen. Based on the description of the manufacturing process, we find that the frozen buri fish collar at issue contains all of its bones as bone removal is not identified as part of the manufacturing process. Because the bones are not removed, the "minor bone" exception is not applicable. Therefore, we conclude that the frozen buri fish collar is not "fish fillet" or "other fish meat," within the meaning of EN 03.04. As such, it is not classified in heading 0304, HTSUS, which provides for "Fish fillets and other fish meat (whether or not minced), fresh, chilled or frozen."

Heading 0303, HTSUS, provides for "Fish, frozen, excluding fish fillets and other fish meat of heading 0304." EN 03.03 provides that the provisions of EN 03.02 apply, *mutatis mutandis*, to the products of this heading. In relevant part, EN 03.02 provides that the heading covers fish, whether whole, headless, gutted, or in cuts containing bones or cartilage, but does not include fish fillets and other fish meat of heading 03.04. Based on the described manufacturing process, the buri fish collar at issue is frozen, beheaded, eviscerated, and contains bones. As such, it meets the relevant terms of EN 03.02 and EN 03.03, and is provided for in heading 0303, HTSUS. Specifically, the buri fish collar is classified under subheading 0303.89.0080, HTSUSA, which provides for "Fish, frozen, excluding fish fillets and other fish meat of heading 0304: Other fish, excluding edible fish offal of subheadings 0303.91 to 0303.99: Other: Other."

HOLDING:

Under the authority of GRIs 1 and 6, the frozen buri fish collar is classified under heading 0303, HTSUS, and specifically under subheading 0303.89.0080, HTSUSA, which provides for "Fish, frozen, excluding fish fillets and other fish meat of heading 0304: Other fish, excluding edible fish offal of subheadings 0303.91 to 0303.99: Other: Other." The 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 on the internet at https://hts.usitc.gov/current.

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[4] *Minor*, Dictionary.com, *https://www.dictionary.com/browse/minor* (last visited February 17, 2023).

EFFECT ON OTHER RULINGS:

NY N306583, dated November 18, 2019, is hereby REVOKED.

Sincerely,

YULIYA A. GULIS,
Director
Commercial and Trade Facilitation Division

PROPOSED MODIFICATION OF ONE RULING LETTER RELATING TO THE TARIFF CLASSIFICATION OF A PAPERBOARD COSMETIC CONTAINER WITH SLEEVE FROM CHINA

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

ACTION: Notice of proposed modification of one ruling letter relating to the tariff classification of a paperboard cosmetic container with sleeve from China.

SUMMARY: Pursuant to section 625(c), Tariff Act of 1930 (19 U.S.C. § 1625(c)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that U.S. Customs and Border Protection (CBP) intends to modify one ruling letter concerning tariff classification of a paperboard cosmetic container with sleeve from China 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 August 18, 2023.

ADDRESS: Written comments are to be addressed to U.S. Customs and Border Protection, Office of Trade, Regulations and Rulings, Attention: Monique Moore, 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. Monique Moore at (202) 325–1826.

FOR FURTHER INFORMATION CONTACT: Mr. Nicholas A. Horne, Chemicals, Petroleum, Metals and Miscellaneous Articles 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 obli-

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

Pursuant to 19 U.S.C. § 1625(c)(1), this notice advises interested parties that CBP is proposing to modify one ruling letter pertaining to the tariff classification of a paperboard cosmetic container with sleeve from China. Although in this notice, CBP is specifically referring to New York Ruling Letter (NY) N302628, dated March 18, 2019, (Attachment A), this notice also covers any rulings on this merchandise which may exist, but have not been specifically identified. CBP has undertaken reasonable efforts to search existing databases for rulings in addition to the one identified. No further rulings have been found. Any party who has received an interpretive ruling or decision (i.e., a ruling letter, internal advice memorandum or decision, or protest review decision) on the merchandise subject to this notice should advise CBP during the comment period.

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

In NY N302628, CBP classified a paperboard cosmetic container with sleeve from China in heading 4823, HTSUS, specifically in subheading 4823.90.6700, HTSUSA (Annotated), which provides for "[o]ther paper, paperboard, cellulose wadding and webs of cellulose fibers, cut to size or shape; other articles of paper pulp, paper, paperboard, cellulose wadding or webs of cellulose fibers: Other: Other: Other: Of coated paper or paperboard: Other." CBP has reviewed NY N302628 and has determined the ruling letter to be partially in error. It is now CBP's position that a paperboard cosmetic container with sleeve from China is properly classified in heading 4819, HTSUS, specifically in subheading 4819.50.4040, HTSUSA, which provides for

"[c]artons, boxes, cases, bags and other packing containers, of paper, paperboard, cellulose wadding or webs of cellulose fibers; box files, letter trays and similar articles, of paper or paperboard of a kind used in offices, shops or the like: Other packing containers, including record sleeves: Other: Other: Rigid boxes and cartons."

Pursuant to 19 U.S.C. § 1625(c)(1), CBP is proposing to modify NY N302628 and to revoke or modify any other ruling not specifically identified to reflect the analysis contained in the proposed Headquarters Ruling Letter (HQ) HQ H315829, set forth as Attachment B to this notice. Additionally, pursuant to 19 U.S.C. § 1625(c)(2), CBP is proposing to revoke any treatment previously accorded by CBP to substantially identical transactions.

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

Yuliya A. Gulis,
Director
Commercial and Trade Facilitation Division

Attachments

N302628
March 18, 2019
MAR-2–48:OT:RR:NC:N1:130
CATEGORY: Marking
TARIFF NO.: 9903.88.03; 4823.90.6700

MR. SAMUEL FOCARINO
COMET CUSTOMS BROKERS, INC.
587 W. MERRICK RD.
VALLEY STREAM, NY 11580

RE: The country of origin marking of a paperboard cosmetic container with sleeve from China

DEAR MR. FOCARINO:

In your letter, dated January 22, 2019, you requested a country of origin marking ruling on behalf of your client, Shipment Associates, Inc., dba The Balm. Samples were submitted for our review and will be retained for reference.

The product under consideration is a printed paperboard container that will be filled with a pan of cosmetic powder blush after importation into the United States. The container, constructed of coated paperboard, folds closed like a book, and includes a mirror on one interior side and a depression to hold the blush pan on the other. The container, when closed, slips into a four-sided paperboard sleeve that holds the container in the closed position. In your request, you inquire as to whether it is permissible to mark the container “Made in USA” as a reflection of the origin of the predominant product, the cosmetic blush. The container is manufactured in China.

Section 304, Tariff Act of 1930, as amended (19 U.S.C. 1304), provides that, unless excepted, every article of foreign origin (or its container) imported into the U.S. shall be marked in a conspicuous place as legibly, indelibly and permanently as the nature of the article (or its container) will permit, in such a manner as to indicate to the ultimate purchaser in the U.S. the English name of the country of origin of the article. Part 134, Customs Regulations (19 CFR Part 134), implements the country of origin marking requirements and exceptions of 19 U.S.C. 1304. Pursuant to 19 CFR Section 134.1(b), the country of origin is the country of manufacture, production or growth of any article of foreign origin entering the U.S. Section 134.1(d) defines the ultimate purchaser as generally the last person in the U.S. who will receive the article in the form in which it was imported.

However, where the articles imported constitute containers, 19 CFR Part 134 Subpart C is applicable. The country of origin marking requirements applicable to containers imported in an empty state depend, in part, on whether the containers are reusable or disposable in nature. Disposable containers imported by persons or firms who fill them with various products which they sell may be excepted from individual marking pursuant to 19 U.S.C. 1304(a)(3)(D). However, this exception is not applicable if the imported containers are reusable. Thus, the paperboard cosmetic containers may be excepted from individual marking only if they are disposable containers, of the type ordinarily discarded after the contents have been consumed. Under 19 CFR 134.23, containers are considered reusable if they are either designed for or capable of reuse after the contents have been consumed, or impart the essential character to the whole importation. Such containers, whether im-

ported full or empty, must be individually marked to indicate the country of their own origin with a marking such as, "Container Made in (name of country)."

In order to determine whether the paperboard cosmetic containers are excepted from country of origin marking requirements, it is first necessary to establish whether they are disposable or reusable containers, as well as to ascertain the identity of the ultimate purchaser within the meaning of 19 U.S.C.1304. Because the paperboard cosmetic containers are limited to a single use, cannot be refilled, and would be disposed of after the cosmetic is consumed, we find that they are disposable. The ultimate purchaser, therefore, is the manufacturer that fills the container with the cosmetic blush. Therefore, only the outermost container in which the paperboard cosmetic containers reach the ultimate purchaser is required to be marked to indicate the origin of its contents.

The paperboard cosmetic containers do not have to be individually marked with the country of origin, China. However, you indicate that they are marked "Made in USA" as the cosmetic product that will fill the container is manufactured in the United States. The paperboard containers are ordinary packaging and will lose their identity as separate articles of commerce when they are filled with the pans of cosmetic blush powder. The words "Made in the USA" refer to the cosmetic and not to the container, and such printing will not be considered misleading or deceptive, provided that the Customs officers at the port of entry are satisfied that the cosmetic blush is made in the United States.

While you do not request a classification ruling on the paperboard cosmetic containers, we find that it is necessary to inform you of additional requirements for imports of this product into the United States.

The applicable subheading for the paperboard cosmetic containers will be 4823.90.6700, Harmonized Tariff Schedule of the United States (HTSUS), which provides for Other paper, paperboard, cellulose wadding and webs of cellulose fibers, cut to size or shape; other articles of paper pulp, paper, paperboard, cellulose wadding or webs of cellulose fibers: Other: Other: Other: Of coated paper or paperboard: Other. The rate of duty will be free.

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 4823.90.6700, 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 4823.90.6700, HTSUS, listed above.

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 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 Laurel Duvall at laurel.duvall@cbp.dhs.gov.

Sincerely,

STEVEN A. MACK
Director
National Commodity Specialist Division

HQ H315829
OT:RR:CTF:CPMMA H315829 NAH
CATEGORY: Classification
TARIFF NO: 4819.50.4040

MR. SAMUEL FOCARINO
COMET CUSTOMS BROKERS, INC.
587 W. MERRICK RD.
VALLEY STREAM, NY 11580

RE: Modification of NY N302628; tariff classification of a paperboard cosmetic container with sleeve from China

DEAR MR. FOCARINO:

This letter is in reference to your New York Ruling Letter (NY) N302628, dated March 18, 2019, concerning the country of origin marking and tariff classification of a paperboard cosmetic container with sleeve from China. In NY N302628, U.S. Customs and Border Protection (CBP) classified the subject merchandise in subheading 4823.90.6700, Harmonized Tariff Schedule of the United States Annotated (HTSUSA), as "Other paper, paperboard, cellulose wadding and webs of cellulose fibers, cut to size or shape; other articles of paper pulp, paper, paperboard, cellulose wadding or webs of cellulose fibers: Other: Other: Other: Of coated paper or paperboard: Other." We have reviewed NY N302628 and determined that the ruling is partially in error with respect to the tariff classification of the subject merchandise. Accordingly, for the reasons set forth below, CBP is modifying NY N302628.

FACTS:

The subject merchandise was described in NY N302628 as follows:

> The product under consideration is a printed paperboard container that will be filled with a pan of cosmetic powder blush after importation into the United States. The container, constructed of coated paperboard, folds closed like a book, and includes a mirror on one interior side and a depression to hold the blush pan on the other. The container, when closed, slips into a four-sided paperboard sleeve that holds the container in the closed position. . . . The container is manufactured in China.

ISSUE:

Whether a paperboard cosmetic container with sleeve from China is classified under subheading 4823.90.6700, HTSUSA, as "Other paper, paperboard, cellulose wadding and webs of cellulose fibers, cut to size or shape; other articles of paper pulp, paper, paperboard, cellulose wadding or webs of cellulose fibers: Other: Other: Other: Of coated paper or paperboard: Other" or under subheading 4819.50.4040, HTSUSA, as "Cartons, boxes, cases, bags and other packing containers, of paper, paperboard, cellulose wadding or webs of cellulose fibers; box files, letter trays and similar articles, of paper or paperboard of a kind used in offices, shops or the like: Other packing containers, including record sleeves: Other: Other: Rigid boxes and cartons."

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 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 HTSUS subheadings under consideration are the following:

4819	Cartons, boxes, cases, bags and other packing containers, of paper, paperboard, cellulose wadding or webs of cellulose fibers; box files, letter trays and similar articles, of paper or paperboard of a kind used in offices, shops or the like:
4819.50	Other packing containers, including record sleeves:
4819.50.40	Other:
	Other:
4819.50.4040	Rigid boxes and cartons.
	* * *
4823	Other paper, paperboard, cellulose wadding and webs of cellulose fibers, cut to size or shape; other articles of paper pulp, paper, paperboard, cellulose wadding or webs of cellulose fibers:
4823.90	Other:
	Other:
	Other:
	Of coated paper or paperboard:
4823.90.6700	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 48.19 states, in pertinent part, as follows:

> This group covers containers of various kinds and sizes generally used for the packing, transport, storage or sale of merchandise, whether or not also having a decorative value. . .
>
> ***
>
> The heading includes folding cartons, boxes and cases. These are:
>
> - cartons, boxes and cases in the flat in one piece, for assembly by folding and slotting (e.g., cake boxes); and
> - containers assembled or intended to be assembled by means of glue, staples, etc., on one side only, the construction of the container itself providing the means of forming the other sides, although, where appropriate, additional means of fastening, such as adhesive tape or staples may be used to secure the bottom or lid.

> ***
>
> The articles of this heading may also have reinforcements or accessories of materials other than paper (e.g., textile backings, wooden supports, string handles, corners of metal or plastics).

EN 48.23 states, in pertinent part, as follows:

> This heading includes:
>
> (A) Paper and paperboard, cellulose wadding and webs of cellulose fibers, not covered by any of the previous headings of this Chapter :
>
> ***
>
> (B) Articles of paper pulp, paper, paperboard, cellulose wadding or webs of cellulose fibers, not covered by any of the previous headings of this Chapter nor excluded by Note 2 to this Chapter.
>
> Thus the heading includes:
>
> (1) Filter paper and paperboard (folded or not). Generally, these are in shapes other than rectangular (including square), such as circular filter papers and boards.
>
> (2) Printed dials, other than in rectangular (including square) form, for self-recording apparatus.
>
> (3) Paper and paperboard, of a kind used for writing, printing or other graphic purposes, not covered in the earlier headings of this Chapter, cut to shape other than rectangular (including square).

* * * * *

Turning to the subject merchandise, the paperboard cosmetic container with sleeve from China is meant to be filled with a pan of cosmetic powder after importation, to be sold to end users from a retail seller. The ENs to heading 48.19 explain that the subheading is meant to cover containers such as boxes, cartons, or cases "generally used for the packing, transport, storage or sale of merchandise, whether or not also having a decorative value." Additionally, the ENs to heading 48.23 explain that the subheading is only meant for paper and paperboard products that do not fit into other subheadings. The subject merchandise is made of paperboard, but it is also a container meant for packing, transport, storage, and sale of cosmetics. Accordingly, CBP wrongly classified the subject merchandise in heading 4823, HTSUS.

Moreover, CBP has consistently classified similar merchandise in subheading 4819.50.40, HTSUS. *See e.g.* NY N105303, dated June 2, 2010 (classifying an empty cosmetic compact made of paperboard with a mirror on the flap in subheading 4819.50.40, HTSUS); NY N003219, dated December 6, 2006 (classifying an empty cosmetic compact made of paperboard with a hinged lid, magnetic closure, and covered with a film laminated colored paper in subheading 4819.50.40, HTSUS); NY G86039, dated January 5, 2001 (classifying an empty paperboard cosmetic gift box with a hinged lid and mirror on the underside of the lid in subheading 4819.50.40, HTSUS). As such, the subject paperboard cosmetic container with sleeve from China in NY N302628 is properly classified in subheading 4819.50.40, HTSUSA, as "Cartons, boxes, cases, bags and other packing containers, of paper, paperboard, cellulose wadding or webs of cellulose fibers; box files, letter trays and similar articles,

of paper or paperboard of a kind used in offices, shops or the like: Other packing containers, including record sleeves: Other: Other: Rigid boxes and cartons."

HOLDING:

By application of GRIs 1 and 6, the paperboard cosmetic container with sleeve from China is classified in heading 4819, HTSUS, and specifically in subheading 4819.50.4040, HTSUSA, which provides for "Cartons, boxes, cases, bags and other packing containers, of paper, paperboard, cellulose wadding or webs of cellulose fibers; box files, letter trays and similar articles, of paper or paperboard of a kind used in offices, shops or the like: Other packing containers, including record sleeves: Other: Other: Rigid boxes and cartons." The 2023 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/current.

EFFECT ON OTHER RULINGS:

NY N302628, dated March 18, 2019, is hereby modified.

Sincerely,

Yuliya A. Gulis,
Director
Commercial and Trade Facilitation Division

QUARTERLY IRS INTEREST RATES USED IN CALCULATING INTEREST ON OVERDUE ACCOUNTS AND REFUNDS OF CUSTOMS DUTIES

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

ACTION: General notice.

SUMMARY: This notice advises the public that the quarterly Internal Revenue Service interest rates used to calculate interest on overdue accounts (underpayments) and refunds (overpayments) of customs duties will remain the same from the previous quarter. For the calendar quarter beginning July 1, 2023, the interest rates for overpayments will be 6 percent for corporations and 7 percent for non-corporations, and the interest rate for underpayments will be 7 percent for both corporations and non-corporations. This notice is published for the convenience of the importing public and U.S. Customs and Border Protection personnel.

DATES: The rates announced in this notice are applicable as of July 1, 2023.

FOR FURTHER INFORMATION CONTACT: Bruce Ingalls, Revenue Division, Collection Refunds & Analysis Branch, 6650 Telecom Drive, Suite #100, Indianapolis, Indiana 46278; telephone (317) 298–1107.

SUPPLEMENTARY INFORMATION:

Background

Pursuant to 19 U.S.C. 1505 and Treasury Decision 85–93, published in the **Federal Register** on May 29, 1985 (50 FR 21832), the interest rate paid on applicable overpayments or underpayments of customs duties must be in accordance with the Internal Revenue Code rate established under 26 U.S.C. 6621 and 6622. Section 6621 provides different interest rates applicable to overpayments: one for corporations and one for non-corporations.

The interest rates are based on the Federal short-term rate and determined by the Internal Revenue Service (IRS) on behalf of the Secretary of the Treasury on a quarterly basis. The rates effective for a quarter are determined during the first-month period of the previous quarter.

In Revenue Ruling 2023–11, the IRS determined the rates of interest for the calendar quarter beginning July 1, 2023, and ending on September 30, 2023. The interest rate paid to the Treasury for underpayments will be the Federal short-term rate (4%) plus three

percentage points (3%) for a total of seven percent (7%) for both corporations and non-corporations. For corporate overpayments, the rate is the Federal short-term rate (4%) plus two percentage points (2%) for a total of six percent (6%). For overpayments made by non-corporations, the rate is the Federal short-term rate (4%) plus three percentage points (3%) for a total of seven percent (7%). These interest rates used to calculate interest on overdue accounts (underpayments) and refunds (overpayments) of customs duties remained the same from the previous quarter. These interest rates are subject to change for the calendar quarter beginning October 1, 2023, and ending on December 31, 2023.

For the convenience of the importing public and U.S. Customs and Border Protection personnel, the following list of IRS interest rates used, covering the period from July of 1974 to date, to calculate interest on overdue accounts and refunds of customs duties, is published in summary format.

Beginning date	Ending date	Under-payments (percent)	Over-payments (percent)	Corporate overpay-ments (eff. 1–1–99) (percent)
070174	063075	6	6	....
070175	013176	9	9	....
020176	013178	7	7	....
020178	013180	6	6	....
020180	013182	12	12	....
020182	123182	20	20	....
010183	063083	16	16	....
070183	123184	11	11	....
010185	063085	13	13	....
070185	123185	11	11	....
010186	063086	10	10	....
070186	123186	9	9	....
010187	093087	9	8	....
100187	123187	10	9	....
010188	033188	11	10	....
040188	093088	10	9	....
100188	033189	11	10	....
040189	093089	12	11	....
100189	033191	11	10	....
040191	123191	10	9	....
010192	033192	9	8	....
040192	093092	8	7	....
100192	063094	7	6	....

Beginning date	Ending date	Under-payments (percent)	Over-payments (percent)	Corporate overpay-ments (eff. 1–1–99) (percent)
070194	093094	8	7	....
100194	033195	9	8	....
040195	063095	10	9	....
070195	033196	9	8	....
040196	063096	8	7	....
070196	033198	9	8	....
040198	123198	8	7	....
010199	033199	7	7	6
040199	033100	8	8	7
040100	033101	9	9	8
040101	063001	8	8	7
070101	123101	7	7	6
010102	123102	6	6	5
010103	093003	5	5	4
100103	033104	4	4	3
040104	063004	5	5	4
070104	093004	4	4	3
100104	033105	5	5	4
040105	093005	6	6	5
100105	063006	7	7	6
070106	123107	8	8	7
010108	033108	7	7	6
040108	063008	6	6	5
070108	093008	5	5	4
100108	123108	6	6	5
010109	033109	5	5	4
040109	123110	4	4	3
010111	033111	3	3	2
040111	093011	4	4	3
100111	033116	3	3	2
040116	033118	4	4	3
040118	123118	5	5	4
010119	063019	6	6	5
070119	063020	5	5	4
070120	033122	3	3	2
040122	063022	4	4	3
070122	093022	5	5	4
100122	123122	6	6	5
010123	093023	7	7	6

Dated: June 28, 2023.

CRINLEY S. HOOVER,
Acting Chief Financial Officer,
U.S. Customs and Border Protection.

[Published in the Federal Register, July 5, 2023 (88 FR 42946)]

U.S. Court of International Trade

Slip Op. 23–93

AMERICAN PACIFIC PLYWOOD, INC., INTERGLOBAL FOREST LLC, AND U.S. GLOBAL FOREST, INC., Plaintiffs, and LB WOOD CAMBODIA CO., LTD., AND CAMBODIAN HAPPY HOME WOOD PRODUCTS CO, LTD., Plaintiff-Intervenors, v. UNITED STATES, Defendant, and COALITION FOR FAIR TRADE IN HARDWOOD PLYWOOD, Defendant-Intervenor.

Before: M. Miller Baker, Judge
Consol. Ct. No. 20–03914
PUBLIC VERSION

[The court sustains Customs's finding of evasion and enters judgment for Defendant and Defendant-Intervenor.]

Dated: June 22, 2023

Gregory S. Menegaz, deKieffer & Horgan, PLLC, of Washington, DC, argued for Plaintiffs American Pacific and U.S. Global and for Plaintiff-Intervenors. With him on the briefs, except for Plaintiff InterGlobal Forest's reply brief, were *J. Kevin Horgan* and *Alexandra H. Salzman*. *Vivien J. Wang*, deKieffer & Horgan, PLLC, of Washington, DC, presented rebuttal argument for Plaintiffs American Pacific and U.S. Global and for Plaintiff-Intervenors.

Ignacio J. Lazo, Cadden & Fuller LLP of Irvine, CA, argued for Plaintiff InterGlobal Forest, LLC. On the reply brief was *Thomas H. Cadden*.

Hardeep K. Josan, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice of New York, NY, argued for Defendant. With her on the brief were *Brian M. Boynton*, Acting Assistant Attorney General; *Patricia M. McCarthy*, Director; *Justin R. Miller*, Attorney-in-Charge International Trade Field Office; and *Claudia Burke*, Assistant Director. Of counsel on the brief was *Jennifer Petelle*, Attorney, Office of the Chief Counsel, U.S. Customs and Border Protection.

Maureen E. Thorson, Wiley Rein LLP of Washington, DC, argued for Defendant-Intervenor. With her on the brief were *Timothy C. Brightbill* and *Stephanie M. Bell*.

OPINION

Baker, Judge:

This sprawling matter involves consolidated cases brought by three U.S. importers, supported by two plaintiff-intervenor Cambodian producers, challenging U.S. Customs and Border Protection's determination that Plaintiffs evaded antidumping and countervailing duties on hardwood plywood from China by misrepresenting it as a product of Cambodia. For the reasons explained below, the court sustains the agency's decision.

I

The Enforce and Protect Act (EAPA) amended the Tariff Act of 1930 by inserting a new section, "Procedures for Investigating Claims of Evasion of Antidumping and Countervailing Duty Orders." *See* Pub. L. No. 114–125, § 421, 130 Stat. 122, 161 (2016), *codified at* 19 U.S.C. § 1517.

EAPA directs Customs to initiate an investigation within 15 days after receiving an allegation that "reasonably suggests" that covered merchandise subject to an antidumping or countervailing duty order has been imported into this country through "evasion." *See* 19 U.S.C. § 1517(a)(3), (b)(1). The statute defines "evasion" as the entry of goods through any false statement or omission that results in the reduction or nonpayment of antidumping or countervailing duties. *See id.* § 1517(a)(5)(A).

After starting an investigation, Customs has 90 days to decide "if there is a reasonable suspicion" that the goods were imported through evasion. *Id.* § 1517(e). If the agency so finds, it must impose "interim measures," which the statute defines as suspending the liquidation of unliquidated entries that were imported on or after the date the agency started the investigation, extending the period for liquidation as necessary, and taking "such additional measures" as necessary to protect the government's revenue interests, including requiring the posting of additional security. *See id.* § 1517(e)(1)–(3).[1]

"Reasonable suspicion" applies only to the imposition of "interim measures." Customs must then make a final "determination of evasion" within 300 calendar days from the investigation's start and decide, "based on substantial evidence," whether the entries in question were made through evasion. 19 U.S.C. § 1517(c)(1)(A). If the agency finds evasion, it must (1) suspend liquidation of relevant entries made between the investigation's start and the final determination, *id.* § 1517(d)(1)(A)(i); (2) extend the liquidation period for entries made *before* the investigation started, *id.* § 1517(d)(1)(B)(i); (3) notify the Department of Commerce of the determination and ask it to identify either the applicable antidumping/countervailing duty rates or cash deposit rates for the relevant entries, *id.* § 1517(d)(1)(C)(i)–(ii); and (4) require the posting of cash deposits and

[1] " 'Liquidation' refers to the process by which an importer's liability is fixed based on duties owed upon the date of entry. Upon entry of goods, the importer must deposit estimated duties and fees with Customs. Subsequently, Customs 'liquidates' the entry to make a 'final computation or ascertainment of duties owed' on that entry of merchandise." *ARP Materials, Inc. v. United States*, 520 F. Supp. 3d 1341, 1347 (CIT 2021) (quoting 19 C.F.R. § 159.1), *aff'd*, 47 F.4th 1370 (Fed. Cir. 2022).

assess duties on the relevant entries per Commerce's direction, *id.* § 1517(d)(1)(D).[2]

After the final determination, the statute authorizes an administrative appeal in which the Customs Commissioner conducts a *de novo* review. The appellant may be either "a person determined to have entered such covered merchandise through evasion" or "an interested party that filed an allegation" that sparked the investigation. *Id.* § 1517(f)(1). Those same parties may then "seek judicial review of the determination under subsection (c) [i.e., the final determination] and the review under subsection (f) [i.e., the administrative appeal] in" this court. *Id.* § 1517(g)(1).

II

A

In 2018, Commerce imposed antidumping and countervailing duties on U.S. imports of certain hardwood plywood products from China. *Certain Hardwood Plywood Products from the People's Republic of China: Amended Final Determination of Sales at Less Than Fair Value, and Antidumping Duty Order*, 83 Fed. Reg. 504, 504–13 (Dep't Commerce Jan. 4, 2018); *Certain Hardwood Plywood Products from the People's Republic of China: Countervailing Duty Order*, 83 Fed. Reg. 513, 513–16 (Dep't Commerce Jan. 4, 2018).

The three plaintiffs here—American Pacific Plywood, Inc.; U.S. Global Forest, Inc.; and InterGlobal Forest, LLC, all U.S. importers of hardwood plywood—assert that Chinese plywood manufacturers anticipated the duties and "responded by moving plywood production to Cambodia, beyond the geographic scope of the Orders." ECF 49, at 1–2. For example, they state that in 2017 the company that originally "sold finished plywood products directly to [InterGlobal Forest] and shipped them from China . . . formed and funded a Cambodian company, LB Wood Cambodia Co., Ltd." *Id.* at 2.

LB Wood is a plaintiff-intervenor and is based in the Sihanoukville Special Economic Zone, an area near Cambodia's only deep-water port that was established as an "economic and trade cooperation zone constructed by Chinese and Cambodian enterprises." Appx1022. The other plaintiff-intervenor, Cambodian Happy Home Wood Products Co., Ltd., operates in the same zone. Appx1024.

It appears to be undisputed that after Commerce implemented the antidumping and countervailing duty orders, Plaintiffs—and other U.S. hardwood plywood importers—quickly shifted their purchases

[2] In addition, Customs may "take such additional enforcement measures as the Commissioner determines appropriate"; the statute gives four examples. *Id.* § 1517(d)(1)(E).

from Chinese producers to LB Wood and Happy Home. In response, during 2019 the Coalition for Fair Trade in Hardwood Plywood filed an allegation with Customs that Plaintiffs were selling Chinese hardwood plywood that was transshipped through, and mislabeled as originating from, Cambodia.

Customs then investigated, Appx1021, found a reasonable suspicion of evasion, and imposed interim measures under 19 U.S.C. § 1517(e). Appx1028. The measures included suspending liquidation of Plaintiffs' entries of hardwood plywood from Cambodia; adjusting the duty rates so the entries would be subject to the antidumping and countervailing duty orders; requiring cash deposits of 194.53 percent *ad valorem* for all entries unliquidated as of June 5, 2018; and extending suspension for all unliquidated entries. Appx1021, Appx1026–28.

Customs notified Plaintiffs of the investigation and of the interim measures on October 1, 2019, Appx1020 *et seq.*, and provided them with public versions of the Coalition's allegation letters and the agency's initiation memoranda. Plaintiffs and Plaintiff-Intervenors submitted written arguments and the Coalition responded.

Customs reached a final decision in June 2020. Appx1034. The agency determined that substantial evidence in the administrative record showed that Plaintiffs' imports were entered through evasion, resulting in the avoidance of applicable antidumping or countervailing duty deposits or other security. Appx1038. Along with producer-specific facts, Customs relied on an agency employee's visit to Plaintiff-Intervenors' Cambodian factories before the investigation. The employee noted, among other things, that the types of plywood at the factories are "temperate woods that do not grow well in Cambodia's tropical climate." Appx1039; Appx1044.[3]

B

Customs found that LB Wood's parent company is [[ ]]. Appx1035, Appx1038. The agency emphasized that LB Wood registered as a business in Cambodia only after Commerce's preliminary determination in its antidumping duty investigation.[4] The company sourced "most of its raw materials, [[ ]] percent by value, from [[ ]]," and "also sourced some of its raw materials

[3] Customs could not follow up on that visit because of COVID-related travel disruptions and because [[ ]]. Appx1037.

[4] Customs found that the parent company registered LB Wood in Cambodia "only [[ ]] days after the preliminary AD determination." Appx1038.

from [[ ]],” such that “LB Wood sourced raw materials almost exclusively from [[ ]] . . . .” Appx1039.

The agency concluded that “record evidence shows that not only was LB Wood likely established with a goal to avoid paying AD/CVD duties on Chinese plywood, its location [in the Sihanoukville special zone] helped facilitate such evasion.” Appx1038. Sales data also showed that “LB Wood’s relationship with American Pacific and InterGlobal began only [[ ]] the January 2018 imposition of the AD/CVD orders on Chinese plywood.” Appx1039.

C

Customs found that Happy Home sourced [[ ]] percent of its raw materials by value from [[ ]] and that [[ ]] percent by value came from [[ ]]. Appx1044. “Thus, Happy Home sourced [[ ]] of its raw materials from [[ ]] . . . .” *Id.* Happy Home’s [[ ]] admitted the company [[ ]], which Customs construed as “clearly indicat[ing] that Happy Home purchases Chinese-origin plywood to some extent and comingles [sic] it with Cambodian-origin plywood.” Appx1045. Customs also identified various discrepancies in financial data and other recordkeeping, and noted that key records were written in [[ ]]. Appx1046–1048.

Perhaps most significantly, Customs found that Happy Home’s records showed that it exported [[ ]] plywood to the United States in 2016 and 2017 than Cambodia [[ ]].[5] Happy Home and U.S. Global argued that Customs’s Cambodian production data were unreliable and noncontemporaneous, but the agency found that because the source was a U.N. publication using data from the Cambodian government, “the figures are authoritative and reliable for our investigation’s purposes. Further, data from other United Nations publications . . . have been considered reliable and have been used in other AD/CVD trade remedy cases.” Appx1049.

D

Following Customs’s final determination of evasion, Plaintiffs and Plaintiff-Intervenors took administrative appeals. The agency rejected Plaintiff-Intervenors’ appeals because under EAPA regulations

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[5] [[ ]] despite Cambodia’s total plywood production in those two years being 27,000 m^3. Appx1049. Customs also noted that Happy Home’s 2016 figure was probably too low because Happy Home had reported some of its entries using [[ ]]. Appx1049 n.134.

they were not "parties to the investigation" and thus were not entitled to seek administrative review. Appx1053 & n.4. The agency's appellate office then affirmed the evasion determination. Appx1073.

Plaintiffs later filed these three separate lawsuits. The court granted the Coalition's motion to intervene as a defendant, Case 20–3914, ECF 16, LB Wood and Happy Home's unopposed motions to intervene as plaintiffs, Case 20–3914, ECF 23,[6] and the parties' motion to consolidate, Case 20–3914, ECF 29. Plaintiffs (ECF 47) and Plaintiff-Intervenors (ECF 50) moved for judgment on the agency record; the government (ECF 56) and the Coalition (ECF 58) opposed.

III

The court has subject-matter jurisdiction under 28 U.S.C. § 1581(c). Plaintiffs sued under section 517 of the Tariff Act of 1930, 19 U.S.C. § 1517(g)(1). Section 1517(g)(2), in turn, directs that this court

shall examine—

> (A) whether the Commissioner fully complied with all procedures under subsections (c) and (f); and
>
> (B) whether any determination, finding, or conclusion is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.

19 U.S.C. § 1517(g)(2); *see also* 28 U.S.C. § 2640(e) (providing that "[i]n any civil action not specified in this section"—including actions, such as this, commenced under Section 517 of the Tariff Act of 1930, which are not so specified—"the Court of International Trade shall review the matter as provided in section 706 of title 5," i.e., for agency action that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," 5 U.S.C. § 706(2)(A)).

Plaintiffs contend that the court must also decide whether Customs's decisions were supported by substantial evidence. ECF 49, at 83. The statute requires the court to determine whether Customs complied with the *procedures* in § 1517(c) and (f).

In turn, § 1517(c)(1)(A) directs Customs to make its final determination "based on substantial evidence," while § 1517(f) directs that the administrative appeal involves de novo review. The question is therefore whether the administrative record shows that Customs applied substantial evidence review—not whether substantial evi-

[6] The court expressed doubts about whether Plaintiff-Intervenors qualified for intervention as of right under USCIT R. 24(a)(2). *See* Case 20–3914, ECF 23, at 2–3. Nevertheless, because the motions were unopposed and the issue is not jurisdictional, *id.*, the court granted the motions.

dence supports the agency's findings. *See Ikadan Sys. USA, Inc. v. United States*, Ct. No. 21–00592, Slip Op. 23–88, at 20, 2023 WL 3962058, at *9 (CIT June 13, 2023) (emphasizing the distinction between "arbitrariness review" and "substantial evidence" review and noting that this court applies the former in EAPA cases).

IV

Plaintiffs challenge Customs's imposition of interim measures as "invalid" and argue the measures must be rescinded based on multiple theories. They also contend the agency improperly applied the substantial evidence standard in making its final determination and on administrative appeal. For their part, Plaintiff-Intervenors contend that Customs improperly denied them access to administrative remedies.

A

Plaintiffs' main argument challenges Customs's decision to impose interim measures. Plaintiffs concede, however, that "[t]he EAPA statute's interim measures in accordance with 19 U.S.C. § 1517(e), taken by themselves, are not problematic . . . ." ECF 49, at 30. Thus, the court understands Plaintiffs to challenge not specific interim measures per se, but instead the procedures Customs employed in the initial phase of its investigation preceding the imposition of those measures and whether the record allowed for a "reasonable suspicion" of evasion. Thus, if the court sustains Customs's procedures and findings, the agency's interim decision stands.

1

The Coalition argues that "Congress did not provide for judicial review of decisions to impose interim measures." ECF 58, at 19 (citing 19 U.S.C. § 1517(g)(1)–(2)). The court addresses this threshold issue first.

The Coalition asserts that in *Diamond Tools Technology LLC v. United States*, 545 F. Supp. 3d 1324 (CIT 2021), the court "read as purposeful the lack of any reference to 19 U.S.C. § 1517(e), concerning interim measures, in the EAPA's judicial review provisions." ECF 58, at 19 (citing 545 F. Supp. 3d at 1335). But *Diamond Tools* undercuts that argument: "The court's review of Customs' determination as to evasion may encompass interim decisions subsumed into the final determination." *Id.* at 1331 (quoting *Vietnam Finewood Co. v. United States*, 466 F. Supp. 3d 1273, 1284 (CIT 2020)).

The court finds *Diamond Tools* persuasive. That leaves the question of what standard of review applies. Because the interim decision merges into the final determination, which Customs renders under §

1517(c), the court concludes that as a general matter the appropriate portions of the standard of review prescribed in § 1517(g) apply. Subsection (g) governs review of "whether a determination under subsection (c) . . . is conducted in accordance with [that] subsection[ ]." 19 U.S.C. § 1517(g). As to a final determination, subsection (g) requires that the court determine whether Customs fully complied with all subsection (c) procedures and "whether any determination, finding, or conclusion is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." *Id.* § 1517(g)(1), (2).

The subsection (c) procedures, however, do not apply to interim decisions, so that leaves the latter part of the standard—"arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." Those words also appear in the APA's "scope of review" section, *see* 5 U.S.C. § 706(2)(A), which applies here as the default standard of review. *See* 28 U.S.C. § 2640(e); *see also* 19 U.S.C. § 1517(g)(3) ("Nothing in this subsection shall affect the availability of judicial review to an interested party under any other provision of law.").

2

Plaintiffs argue that the "interim measures are invalid because [Customs] neither gave timely notice to Plaintiffs of the ongoing EAPA investigation and impending interim measures nor provided Plaintiffs a timely opportunity to rebut and defend against the evasion allegation and imposition of the interim measures." ECF 49, at 41.

Plaintiffs do not dispute that Customs complied with its regulation governing notice of an EAPA investigation and interim measures. *See* 19 C.F.R. § 165.15(d)(1). Customs opened the investigation here on June 26, 2019, and notified Plaintiffs and the Coalition of the investigation and the imposition of interim measures on October 1, 2019.[7] *See* Appx1020–1021; *see also* ECF 49, at 31.

Plaintiffs acknowledge that the statute "is silent . . . on when [Customs] must give notice of allegations of evasion filed with the agency and [Customs]'s decision to initiate an EAPA investigation." ECF 49, at 31. But they contend that the lack of notice and the opportunity to be heard prior to the imposition of interim measures violated their due process rights. *Id.* at 31–32.

Plaintiffs rely on Supreme Court case law about receiving notice before an adverse action. *See generally id.* at 27–33. They also com-

[7] While, by the court's math, Customs gave notice one day late, an agency's simple failure to follow a procedural requirement does not void subsequent agency action unless a plaintiff shows substantial prejudice, *Dixon Ticonderoga Co. v. United States*, 468 F.3d 1353, 1355 (Fed. Cir. 2006), which Plaintiffs have not.

pare EAPA to the antidumping and countervailing duty statute. *Id.* at 34. They also contend that Customs's EAPA regulations are unenforceable "interpretive rules" for APA purposes. They demand that the court set the regulations aside because the agency published them as "interim regulations" and sought public comments but then "never issued a final rule with its consideration of all comments received."[8] ECF 49, at 35–36. They also contend—without citing the regulations or the Federal Register notice—that Customs "designat[ed] its interim regulations as only interpretive" and therefore cannot use those rules in its investigations because interpretive "rules such as 19 CFR Part 165 do not impose any 'legally binding requirements' on private parties." *Id.* at 37 (quoting *Kisor v. Wilkie*, 139 S. Ct. 2400, 2420 (2019)).

In response, the government emphasizes the statute's silence about when Customs must give notice of an investigation or of the imposition of interim measures and further notes that the statute gives the agency "broad discretion to determine the scope and means of the investigation . . . ." ECF 56, at 5. "The statute does not provide importers with any pre-initiation right to comment on whether [Customs] will suspend liquidation or take other action to protect the revenue . . . ." *Id.* at 18. The government contends that Plaintiffs have not identified any protected interest to support a due process claim and notes that they focus on the interim measures' financial effects. *Id.* at 19–20.

> [T]he EAPA statute *expressly authorizes* [Customs] to extend as interim measures the period for liquidating entries made prior to the initiation of the investigation. Thus, the statutorily authorized interim measures imposed by [Customs] do not give rise to a protected interest beyond what the statute contemplates.

Id. at 20 (emphasis in original; quotation marks and citations omitted).

The key principle, according to the government, is that the statute does not prohibit Customs from acting as it did in this case:

> [W]hile plaintiffs may wish to have known about the impending interim measures prior to imposition, there was no requirement

[8] Customs solicited written comments from interested persons and stated that while it regarded the interim rule as procedural and exempt from notice-and-comment requirements, it had sought comments anyway. *See Investigation of Claims of Evasion of Antidumping and Countervailing Duty Orders*, 81 Fed. Reg. 56,477, 56,481 (Dep't Homeland Sec. and Dep't Treasury Aug. 22, 2016). The extended comment period expired on December 20, 2016, and there is no indication that Customs ever acted on any comments received or issued a final rule.

> under the EAPA statute for [Customs] to provide such notice. In fact, notice may very well have thwarted the investigation. Thus, plaintiffs fail to establish that their due process rights were violated because [Customs] imposed interim measures without prior notification.

Id. at 23–24. In other words, the government asserts that Plaintiffs cannot validly demand to be afforded any procedures that EAPA itself does not require, because to impose any such directive would wrongly impinge on Customs's discretion to establish procedures. *Id.* at 29.

a

Plaintiffs cite nothing to support their contention that Customs has "designated" its EAPA regulations "as only interpretive." ECF 49, at 37. They simply rely on their own characterization of the regulations.

The Federal Register notice, however, shows that Customs designated the regulations as "procedural" rather than "interpretive": "[T]his rule amends the U.S. Customs and Border Protection regulations to set forth procedures for [Customs] to investigate claims of evasion of antidumping and countervailing duty orders." 81 Fed. Reg. at 56,477; *see also id.* at 56,479 (stating that purpose of 19 C.F.R. Part 165 is to set forth "procedures for investigating claims of evasion").

Unless otherwise required by statute, the APA exempts "rules of agency organization, procedure, or practice" from notice and comment requirements applicable to substantive rules. 5 U.S.C. § 553(b)(A). "[A] matter relating to practice or procedure means technical regulation of the form of agency action and proceedings." *Pickus v. U.S. Bd. of Parole*, 507 F.2d 1107, 1113 (D.C. Cir. 1974) (cleaned up).

Plaintiffs' attempt to characterize 19 C.F.R. § 165.15(d)(1) as an invalid interpretive rule fails because the regulation plainly "prescribes order and formality in the transaction of . . . business." *Id.* at 1114. Moreover, "an otherwise-procedural rule does not become a substantive one, for notice-and-comment purposes, simply because it imposes a burden on regulated parties." *James V. Hurson Assocs., Inc. v. Glickman*, 229 F.3d 277, 281 (D.C. Cir. 2000) (cleaned up).

b

"The first inquiry in every due process challenge is whether the plaintiff has been deprived of a protected interest in 'property' or 'liberty.' " *Int'l Custom Prods., Inc. v. United States*, 791 F.3d 1329, 1337 (Fed. Cir. 2015) (quoting *Am. Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 59 (1999)). "[F]or a benefit to warrant the procedural protections of due process, a person clearly must have more than an abstract need or desire for it. He must, instead, have a legitimate claim

of entitlement to it." *Id.* (cleaned up) (citing *Bd. of Regents of State Colls. v. Roth*, 408 U.S. 564, 577 (1972)).

An importer has no "legitimate claim of entitlement" to the right to engage in international trade, to import merchandise under a specific tariff classification or rate of duty, or to rely on the maintenance of a particular duty rate. *Id.* But there is a distinction between the *future* importation of goods and the importer's interest in the duty rate imposed on goods *already imported*—as to the latter, there might be such an interest. *Diamond Tools*, 545 F. Supp. 3d at 1340–41 (discussing *Nereida Trading Co. v. United States*, 683 F. Supp. 2d 1348, 1355 (CIT 2010)). *Diamond Tools*, however, found it critical that

> [i]nterim measures are temporary. Under the EAPA statute, Customs can extend interim measures only upon a final determination of evasion. If Customs finds in its final determination that no evasion exists, any measures taken in the interim, such as a suspension of liquidation or collection of cash deposits, will be lifted and any additional duties or cash deposits paid will be reimbursed to the importer with interest.

Id. at 1341 (cleaned up).

Diamond Tools suggested that an importer *might* have a protected interest in the proper assessment of tariffs on goods already imported, but Plaintiffs do not adopt that theory except to a very limited extent (discussed below). Instead, they complain that they had to return plywood that had already been shipped because they could not afford the deposits required by the interim measures. *See* ECF 49, at 45. But those were future importations, so they had no protected interest in the rate of duty.

As to the issue of goods already imported, Plaintiffs contend that Customs could not impose interim measures on covered merchandise entered before Customs notified them of the initiation of the EAPA investigation—October 1, 2019. *Id.* at 47. As support, they cite *Shelter Forest International Acquisition, Inc. v. United States*, 497 F. Supp. 3d 1388, 1404 (CIT 2021), a case brought under the anticircumvention statute, 19 U.S.C. § 1677j. They contend that because the court there found that the Department of Commerce acted wrongly by trying to give three days' retroactive effect to its order, Customs necessarily acted wrongly here as well. ECF 49, at 47.

Shelter Forest addressed an investigation by a different agency (Commerce there, Customs here) under a different statute (§ 1677j there, § 1517 here) and a different set of administrative regulations (19 C.F.R. Part 351 there, 19 C.F.R. Part 165 here), so it is unclear how it could apply to this case. More importantly, EAPA expressly

provides that, upon a finding of "reasonable suspicion" of evasion, Customs must "extend the period for liquidating each unliquidated entry of such covered merchandise that entered *before the date of the initiation* of the investigation." 19 U.S.C. § 1517(e)(2) (emphasis added).

The regulations, in turn, provide that for unliquidated entries that entered before the investigation's initiation date, Customs will extend the liquidation period and "[t]ake such additional measures as [Customs] determines necessary to protect the revenue of the United States, including requiring a single transaction bond or additional security or the posting of a cash deposit with respect to such covered merchandise . . . ." 19 C.F.R. § 165.24(b)(1)(ii)–(iii).

EAPA and its regulations expressly direct Customs to extend liquidation for unliquidated entries of covered merchandise that entered before the investigation started. Thus, *Shelter Forest*'s reasoning does not apply here. Customs did what the statute instructed.

Finally, Plaintiffs argue that the government's response brief "does not include any analysis of what Plaintiffs' protected interests might be." ECF 65, at 21. But they fail to explain why the government needs to do that. It is their burden to establish a protected interest sufficient to give rise to a due process claim and to show how the alleged due process violation works some sort of harm to that interest. *Cf. Diamond Tools*, 545 F. Supp. 3d at 1341 ("The court does not exclude the possibility that a protected interest may exist; rather, DTT USA has failed to establish what any such interest may be in this specific context and the court declines to do counsel's work."). Because they have not done so, the court need not consider their argument that due process entitled them to notice of the EAPA investigation prior to notice of interim measures.[9]

3

EAPA requires Customs to "decide based on the investigation if there is a *reasonable suspicion* that . . . covered merchandise was entered into the customs territory of the United States through evasion" and, if so, to impose interim measures. 19 U.S.C. § 1517(e) (emphasis added).

Plaintiffs argue that a "reasonable suspicion" requires "a particularized and objective basis for suspecting the existence of proscribed behavior, taking into account the totality of the circumstances." ECF

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[9] In any event, Plaintiffs have failed to identify either the particular date on which they contend they should have received notice or the authority they contend would authorize the court to order Customs to adopt any specific date.

49, at 65 (quoting *AL Tech Specialty Steel Corp. v. United States*, 575 F. Supp. 1277, 1279–80 (CIT 1983)). Plaintiffs are correct that in a non-EAPA context, when this court has considered the meaning of "reasonable grounds to believe or suspect," we have sometimes borrowed from criminal law cases applying the "reasonable suspicion" standard for searches. *See, e.g.*, *China Nat'l Mach. Imp. & Exp. Corp. v. United States*, 264 F. Supp. 2d 1229, 1239 (CIT 2003); *Hangzhou Spring Washer Co. v. United States*, 387 F. Supp. 2d 1236, 1248 (CIT 2005) (quoting *China Nat'l*, 264 F. Supp. 2d at 1239); *Peer Bearing Co.–Changshan v. United States*, 298 F. Supp. 2d 1328, 1336 (CIT 2003) (citing *China Nat'l*, 264 F. Supp. 2d at 1239, and *AL Tech*, 575 F. Supp. at 1280). *But see CEK Grp. LLC v. United States*, Ct. No. 22–00082, Slip Op. 23–69, at 7–8 & n.1, 2023 WL 3198816, at *3 & n.1 (CIT May 2, 2023) (noting that what level of suspicion is "reasonable" varies from statute to statute and expressing doubt that *Terry v. Ohio*, 392 U.S. 1 (1968), applies in the EAPA context because Fourth Amendment concerns are not present).

The parties cite no Federal Circuit precedent on this issue. Nor do Customs's regulations define the term. *See* 19 C.F.R. §§ 165.24 (using "reasonable suspicion" multiple times without defining it), 165.1 (defining various terms but omitting "reasonable suspicion").

In considering what the phrase means in EAPA, it is crucial to consider the difference between the standard for imposing interim measures—"reasonable suspicion" of evasion, 19 U.S.C. § 1517(e)—and the one for final determinations—whether "substantial evidence" shows that covered merchandise entered through evasion, *id.* § 1517(c)(1)(A). Because the standards use different terminology, their meanings presumptively differ, and the court assumes that the standard for an interim decision is less demanding than for a final determination.[10]

Dictionary definitions of "suspicion" include "[i]magination of something (not necessarily evil) as possible or likely; a faint belief that something is the case; a notion, an inkling," 2 *Shorter Oxford English Dictionary* 3128 (5th ed. 2002) (italics removed) (definition #3), and "[a] slight indication or trace, a very small amount, (of something)," *id.* (italics removed) (definition #4). Those definitions align with the one Plaintiffs offer, which also states that a "suspicion" may be *with-*

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[10] EAPA contains a third standard directing Customs to initiate an investigation if the evasion allegation "reasonably *suggests* that covered merchandise has been entered . . . through evasion." *Id.* § 1517(b)(1) (emphasis added). The standards apply at different stages of the process, and it is reasonable to conclude that Congress meant each ensuing standard to require something more than is needed at the earlier stage(s)—that is, "reasonably suggests" is less demanding than "reasonable suspicion," which in turn is less demanding than "substantial evidence." *Cf. CEK*, Slip Op. 23–69, at 8–9, 2023 WL 3198816, at **3–4 (finding that "reasonably suggests" is a low hurdle).

out proof or based on *slight evidence*. ECF 49, at 65 (citing Merriam Webster's Online Dictionary). The court therefore construes the case law cited above, which refers to making the "reasonable suspicion" finding based on the totality of the evidence and requiring "a particularized and objective basis" for that finding, as not imposing a difficult burden on the agency. Moreover, because under the more-demanding "substantial evidence" standard a conclusion may still be supported even if other evidence fairly detracts from the conclusion, the same principle necessarily applies under the less-demanding "reasonable suspicion" standard.

Therefore, as the Coalition correctly notes, *see* ECF 58, at 22, it is inappropriate to flyspeck the evidence piece-by-piece to analyze what each item shows or does not show—the question is what all the evidence at the relevant stage of the investigation showed.

Plaintiffs argue that Customs "had no specific evidence that Plaintiffs were importing Covered Merchandise into the U.S. by means of false statements or documents." ECF 49, at 66. But they then flyspeck the evidence. They dispute the reliability of the trade statistics Customs cited. *Id.* at 67. They argue that Plaintiff-Intervenors' operations in the Sihanoukville Special Economic Zone, that Zone's purpose as an area to facilitate trade with China, and the timing of Plaintiff-Intervenors' establishment "exactly at a time when trade opportunities arose" reflect at most "the dictates of free market economics," which this court has recognized as legitimate conduct. *Id.* at 67–68. They contend that it is normal for production and exportation to shift from a country subject to high antidumping duty rates to a country with low duties. *Id.* at 68–69. Finally, they attack the probativity of Customs' internal e-mail communications. *Id.* at 69–72.

While Plaintiffs may be correct about the *independent* significance of particular pieces of evidence, they miss the forest for the trees. The interim decision discussed Plaintiffs' questionnaire responses and noted that InterGlobal provided information consistent with what agency personnel had observed at a prior visit to LB Wood's facility. Appx1026. U.S. Global did not provide all the information requested by Customs nor explain its failure to do so, but the information it did provide was similarly consistent with agency personnel's prior site visit. *Id.* Customs placed the evidence from that visit on the record and noted it showed both that the wood observed at Happy Home's facility was of a type that could not have been harvested in Cambodia's climate and that the LB Wood and Happy Home factories lacked the sophistication to produce the plywood seen there. Appx1027.

Critically, Customs also cited an affidavit in which Happy Home's [[

]] *Id.* The agency concluded that "[t]he evidence on the record supports a reasonable suspicion that the [[ ]] plywood may have originated in China and that the '[[ ]]' label on Happy Home's and LB Wood's products is not accurate." Appx1028.

The totality of the evidence cited by Customs is easily more than the "slight evidence" or "very small amount" needed to support a "reasonable suspicion." Plaintiffs effectively ask the court to re-weigh the evidence. Because "substantial evidence" review does not allow the court to do so, *see, e.g.*, *Celgene Corp. v. Peter*, 931 F.3d 1342, 1352 (Fed. Cir. 2019), it is that much *less* appropriate for the court to re-weigh the evidence when considering an agency's application of the less-demanding "reasonable suspicion" standard. As the Coalition persuasively argues, Plaintiffs and Plaintiff-Intervenors have not established that Customs had to review the evidence in the way they would prefer. *See* ECF 58, at 26. The court therefore concludes that Customs's finding of a "reasonable suspicion" of evasion was not arbitrary, capricious, an abuse of discretion, or otherwise contrary to law.

4

Plaintiffs insist that Customs had to give them access to unredacted confidential information throughout the investigation on the same terms used by the Department of Commerce in antidumping and countervailing duty investigations. *See* ECF 49, at 48–65. Plaintiff-Intervenors also refer to the Commerce and ITC procedures, ECF 52, at 11, and assert that "there is no legitimate reason for [Customs] to withhold confidential information that was used against interested parties in EAPA Inv. 7321 and not establish an Administrative Protective Order," *id.* at 13.

The government responds that, "as [P]laintiffs acknowledge, there is no statutory authority that requires or authorizes [Customs] to disclose business confidential information under an administrative protective order similar to an antidumping and countervailing duty investigation or safeguards investigation." ECF 56, at 24 (citation to Plaintiffs' brief omitted) (citing, *inter alia*, 19 U.S.C. § 1677f(c)(1)(A), which *requires* Commerce and the ITC to make "business proprietary information" available upon application). The Coalition agrees and further notes that while Customs's regulations do require it to provide a "public summary" of any business confidential information

placed on the record, Plaintiffs and Plaintiff-Intervenors make no specific arguments about the inadequacy of particular public summaries. ECF 58, at 14–15.

The court addresses the last point first in view of persuasive case law. In *Royal Brush Manufacturing, Inc. v. United States*, 483 F. Supp. 3d 1294 (CIT 2020), the court remanded an EAPA proceeding because Customs had "failed to ensure that confidential filings were accompanied by the requisite public summaries." *Id.* at 1305. The record also showed the agency had both failed to respond to the plaintiff's request for disclosure of certain photographs and failed to address the plaintiff's due process arguments in either of its determinations. *Id.* at 1306. The court emphasized Customs's "inattention" to its regulation requiring the submission of public summaries of confidential documents. *Id.* at 1306–07. *Royal Brush*'s conclusion was particularly instructive:

> To be clear, the court does not hold that Royal Brush is entitled to receive access to confidential information. Congress has not mandated that Royal Brush be afforded such access and Royal Brush has not shown that due process requires it. However, Customs must ensure compliance with the public summarization requirements provided in its own regulations.

Id. at 1308.

The following year, *Diamond Tools* analyzed *Royal Brush* in considering another plaintiff's complaint that Customs did not allow access to the confidential versions of various record documents. The *Diamond Tools* plaintiff did not "challenge that Customs complied with its regulations to provide public summaries of proprietary information" and did not raise any administrative objections to the use of public summaries. 545 F. Supp. 3d at 1343. The court noted *Royal Brush*'s rejection of the argument that due process requires full access to confidential information and then found the plaintiff failed to show that access to any particular information was necessary. *Id.* "Customs complied with its regulation concerning public summarization of confidential information. As such, the court finds that Customs did not violate DTT USA's due process rights." *Id.*

Perhaps aware that the *Diamond Tools* plaintiff did not object to the public summaries, Plaintiffs here argue that "public summaries of confidential information are insufficient to ensure effective rebuttal

and defense."[11] ECF 49, at 59 (point heading; title case removed). They fail, however, to address any *particular* public summary, much less explain why they believe it was inadequate—instead, they attack the adequacy of public summaries *in general*, arguing that "[f]or proper agency adjudication that does not violate the due process rights of the parties, full disclosure of confidential information is required." ECF 49, at 60–61 (citing *United States v. N.S. Food Prods. Corp.*, 568 F.2d 240, 251 (2d Cir. 1977)). Plaintiffs ask the court to "declare [Customs]'s enforcement measures and conduct of EAPA Inv. 7321 to be null and void" because the agency did not disclose the entire confidential record. *Id.* at 64. But, as the *Royal Brush* court found when that case returned from remand, Customs's "authority to provide public summaries of business proprietary information, rather than the information itself," is "established," and the plaintiff there failed to show "that greater access to confidential information is otherwise constitutionally required." *Royal Brush Mfg., Inc. v. United States*, 545 F. Supp. 3d 1357, 1366 (CIT 2021).

The same is true here. The *only* specific argument Plaintiffs advance as to any particular piece of evidence is the following:

> Here, [Customs] relied on a report and photographs of Plaintiffs-Intervenors' premises, which cannot be disclosed to the general public. Also, the third-party data that [Customs] put on the record concerning U.S. importers not parties to EAPA Inv. 7321, but which [Customs] claims support its interim measures against Plaintiffs[,] would also necessarily remain confidential.

ECF 49, at 62–63.

Plaintiffs do not assert that Customs failed to provide public summaries of the identified materials or that the summaries were inadequate. They also cite nothing in the administrative record showing that they raised any such concerns *to Customs*.[12] *See Diamond Tools*, 545 F. Supp. 3d at 1343 (faulting plaintiff for failing to raise "specific

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[11] Despite joining Plaintiffs' complaints about the use of public summaries, *see* ECF 52, at 37, Plaintiff-Intervenors peculiarly argue that LB Wood "did not keep a full list of products in brochures or catalogs" such that Customs should have accepted a summary chart Plaintiff-Intervenors apparently submitted, ECF 70, at 7–8. It is unclear what that summary is because the brief cites over two thousand pages of record materials (Appx26661–27335 and Appx27788–29302) and then contains the citation "*[s]ee id.* at Exhibit 1, Summary Sheet." In any event, Plaintiff-Intervenors contend that, on the one hand, Customs cannot validly use summary documents but, on the other hand, it should accept the same from parties. "The equitable rule, 'What's sauce for the goose is sauce for the gander,' would therefore appear to be applicable here." *Bethell v. Koch*, 427 F.2d 1372, 1377 n.6 (CCPA 1970).

[12] The joint appendix in this case consists of 23,346 pages spread (in the confidential version) over 35 volumes. If the appendix shows that Plaintiffs raised their concerns before Customs, it was their obligation to cite the relevant pages.

concerns" before Customs); *cf. Royal Brush*, 483 F. Supp. 3d at 1306 (noting that Customs ignored plaintiff's complaints about confidential information). Nor do they argue that they made any effort to produce their own photographs to dispute Customs's characterization of images the agency placed in the record. *See Skyview Cabinet USA, Inc. v. United States*, Ct. No. 22–00080, Slip Op. 23–91, at 32–33, 2023 WL 4073781, at *12 (CIT June 20, 2023) ("In the unique context of photos and videos, nothing Customs did prevented [the plaintiff] from submitting photos and videos of any facility . . . that Plaintiff claimed manufactured the merchandise in question" or from "creat[ing] a video walkthrough demonstrating actual manufacturing . . . . Due process requires notice and an opportunity to be heard by providing evidence at a meaningful point in the proceedings. Plaintiff received that opportunity, and its as-applied due process challenge regarding photographic and video evidence must therefore fail.") (cleaned up).

Plaintiffs' and Plaintiff-Intervenors' other argument is, essentially, that because Commerce and the ITC allow access to confidential information under administrative protective orders, Customs must employ the same procedure. But "Commerce's actions are not now before the court." *Royal Brush*, 483 F. Supp. 3d 1308 n.22. More importantly, as noted above, a different statute, with different requirements, governs Commerce and ITC investigations.

Plaintiffs cite no authority permitting this court to order Customs to adopt any particular procedure, much less the one Commerce and the ITC use,[13] and EAPA directs the Secretary of Homeland Security—*not* the Court of International Trade—to "prescribe such regulations as may be necessary to implement the amendments made by this section." Pub. L. No. 114–125, § 421, 130 Stat. 122, 169 (2016); *see generally Vt. Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, Inc.*, 435 U.S. 519, 523–24 (1978) (holding that where agency has not chosen to grant additional procedural rights, courts cannot impose requirements and may not grant procedural rights that neither Congress nor agency saw fit to impose).

* * *

In sum, Plaintiffs have not established any protected interest for due process purposes entitling them to any procedures other than what Customs granted them; the totality of the evidence permitted a "reasonable suspicion" that covered merchandise entered the United States via evasion; and Plaintiffs' arguments about access to confi-

[13] Put differently, Plaintiffs have no basis for insisting that the procedure they prefer is the only acceptable one. Plaintiff-Intervenors' complaints about access to confidential information, *see* ECF 52, at 19 (arguing, essentially, "Commerce does it that way"), fail for the same reasons.

dential information lack merit. Customs's imposition of interim measures was not arbitrary, capricious, an abuse of discretion, or otherwise contrary to law.

B

Plaintiffs argue that Customs "improperly applied the substantial evidence standard in [its] determinations of evasion," ECF 49, at 74, and "improperly applied the substantial evidence standard in its de novo review and final determination," *id.* at 117. The court understands Plaintiffs' theory to be that the agency *misapplied* the standard, not that it erred by citing "substantial evidence" as the applicable standard required by statute.

1

Plaintiffs contend that Customs defines the "substantial evidence" standard "as an image of its own 'reasonable mind' and whatever [the agency's] mind might consider adequate to support a conclusion." ECF 49, at 80 (citing Appx1038 n.32). The cited footnote in Customs's final determination reads: "Substantial evidence is not defined in the statute. However, the Federal Circuit has stated that 'substantial evidence means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.' " Appx1038 n.32 (quoting *A.L. Patterson, Inc. v. United States*, 585 F. App'x 778, 781–82 (Fed. Cir. 2014)). Despite citing a nonprecedential opinion, the agency stated the correct standard. *Cf. Nippon Steel Corp. v. United States*, 337 F.3d 1373, 1379 (Fed. Cir. 2003) (defining substantial evidence as "more than a mere scintilla, as such relevant evidence as a reasonable mind might accept as adequate to support a conclusion").

Plaintiffs offer no support for their theory that Customs applied a subjective review, rather than the objective "reasonable mind" standard. Instead, they shift gears and address access to confidential information. *See* ECF 49, at 83. This argument fails for the reasons discussed above.

Plaintiffs then argue that "[t]he agency's failure to put forward, in advance, the potential of adverse action, any record of any kind, substantial or otherwise, is a fatal flaw." *Id.* at 84. It is unclear what that sentence means, but if it means Customs did not rely on an administrative record, that argument is unavailing.

Plaintiffs also argue that the administrative record "is devoid of any evidence that Plaintiff-Intervenors transshipped plywood from China and sold Chinese plywood to Plaintiffs or that Plaintiffs commingled Chinese plywood with Cambodian plywood." *Id.* It appears to the court that Plaintiffs are equating "evidence" with "concrete proof," such that absent hard proof of transshipment or commingling, they

prevail. But they forget that "substantial evidence" does not require concrete proof—rather, it asks whether a reasonable mind might accept the evidence to support a conclusion. Here, Customs cited evidence in the administrative record supporting its conclusion.

Thus, Plaintiffs complain that Customs "speculated that Plaintiff-Intervenors 'likely' commingled Chinese plywood with their own plywood manufactured in Cambodia." *Id.* at 85 (citing Appx1043, Appx1045, Appx1048, Appx1050). Their objection appears to be to the word "likely." Elsewhere, however, Customs made more definitive findings that, in consideration of the full context, were based on the totality of the evidence. *See* Appx1043 (LB Wood); Appx1049–1050 (Happy Home).[14]

Customs also devoted several pages to discussing why it found the evidence Plaintiff-Intervenors submitted unconvincing or unreliable. Appx1040–1043 (LB Wood); Appx1043–1049 (Happy Home). Customs rejected arguments from both Plaintiffs and Plaintiff-Intervenors about the reliability (or lack thereof) of the data Customs used to determine Cambodia's total plywood production between 2016 and 2017 and explained why it considered those data authoritative and reliable. Appx1049. That is what the "substantial evidence" standard required Customs to do—it explained the evidence on which it relied and why it found the totality of that evidence supported its conclusion, and it addressed the parties' evidence and explained why it found that unconvincing.

Plaintiffs and Plaintiff-Intervenors, however, contend that they "submitted voluminous evidence for the record" proving their position. ECF 49, at 90–91; *see also* ECF 52, at 23 (referring to number of pages submitted). Indeed it was voluminous: They cite massive blocks of material, some referring to thousands of record pages. *See, e.g.*, ECF 49, at 91 (citing, *inter alia*, Appx21538–33008); ECF 52, at 23 (citing, *inter alia*, Appx33178–44421). A citation to a block of over 11,000 pages is the functional equivalent of citing nothing. "Judges are not like pigs, hunting for truffles buried in briefs" or in administrative records. *United States v. Dunkel*, 927 F.2d 955, 956 (7th Cir. 1991) (per curiam).

Citing those huge blocks of material, Plaintiffs argue that Customs ignored their "documented proof" of their operations in Cambodia and their documents that "confirm that the companies possessed sufficient manufacturing capacity and quantity to produce all of the mer-

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[14] Plaintiffs attack Customs's reference to the June 2018 site visit for various reasons. ECF 49, at 86–87. But again, the question is not what the agency found any one piece of evidence to show, but what the agency found the totality of the evidence to show. The record establishes that Customs treated the June 2018 site visit as but one of many factors it considered in its analysis.

chandise sold to the U.S." ECF 49, at 92–93. But those block citations establish only one thing—that Plaintiffs merely submitted copious filings to Customs.

Plaintiffs then characterize various photographs in the record and argue about what they "appear" to show. *Id.* at 95–96. They apparently contend the photographs could support a different conclusion than Customs reached. But that cannot by itself undercut Customs's finding of "substantial evidence":

> The substantial evidence test . . . does not require that there be an absence of evidence detracting from the agency's conclusion, nor is there an absence of substantial evidence simply because the reviewing court would have reached a different conclusion based on the same record.

Cleo Inc. v. United States, 501 F.3d 1291, 1296 (Fed. Cir. 2007). Moreover, in an EAPA proceeding the court is to determine whether Customs applied the substantial evidence standard in reaching its final determination. The court finds that Customs did so here and that its conclusions are not arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.

2

In its separate reply, InterGlobal Forest complains about "the supposition and bias inherent in [Customs]'s Notice of Determination as to Evasion," i.e., Customs's final determination. ECF 68, at 1. If InterGlobal Forest contends that Customs acted in bad faith, that argument fails. "[S]howing a government official acted in bad faith is intended to be very difficult" in view of the extremely strong presumption that administrative agency actions are taken in good faith. *Am-Pro Prot. Agency, Inc. v. United States*, 281 F.3d 1234, 1240 (Fed. Cir. 2002). The company has not shown clear and convincing evidence of actual bias or malice by Customs personnel.[15]

3

Plaintiffs and Plaintiff-Intervenors all requested administrative review. Customs found Plaintiff-Intervenors ineligible to do so: "Although they are considered interested parties as per 19 CFR § 165.1, LB Wood and Happy Home are not considered parties to the investigation. Only parties to the investigation are entitled to file a request for review." Appx1053 (footnotes omitted). Plaintiffs and Plaintiff-

[15] InterGlobal Forest also complains that its former counsel allegedly made mistakes and failed to take certain actions, as to which the company says it "should have the opportunity to supplement this record." ECF 68, at 22. InterGlobal cites no authority establishing that ineffective assistance of counsel is a basis for relief in an EAPA proceeding.

Intervenors complain that Customs's appellate office erred by disregarding the latter's submissions. Under the statute, "a person determined to have entered . . . covered merchandise through evasion [here, Plaintiffs] or an interested party that filed an allegation . . . that resulted in the initiation of an investigation [here, the Coalition] . . . may file an appeal . . . ." 19 U.S.C. § 1517(f). While Customs cited its regulations, its rejection of Plaintiff-Intervenors' appeals followed the statute.

Plaintiffs also argue that the statute only limits who can *seek* an administrative review—it does not limit who can then *participate*. Customs's regulations, however, require that a party's brief be part of its request for administrative review. *See* 19 C.F.R. § 165.41. The regulations also provide that only a "party to the investigation" may respond to the request(s) for review. *See id.* § 165.42. "The phrase 'parties to the investigation' means the interested party . . . who filed the allegation of evasion [the Coalition] and the importer (or importers . . .) who allegedly engaged in evasion [Plaintiffs]." *Id.* § 165.1.

Plaintiffs argue that "Plaintiff-Intervenors have the right under due process law to defend the integrity of their business operations, books and records, and their business relations with Plaintiffs." ECF 49, at 119–20. But they cite no authority in support of that proposition, nor do they offer authority establishing that Customs had to allow Plaintiff-Intervenors to participate in the administrative appeal or that this court can compel Customs to allow them to so participate. Thus, Customs's preclusion of Plaintiff-Intervenors' participation was not arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.

Plaintiffs then ask the court to re-weigh the evidence. *See, e.g.*, ECF 49, at 123–24 ("[Customs's appellate office] places inordinate weight on the brief email exchange regarding [Customs]'s June 6, 2018[,] visits to Plaintiff-Intervenors' facilities and the photographs the Agent took at that time."), 127–28 (complaining about the weight Customs gave to its site visit as compared to photographs Plaintiffs submitted). As noted above, the court cannot do that. Plaintiff-Intervenors, in turn, rely on speculation: "[Customs's appellate office] *may not even have reviewed* the underlying record . . . ." ECF 52, at 41–42 (emphasis added). It should be obvious that the court cannot overturn an agency decision based on a party's speculative complaints.

The administrative review determination discusses the evidence submitted by Plaintiffs and Plaintiff-Intervenors and addresses why Customs found that evidence flawed or unsupportive of their position. *See, e.g.*, Appx1066. It then states, "We find that the import data,

coupled with the evaluation of the production capabilities at the factories, discrepancies in record evidence[,] and unsubstantiated production quantities, substantiate [the original] finding of evasion," Appx1072 (emphasis in original), and itemizes the factors Customs found compelling, *id.* Thus, the agency employed substantial evidence review—the statutory standard. The court will not disturb the result.

* * *

For the foregoing reasons, the court **DENIES** the motions for judgment on the agency record filed by Plaintiffs (ECF 47) and Plaintiff-Intervenors (ECF 50), **GRANTS** judgment to Defendant and Defendant-Intervenor, *see* USCIT R. 56.2(b), and **SUSTAINS** Customs's final determination after administrative review in EAPA Investigation 7321. The court will enter judgment for the government and the Coalition. *See* USCIT R. 58(a).

Dated: June 22, 2023
New York, NY

/s/ M. Miller Baker
M. MILLER BAKER, JUDGE

Slip Op. 23–96

GREENFIRST FOREST PRODUCTS, AND GREENFIRST FOREST PRODUCTS (QC) INC., Plaintiffs, v. UNITED STATES Defendant.

Before: Claire R. Kelly, Judge
Court No. 22–00097

[Remanding the U.S. Department of Commerce's denial of plaintiffs' request for a changed circumstances review.]

Dated: July 6, 2023

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OPINION AND ORDER

Kelly, Judge:

Before the Court is the U.S. Department of Commerce's ("Commerce") remand redetermination pursuant to the Court's order in *GreenFirst Forest Prods. v. United States*, 604 F. Supp. 3d 1368 (Ct. Int'l Trade 2022) ("*GreenFirst I*") remanding Commerce's refusal to conduct a changed circumstances review for further explanation or reconsideration. Plaintiffs GreenFirst Forest Products Inc. and GreenFirst Forest Products (QC) Inc. (collectively, "GreenFirst") challenge the results of Commerce's remand redetermination. The Court again remands to Commerce for further explanation or reconsideration.

BACKGROUND

The Court presumes familiarity with the facts of this case from this Court's previous opinion in *GreenFirst I*, 604 F. Supp. 3d 1368, and now recounts only the facts relevant to the Court's review of the Remand Results. On November 8, 2017, Commerce issued its final determination that the Canadian government provided countervailable subsidies for certain softwood lumber products from Canada. *See Certain Softwood Lumber Products from Canada*, 82 Fed. Reg. 51,814 (Dep't Commerce Nov. 8, 2017). Rayonier A.M. Canada G.P. ("RYAM") was a Canadian softwood lumber producer subject to the countervailing duty ("CVD") order, and GreenFirst acquired RYAM's entire lum-

ber and newsprint business on August 28, 2021.[1] Compl. ¶¶ 2–3, Mar. 25, 2022, ECF No. 2. On October 4, 2021, GreenFirst requested that Commerce conduct a changed circumstances review ("CCR") to determine that it was RYAM's successor-in-interest. *Id.* ¶¶ 4, 13, Attach. A. On November 16, 2021, Commerce denied GreenFirst's request to initiate a CCR. *Id.* ¶¶ 5, 14, Attach. A.

On March 25, 2022, GreenFirst challenged Commerce's refusal to initiate a CCR as arbitrary and capricious, and moved for judgment on the agency record. *See* Compl. ¶¶ 24, 27; Pl.'s Mot. J. Agency R., July 29, 2022, ECF No. 22. This Court held that Commerce had not adequately explained its refusal to conduct a CCR, and remanded Commerce's determination for further explanation or consideration. *See GreenFirst I*, 604 F. Supp. 3d at 1373. On February 4, 2023, Commerce released the final results of its remand redetermination. *See* Final Results of Remand Redeterm. Purs. Ct. Remand, Feb. 16, 2023, ECF No. 29–1 ("Remand Results"). In its remand results, Commerce again determined that it would not conduct a successor-in-interest CCR for GreenFirst. *Id.* at 15–16. GreenFirst submitted comments on the remand results, and Defendant replied to GreenFirst's comments. *See* GreenFirst's Cmts. Final Results Redeterm Purs. Ct. Remand, April 3, 2023, ECF No. 32 ("Pl. Br."); Def.'s Resp. Pl.'s Mot. J. Agency R., May 3, 2023, ECF No. 33 ("Def. Br.").

JURISDICTION AND STANDARD OF REVIEW

The Court has jurisdiction pursuant to 28 U.S.C. § 1581(i)(2), (4) (2018). The Court reviews an action brought under 28 U.S.C. § 1581(i) under the same standards as provided under § 706 of the Administrative Procedure Act, as amended. *See* 28 U.S.C. § 2640(e). Under the statute, the reviewing court shall:

> (1) compel agency action unlawfully withheld or unreasonably delayed; and
>
> (2) hold unlawful and set aside agency action, findings and conclusions found to be—
>
> (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law

5 U.S.C. § 706(1)–(2)(A).

Under the arbitrary and capricious standard, courts consider whether the agency "entirely failed to consider an important aspect of

[1] Specifically, Commerce determined that GreenFirst purchased six lumber mills and one newsprint mill from RYAM, and that the purchase involved a change in ownership structure such that RYAM continues to operate as a business and now partially owns GreenFirst's parent company. *See* Compl., Attach. A, Mar. 25, 2022, ECF No. 2.

the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or [the decision] is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

DISCUSSION

GreenFirst argues that Commerce again arbitrarily denied its CCR request based on its inapposite *Pasta from Turkey* practice. Pl. Br. at 8. GreenFirst also argues that Commerce ignored the Court's instruction to further explain its practice on remand.[2] *Id.* at 3–4. Defendant counters that Commerce complied with the Court's remand order, and adequately explained why it would not be appropriate to grant GreenFirst a CCR, based on its *Pasta from Turkey* practice. Def. Br. at 2, 10. For the reasons that follow, the Court remands Commerce's determination for further explanation or reconsideration.

Pursuant to § 751(b) of the Tariff Act of 1930, as amended, 19 U.S.C. § 1675(b)(1),[3] Commerce shall review an affirmative CVD determination whenever it receives information from an interested party which shows "changed circumstances sufficient to warrant a review of such determination." *Id.* The statute does not define "changed circumstances." *Id.* Through practice, Commerce has established that successor-in-interest companies may be entitled to a CCR. *See, e.g.*, Heavy Walled Rectangular Welded Carbon Steel Pipes and Tubes from the Republic of Turkey: Not. of Initiation and Prelim. Results of [CVD CCR], 87 Fed. Reg. 10,772, 10,773 (Feb. 25, 2022) (finding a respondent was a successor-in-interest for CVD purposes). Commerce has further established that it will not conduct a successor-in-interest CCR when there is evidence of significant changes to a company. *See Certain Pasta from Turkey: Preliminary Results of [CVD CCR]*, 74 Fed. Reg. 47,225, 47,227 (Dep't Commerce Sept. 15, 2009) (Prelim. Results of [CVD CCR]), unchanged in *Certain Pasta from Turkey*, 74 Fed. Reg. 54,022 (Dep't Commerce Oct. 21, 2009) (Final Results of [CVD CCR]) ("*Pasta from Turkey*"). The respondent in *Pasta from*

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[2] GreenFirst also submitted supplemental authority showing that Commerce has preliminarily determined it to be RYAM's successor-in-interest in the context an antidumping CCR. *See* Pls.' Not. Supp. Authority, May 23, 2023, ECF No. 35. However, GreenFirst acknowledges that the legal standards for antidumping and CVD CCRs are different, and does not argue that Commerce must make an affirmative successorship determination for CVD purposes because of the results of its antidumping review. *See id.* Rather, GreenFirst has provided this information "simply to make the Court aware" of the parallel proceeding. *Id.* at 2.

[3] 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.

Turkey was individually examined in the prior administrative review. *See Certain Pasta from Turkey: Final Results of [CVD] Admin. Rev.*, 71 Fed. Reg. 52,774, 52,774 (Sept. 7, 2006) (final determination of CVD rate for respondent).

Commerce explained the rationale for its significant changes practice, stating that it would generally find a successor company to be the same as a predecessor company for cash deposit purposes "where there is no evidence of significant changes in the respondent's operations, ownership, corporate or legal structure during the relevant period . . . that could have affected the nature and extent of the respondent's subsidy levels." *Pasta from Turkey*, 74 Fed. Reg. at 47,227. Thus, in *Pasta from Turkey*, Commerce concludes that a putative successor-in-interest company with significant changes should not acquire the cash deposit rate of a predecessor company, because the changes "could affect the nature and extent of the respondent's subsidization." *Id.* at 47,228. Therefore, Commerce's *Pasta from Turkey* practice dictates that it will not conduct a CCR where it has evidence of significant changes in the successor company.[4] *Id.* at 47,225, 47,227.

In *GreenFirst I*, 604 F. Supp. 3d 1368, this Court held that Commerce had not adequately explained why its *Pasta from Turkey* practice applied when a predecessor company had not been individually examined. *Id.* at 1373. The Court explained that the purpose of a CVD CCR is to determine whether a successor company is the same entity as a predecessor company for subsidization purposes. *Id.* at 1372

[4] Under the statute, Commerce, may review a determination when it receives information showing sufficiently changed circumstances. 19 U.S.C. § 1675(b). One type of changed circumstance is a name change, which serves as the legal basis for Commerce to revise its instructions to the U.S. Department of Customs and Border Protection. *See* Heavy Walled Rectangular Welded Carbon Steel Pipes and Tubes from the Republic of Turkey: Not. of Initiation and Prelim. Results of [CVD CCR], 87 Fed. Reg. 10,772, 10,773 (Feb. 25, 2022) ("Where Commerce makes an affirmative CVD successorship finding, the successor's merchandise will be entitled to enter under the predecessor's cash deposit rate"). A party might be able to argue that it would be entitled to a different rate, i.e., circumstances had changed such that the determination should be modified because it had become the successor in interest to a company that had a different rate assigned under the prior determination. *See Pasta from Turkey* 74 Fed. Reg. at 47,226 ("the function of CCRs is to address the effect of 'changed circumstances' on a final affirmative determination that resulted in a CVD order.") The changed circumstance would be that one company had become another company (and thus should be entitled to that other company's rate).

In *Pasta from Turkey*, Commerce limited CCRs for successor-in-interest changes to those cases where the successor company was essentially the same as the predecessor because "if the company is not essentially the same, . . . the Department should normally assign the successor company the 'all others' rate until an administrative review is requested as the all others rate is the default rate for exports that have not been investigated or subject to an administrative review." *Id.* Thus, in a successor-in-interest analysis Commerce contends under *Pasta from Turkey* there can be no significant changes in the successor company as compared to the predecessor in order to obtain a "changed circumstances" review.

(citing *Marsan Gida Sanayi Ve Ticaret A.S. v. United States*, 35 CIT 222, 225, Slip Op. 2011–20 (2011)). Therefore, if the company is the same, a CCR will allow it to obtain the same rate; however, if the successor is different from its predecessor, it could have different levels of subsidization, and inheriting a previously calculated rate would not be appropriate. *See id.* The Court specified that in Commerce's *Pasta from Turkey* practice, the predecessor company had been individually examined, and received an individual rate based on the actual level of that company's subsidization. *Id.* at 1373. Additionally, the Court was not persuaded by Defendant's explanation that a CCR "does not examine *how* a 'significant change' impacted subsidization levels of the predecessor," because this explanation did not address whether the practice itself was reasonable. *See id.* (emphasis in original).

On remand, Commerce again explains that its practice articulated in *Pasta from Turkey* is to decline a CCR review for a company seeking to be considered a successor-in-interest for cash deposit purposes if that company has "undergone significant changes that would require Commerce to fully assess the company's level of subsidization." Remand Results at 6. Commerce reiterates that purchase or sale of significant productive facilities is considered to be "significant" for the purposes of its practice, and that GreenFirst's purchase of newsprint and saw mills from RYAM therefore constituted a significant change. *Id.* at 6–7, 9.[5] Commerce further explains that:

> The crux of the CVD successor-in-interest methodology is not whether the predecessor company was individually examined but whether the successor company underwent significant changes in ownership, structure, and productive facilities, such that it is not the same entity as the predecessor company. In such circumstances where "significant changes" are present, it is not appropriate for the requesting company to inherit the cash deposit rate of essentially a different company. Rather, it is appropriate for the requesting company to be assigned the all-others rate from the investigation.

Id. at 7–8. From this explanation, it is evident that Commerce focuses on whether a company is essentially the same as its alleged predecessor when considering whether to grant a CCR, and is not con-

[5] As discussed, GreenFirst did not simply change its name, nor did it purchase the entirety of RYAM—instead it purchased RYAM's lumber and pulp mills, with RYAM emerging from the transaction as the partial owner of GreenFirst's parent company. *See* Compl. at Attach. A.

cerned with the company's actual level of subsidization. *See* Def. Br. at 6 ("Thus, the purpose of the rule is not to determine actual subsidy rates . . . ."). However, this explanation does not address the question that the Court posed in *GreenFirst I* concerning the reasoning behind Commerce's practice, namely why this practice is reasonable as applied to a non-examined company. *See GreenFirst I*, 604 F. Supp. 3d at 1373.

Commerce offers no rationale explaining how its practice in *Pasta from Turkey* extends beyond individually-examined respondents. First, Commerce offers no explanation as to why its determination is reasonable other than that its determination in *Pasta from Turkey* was reasonable. *See* Remand Results at 7–9. The respondent in *Pasta from Turkey* had been individually examined in the prior administrative review, and Commerce relied upon that individual examination to justify its determination that it would be "inappropriate to affirm a cash deposit rate that had been calculated during a previous time." *Pasta from Turkey*, 74 Fed. Reg. at 47,227. That an individual rate had been calculated rendered Commerce's decision to deny a potentially preferential rate to a different company reasonable. *See Marsan*, 35 CIT at 232 (changed company not entitled to "a previously calculated CVD cash deposit rate"). In contrast, RYAM's rate was not "calculated" or based on a "fact pattern," such that the rate was unique to RYAM. Rather, Commerce determined RYAM's rate by averaging the rates of non-selected companies. *See Certain Softwood Lumber Products from Canada*, 83 Fed. Reg. 347, 348 (Dep't Commerce Jan. 3, 2018). Therefore, the reasoning behind Commerce's determination in *Pasta from Turkey* does not apply to GreenFirst's CCR request, because GreenFirst does not stand to inherit a "calculated" rate.

Second, Commerce seems to assert that because *Pasta from Turkey* did not expressly declare its rationale as limited only to situations where Commerce individually examined a company, that the Court should accept its rationale as reasonable under a different set of circumstances. *See* Def. Br. at 8; Remand Results at 8 ("there is no language within Pasta from Turkey that expressly limits Commerce's successor-in-interest analysis"). Regardless of whether Commerce expressly articulated the limitations behind its *Pasta from Turkey* practice, Commerce must nevertheless explain the reasoning behind its decision under the present factual circumstances. *See State Farm*, 463 U.S. at 43 ("the agency must examine the relevant data and articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made'") (citing

Burlington Truck Lines, Inc. v. United States, 371 U.S. 156, 168 (1962).

If Commerce believes that it is inappropriate for a putative successor-in-interest company to inherit a non-selected rate from a non-individually examined company unless the successor-in-interest company is essentially the same as the non-individually examined company previously assigned that rate, it must explain why this specific transfer of a rate is inappropriate.[6] Commerce cannot justify its determination with reasoning which is applicable to a different fact pattern without explaining why the determination is nonetheless reasonable given the different fact pattern. On remand, Commerce must either reconsider or further explain its determination that its *Pasta from Turkey* practice applies when a predecessor company was not individually examined.

CONCLUSION

In accordance with the foregoing, it is

ORDERED that Commerce's determination is remanded for further explanation or reconsideration consistent with this opinion; and it is further

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

ORDERED that the parties shall have 30 days thereafter to file comments on the remand redetermination; and it is further

ORDERED that the parties shall have 30 days to file their replies to the comments on the remand redetermination; and it is further

ORDERED that the parties shall file the joint appendix within 14 days of the date of filing of responses to the comments on the remand redetermination; and it is further

ORDERED that Commerce shall file the administrative record within 14 days of the date of filing of its remand redetermination.

Dated: July 6, 2023
New York, New York

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

[6] For example, if Commerce is concerned that highly-subsidized companies may be able to receive the non-selected deposit rate through a CCR without volunteering for individual review, or that allowing CCRs for companies with significant changes would be administratively impracticable, it must specify the harms it wishes to avoid in its redetermination.

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