INTERNATIONAL TRADE LAW:
A Comprehensive E-Textbook

6th Edition, 2025 (Eight Volumes)

VOLUME THREE:
CUSTOMS LAW

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There are seven sins in the world: Wealth without work, Pleasure without conscience, Knowledge without character, Commerce without morality, Science without humanity, Worship without sacrifice, and Politics without principle.

Mahatma Gandhi (1869-1948)

Dedication

For Shera and Her Generation,
That They Are Not Scourged by Poverty, Extremism, or a Clash of Civilizations,
But Rather Blessed by Peace through Sustainable Trade and Development.

And for the Glory of God.

About the Author

Born in Toronto, Rakesh (Raj) Kumar Bhala is a dual Canadian-U.S. citizen. He is the inaugural Leo. S. Brenneisen Distinguished Professor (2017-present) at the University of Kansas School of Law (KU Law), before which he was the Rice Distinguished Professor (2003-2017). Both are university-level chairs. He served as KU Law's Associate Dean for International and Comparative Law (2011-2017). Raj teaches *International Trade Law*, *Advanced International Trade Law*, *Law and Literature*, and *Islamic Law*. *Ingram's Business Magazine* designated him as one of "50 Kansans You Should Know" (https://ingrams.com/article/50-kansas-you-should-know-the-class-of-2020/).

Before joining KU Law, Raj was the Patricia Roberts Harris Research Professor at The George Washington University School of Law (1998-2003). He began his teaching career at William & Mary Marshall-Wythe School of Law (1993-1998), where he was voted tenure and full professorship. At both, he headed the International Law programs.

Raj has been a Visiting Professor at Duke, Michigan, La Trobe University (Melbourne), Tel Aviv University, University of Auckland (where he was the 2017 New Zealand Legal Research Foundation Visitor), Washington University in Saint Louis, and World Trade Institute (Berne). He has guest lectured around the world, including across India, and held fellowships at the Bank of Japan and University of Hong Kong. An International Bar Association (IBA) member since 1995, Raj has served in officer positions on the Academic and Professional Development and Customs and International Trade Law Committees.

Raj practiced at the Federal Reserve Bank of New York (1989-1993), where he twice won the President's Award for Excellence thanks to his service as a delegate to the United Nations Conference on International Trade Law (UNCITRAL), along with a Letter of Commendation from the U.S. Department of State. He was Senior Advisor to Dentons U.S. LLP (2017-2023), the world's largest law firm, focusing on International Trade Law. He is a member of the State Department's Speaker Program.

Raj is a Harvard Law School graduate (1989, *Cum Laude*), where he wrote his first book – *Perspectives on Risk-Based Capital* (1989) – as a third-year J.D. student. As a Marshall Scholar (1984-1986), Raj earned two Master's degrees, from the London School of Economics (LSE, 1985) in Economics, and from Oxford (Trinity College, 1986) in Management (Industrial Relations). His undergraduate degree is from Duke (1980-1984, *Summa Cum Laude*, *Phi Beta Kappa*), where he was an Angier B. Duke Scholar and double-majored in Economics and Sociology. At Harvard and Duke, he served as a Research Assistant (RA), respectively, in International Financial Law to Nomura Professor

Hal S. Scott (1987-1989) and Development Economics to James B. Duke Professor Allen C. Kelley (1981-1984).

Raj is author of 100 scholarly articles published in law journals world-wide, including three trilogies: on *stare decisis* in International Trade Law; the failed Doha Round of multilateral trade negotiations; and India's trade law and policy. He has written 13 books. They include *International Trade Law: A Comprehensive Textbook* (5th edition, 2019, 4 volumes) www.dropbox.com/s/78sagrsm4g30k4g/R%20Bhala%20Book%20Launch.mp4?dl=0), which is one of the world's leading references and has been used at over 100 law schools world-wide, plus the first treatise on GATT in nearly 50 years, *Modern GATT Law* (2nd edition, 2013, 2 volumes). His monographs, *Trade War: Causes, Conduct, and Consequences of Sino-American Confrontation* (2024), and *TPP Objectively: Legal, Economic, and National Security Dimensions of CPTPP* (2nd edition, 2019), were the first interdisciplinary analyses of their subjects by a legal scholar. *Trade, Development, and Social Justice* (2003) was a rare application of Catholic Social Justice Theory to GATT. Raj is the first non-Muslim American scholar to write a textbook on Islamic Law, *Understanding Islamic Law (Sharīʻa)* (3rd edition, 2023). That textbook, too, has been widely used, including for 10 years (2010-2019) in his course for U.S. Special Operations Forces at the Command and General Staff College, Fort Leavenworth, Kansas.

Raj's current project is a new book, *Principles of Law, Literature, and Rhetoric: A Shakespearean Approach*. Covering legal interpretative methodologies as well as legal themes in classic works, in both a theoretical and practical sense, this work aims to help organize the subject for use in teaching and research.

In 2022, Raj testified before the U.K. Parliament, House of Commons, International Trade Committee, on trade and human rights. Media world-wide have frequently called upon Raj. He has been quoted in the *Associated Press*, *Bloomberg*, CNN, *Financial Times*, *Fortune*, *Frankfurter Allgemeine Sonntagszeitung*, *Hutch Post*, *Los Angeles Times*, *National Law Journal*, *Nikkei Asia*, *Reuters*, *South China Morning Post*, and *The Christian Science Monitor*, *New York Times*, *Washington Post*, and *Weekly Standard*. He has been on radio in America, Bulgaria, and New Zealand, and TV in the EU, India, and Korea. From January 2017-October 2022, across 65 consecutive months, "On Point" was his column on International Law and Economics, which Bloomberg Quint / BQ Prime (Mumbai) published (www.bqprime.com/author/92714/raj-bhala) and distributed to approximately 6.2 million readers globally.

Raj has served on the Executive Board of Directors of the Carriage Club of Kansas City, including as its Treasurer. He also been on the Alumni Association Board of the University School of Milwaukee (USM), his high school *alma mater* (Class of 1980). He is grateful to his USM teachers for a liberal arts education that made all good things possible. Raj loves fitness training, has finished 115 marathons, including the "Big Five" of the "World's Majors" (Boston twice, New York twice, Chicago twice, Berlin, and London). He enjoys studying Shakespeare and (especially since becoming Catholic at Easter Vigil 2001) Theology – and watching baseball.

Summary of Contents for All Eight Volumes

The Part and Chapter titles in this Summary of Contents cover all eight Volumes of the Sixth Edition of *International Trade Law: A Comprehensive E-Textbook*. The Detailed Contents of each individual Volume are set out in the pertinent Volume.

Detailed Contents for Volume Three

VOLUME THREE:
CUSTOMS LAW

Preface

Dating to 1993, this *E-Textbook* is based on 32 years of research and teaching around the world. So, it aims to provide students, scholars, and practitioners around the world with a world-class reference – for free. All eight Volumes of the *E-Textbook* are available Open Access.

These Volumes may be used as a set, in sequence, as I do in my *International Trade Law* and *Advanced International Trade Law* courses, covering Volumes 1-4 and 5-8, respectively. Or, one of them may be assigned as a stand-alone Volume for a specialty course or seminar, such as Volume Four for a class on *Trade and National Security*, Volume Seven for a class on *FTAs*, or Volume Eight for a class on *Trade and Development*. Or, any one or more of them may be used for research papers, articles, and books on subjects that implicate multiple Volumes. The only constraint on how the *E-Textbook* is read is the imagination of the reader. As trade negotiators sometimes say, the "geometry is variable."

The five previous Editions of this work were published by Michie (1st Edition, 1996), LexisNexis (2nd Edition, 2001, 3rd Edition, 2008, and 4th Edition, 2 Volumes, 2015), and Carolina Academic Press (5th Edition, 4 Volumes, 2019). All were available as a hard copy, and eventually as an electronic book, or "e-book." An earlier Edition was translated into Vietnamese.

The prior Editions, whether print or electronic, became ever-more expensive. Since its 1st Edition, and particularly since its 5th Edition, printing costs increased dramatically. Publishers went out of business or were merged into other publishers. (Sadly, many of my editors, who were my friends, lost their jobs.) Contemporaneously, in a world of curt social media communications, patience for thick books decreased. As the endurance of attention spans diminished, bottom-line answers mattered more than cognitive reasoning processes. Authors were pressured to jam more material into less space, and convey all of it faster.

These trends – adversely affecting both the supply and demand curves for lengthy, conventionally published, law school teaching materials – increasingly impeded access to the previous Editions. That was especially true for students of modest means in America and across the world. The cost of those materials became a non-*de minimis* element in calculating student indebtedness to earn a law degree. Some students could not afford to take my *International Trade Law* and *Advanced International Trade Law* courses. Others cobbled together resources, borrowed or shared the book, or made do with old editions. All the while, good teachers, seeking to be good shepherds, cared about serving their students with instructional materials exceed their teachers.

Thanks to the University of Kansas, School of Law, Wheat Law Library, and its Director, Professor Chris Steadham and Team, the problem of rising supply costs is solved. All eight Volumes of this 6th Edition are published by the Library. Thanks also to Marianne Reed, Digital Publishing and Repository Manager, KU Libraries. Because of her, they may be downloaded from KU ScholarWorks quickly and easily at zero cost. No student, teacher, scholar, or practitioner is left behind for want of eight PDF files.

Likewise, all relevant primary and secondary source documents are freely available on the Library's International Trade Law Research & Study Guide Web page (https://guides.law.ku.edu/intltrade). Not one dollar or *dirham*, *riyal* or *rupee* need be spent on paying for a Documents Supplement.

As for demand, no background in the subject matter is presumed. What is required is intellectual curiosity about the subject, an open-hearted willingness to fall ever-more in love with it – and, yes, patience. Learning the subject pays off handsomely, both in professional and personal returns. What also is needed is an appreciation for the reality that the boundaries of the subject continue to widen, its theory and practice continue to deepen. There is a canon, a common core that is the language for a common dialogue. Yet, this canon evolves.

Accordingly, the 1996 single-volume 1st Edition of this work was 1,450 pages. The work has grown with the 30 years' worth of developments in the field, avoiding trade-offs that disrespect its controversies and grandeur. The eight Volumes of this 6th Edition span approximately 6,666 pages. The Volumes are organized thematically into 188 Chapters, thus averaging 36 pages per Chapter.[1] A cursory nutshell (summarizing assorted topics), or a slender work on one aspect of the field (*e.g.*, the WTO), have their place. But they can take a reader only so far. This *E-Textbook* embraces a different challenge: take all readers ***further***.

[1] Volume One (Interdisciplinary Foundations), 753 pages, 25 Chapters; Volume Two (Fundamental Multilateral Obligations), 885 pages, 28 Chapters; Volume Three (Customs Law), 440 pages, 16 Chapters; Volume Four (National Security), 1,089 pages, 25 Chapters; Volume Five (Remedies), 1,085 pages, 33 Chapters; Volume Six (Special Sectors), 628 pages, 16 Chapters; Volume Seven (Free Trade Agreements, Labor, and Environment), 1,196 pages, 30 Chapters; and Volume Eight (Growth, Development, and Poverty), 590 pages, 15 Chapters. (Please note page counts are approximate.)

Acknowledgments

A publication of this breadth and depth results from many skilled minds. I am blessed by such minds around me that not only contribute to a better product than possibly could be achieved alone, but also make the research and writing process every bit as fun as quiet contemplation (an equally indispensable activity).

Each Volume of this *E-Textbook* is "Made in the Midwest." That origination is thanks in part to my Research Assistants (RAs). They came from near and far to the University of Kansas School of Law (KU Law) for their *Juris Doctor* (J.D.) degree, plus earned a Certificate in International Trade in Finance. I asked these talented, cosmopolitan RAs to treat me not as a Professor, but a colleague, and take a "hard look" at the drafts. They worked diligently on hundreds of draft pages. I am grateful for their contributions and personal sacrifices.

Listed alphabetically, my KU Law School RAs on this and previous editions of this work are:

Jacob C. Barefield, J.D. Class of 2023
Bridget Beran, J.D. Class of 2023
Matthew Walter Cooper, J.D. Class of 2015
Owen Andrew Grieb, J.D. Class of 2007
Katie Charlotte Hahn, J.D. Class of 2023
Madeline Renee Heeren, J.D. Class of 2015
David Roy Jackson, J.D. Class of 2007
Lauren E. Johannes, J.D. Class of 2019
Shannon B. Keating, J.D. Class of 2013
Viet Q. Le, J.D. Class of 2019
Heidi Minnihan, J.D. Class of 2014, M.B.A. Class of 2014
Corrine (Cori) Moffett, J.D. Class of 2021
Quan M. Nguyen, J.D. Class of 2025
Aqmar Rahman, J.D. Class of 2015
Michael Robert Rebein, J.D. Class of 2025
Sarah Schmidt, J.D. Class of 2013, M.A. Economics Class of 2013
Bruno Germain Simões, J.D. Class of 2013
Devin S. Sikes, J.D. Class of 2008
Dan Spencer IV, J.D. Class of 2006
Brien C. Stonebreaker, J.D., M.P.H. Class of 2024
Kaitlyn E. Taylor, J.D. Class of 2025
Chalinee Tinaves, J.D. Class of 2014
Spencer Toubia, J.D. Class of 2015
Eric Witmer, J.D. Class of 2016
Cody N. Wood, J.D. Class of 2017

It is a joy to see each one of them flourish, professionally and personally, in their extraordinary endeavors across the world.

Hearty thanks also go to Professor Chris Steadham, Director, Wheat Law Library, University of Kansas, School of Law. In every respect, at every step, Chris and his Team – which includes W. Blake Wilson, Assistant Director for Instructional and Faculty Services, and Pamela Crawford, Assistant Director for Public & Technical Services (*Emerita*) – have been efficient, supportive, and responsive. They consistently worked hard to produce, promote, and distribute a product for teaching and research useful around the globe. They are fun professionals with whom to collaborate. Ditto for Marianne Reed, Digital Publishing and Repository Manager, KU Libraries.

This publication is the blessing of a splendid family. The family improves its quality. There is my immediate family: my smart and lovely wife and best friend, **Kara**; and our poised daughter, **Shera**, our little gift who has matured beyond our best dreams into a smiling Dartmouth graduate and Fulbright Scholar with a big heart, world class intellect and *très chic* sense of fashion. And, there is my **Research Assistant** family (above). Thank you.

I also gratefully acknowledge the law firms of Crowell & Moring LLP, Washington, D.C., and Miller & Company, P.C., Kansas City, Missouri. Their monthly client alerts on International Trade Law are superb. In addition to quoting and citing renowned media sources (especially *Bloomberg*, *Financial Times*, *Nikkei Asia*, Reuters, and *The New York Times*), I have relied on these alerts for valuable explanations and insights on key developments (especially concerning customs classification, AD-CVD, and safeguard cases and export controls and trade sanctions).

Since the initial version of this work, all previous Editions underwent extensive editing by their publishers: Michie for the 1st Edition, 1996; LexisNexis for the 2nd Edition, 2001, 3rd Edition, 2008, and 4th Edition (Two Volumes), 2015; and, Carolina Academic Press for the 5th Edition (Four Volumes), 2019. Across these Editions, my Research Assistants poured over the manuscript, and my students furnished corrections. Thank you all.

Still more scrutiny was applied to this 6th Edition to ensure all Eight Volumes of the *International Trade Law E-Textbook* are as universally user-friendly as possible. Toward this goal, I exercised editorial judgment, though in a light-handed manner that in no way impinged on the meaning of any quoted or excerpted materials. Specifically, I: (1) standardized spelling according to American (not British) English; (2) used international dating (day-month-year); (3) occasionally made minor stylistic (but not substantive) changes (*e.g.*, converting bullet points to numbers, adding an Oxford comma, simplifying ellipses, fonts, and indents, and normalizing "emphasis original" and "emphasis added" notations); and (4) providing full citations (thus avoiding the tyranny of the *Blue Book*).

For over three decades, dating to my research and teaching in 1993, this work has been a joyful passion shaping my career, and more importantly, serving readers globally. No further Editions are anticipated. Any significant updates may be offered through a *Supplement* and/or posted materials, to which the same editorial standards would apply.

Table of Abbreviations

AANZFTA	*ASEAN-Australia-New Zealand Free Trade Agreement*
AB	WTO Appellate Body
AB InBev	Anheuser-Busch InBev SA/NV
ABA	American Bar Association
ABI	Automated Broker Interface
ACA	*America Competes Act of 2022*, *i.e.*, *America Creating Opportunities for Manufacturing, Pre-Eminence in Technology, and Economic Strength Act of 2022*, sometimes abbreviated as *COMPETES Act* (House of Representatives bill)
ACDB	WTO Accession Commitments Data Base
ACFTA (*AfCFTA*)	*African Continental Free Trade Area* (entered into force 30 May 2019, operational 7 July 2019, with staged implementation on 1 January 2021 and concluding with full implementation by 2030)
ACFTU	All China Federation of Trade Unions
ACI	Anti-Coercion Instrument (EU)
ACP	African, Caribbean, and Pacific
ACS	Automated Commercial System
ACTRAV	Bureau for Workers' Activities (ILO)
ACWL	Advisory Center on WTO Law
AD	Antidumping
AD Agreement	WTO *Antidumping Agreement* (*Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994*)
ADB	Asian Development Bank
Additional Protocol	*Model Additional Protocol* (associated with *NPT*, *CSA*)
ADP	Automatic data processing
ADR	American Depositary Receipt
ADVANCE Democracy Act	2007 *Advance Democratic Values, Address Non-democratic Countries and Enhance Democracy Act*
AECA	*Arms Export Control Act of 1976*
AEO	Authorized Economic Operator
AEOI	Atomic Energy Organization of Iran
AES	Automated Export System
AFA	Adverse Facts Available
AfCFTA	*African Continental Free Trade Area*

(*ACFTA*)	
AfDB	African Development Bank
AFIP	*Administración Federal de Ingresos Públicos* (Argentina, Federal Public Revenue Administration)
AFL-CIO	American Federation of Labor-Congress of Industrial Organizations
AFP	*Agence France-Presse*
AFR	Application for Further Review (U.S. CBP)
AFTA	*ASEAN Free Trade Area*
AG (1st meaning)	*Aktiengesellschaft* (company incorporated in Austria, Germany, or Switzerland, limited by share ownership, the shares of which are tradeable on a stock market)
Ag (2nd meaning)	Agriculture
AGOA	2000 *African Growth and Opportunity Act*
AGOA II	included in 2002 *Trade Act*
AGOA III	2004 *African Growth and Opportunity Acceleration Act*
Agriculture Agreement (*Ag Agreement*)	WTO *Agreement on Agriculture*
AI (1st meaning)	Artificial Intelligence
AI (2nd meaning)	Avian Influenza
AID	U.S. Agency for International Development
AIG	American Insurance Group
AIIS	American Institute for International Steel
AIKSCC	All India *Kisan Sangharsh* Coordination Committee
AIM	Aluminum Import Monitoring system (U.S. DOC)
AIO	Aerospace Industries Organization (Iran)
AIOC	Anglo Iranian Oil Company
AIPAC	American Israel Public Affairs Committee
AIS	Automatic Identification System (ship location transponder)
AIT	American Institute in Taiwan
ALADI	Latin American Integration Association (Spanish acronym)
ALBA	Bolivarian Alliance for the Peoples of our America

ALD	atomic layer deposition (production tools)
ALJ	Administrative Law Judge
ALOP	Appropriate Level Of Protection
ALT	Alternate (alternate proposed text)
AMA	American Medical Association
AmCham	American Chamber of Commerce
AMEC	Advanced Micro-Fabrication Equipment Inc. (China)
AMI Credit	Advanced Manufacturing Investment Credit (U.S. 2022 *CHIPS Act*)
AMIS	Agricultural Market Information System
AMPS	Acrylamido tertiary butyl sulfonic acid
AMS (1st meaning)	Aggregate Measure of Support
AMS (2nd meaning)	Agriculture Marketing Services (USDA)
ANAD	National Association of Democratic Lawyers (Mexico)
ANZCERTA	*Australia-New Zealand Closer Economic Relations Trade Agreement* (*CER*)
ANZUS (*ANZUS Treaty*)	1951 *Australia, New Zealand, United States Security Treaty*
AoA	WTO *Agreement on Agriculture*
AOG	All Other Goods
AOR	All Others Rate
APA	1946 *Administrative Procedure Act* (U.S.)
APEC	Asia Pacific Economic Cooperation (forum)
APEP	Assistant to the President for Economic Policy (U.S.)
API	active pharmaceutical ingredient
APMC	Agricultural Produce Marketing Committee (India)
APNSA	Assistant to the President for National Security Affairs (U.S.)
APOC	Anglo Persian Oil Company
APTA	*Asia-Pacific Trade Agreement*
APV	Annual Purchase Value
AR	Administrative Review
ARI	Additional (United States) Rules of Interpretation

ARP Act of 2000	2000 *Agricultural Risk Protection Act*
ARRA	2009 *American Recovery and Reinvestment Act*
ARS	Advance Ruling System
ASA (1st meaning)	American Securities Association
ASA (2nd meaning)	American Sugar Alliance
ASCM	WTO *Agreement on Subsidies and Countervailing Measures* (*SCM Agreement*)
ASEAN	*Association of Southeast Asian Nations*
ASL (*AFSL*)	*Anti-Foreign Sanctions Law* (June 2021 PRC *Law* blocking compliance with sanctions against China)
ASM	artisanal small mine
ASML (ASML Holding N.V.)	Advanced Semiconductor Materials Lithography (Netherlands)
ASP	American Selling Price
ASPI	Australian Strategic Policy Institute
ATAP	1996 *Agreement Concerning Certain Aspects of Trade in Agricultural Products* (1985 *U.S.-Israel FTA*)
ATC	WTO *Agreement on Textiles and Clothing*
ATISA	*ASEAN Trade In Services Agreement*
ATPA	1991 *Andean Trade Preferences Act*
ATPDEA	2002 *Andean Trade Promotion and Drug Eradication Act*
ATT	2014 U.N. *Arms Trade Treaty*
AU$	Australian Dollar
AUD	Australian Dollar
AUKUS	September 2021 *Australia – United Kingdom – United States Security Partnership* (Trilateral Security Agreement concerning nuclear submarines and their deployment in Indo-Pacific region)
AUMF	2001 *Authorization for Use of Military Force*
AUMF (*Iraq Resolution*)	2002 *Authorization for Use of Military Force Against Iraq Resolution*
Automotive Appendix	Appendix, *Provisions Related to the Product-Specific Rules of Origin for Automotive Goods*, to Annex 4-B of *USMCA* Chapter 4
AUV	Average Unit Value
AV	Audio-Visual
AVE	*Ad Valorem* Equivalent

AVIC	Aviation Industry Corporation of China
B&H	Brokerage and handling (costs)
B&O	Washington State Business and Occupation Tax Rate Reduction
BA	Bankers Acceptance
BAE	British Aerospace Systems Plc
BAMS-D	Broad Area Maritime Surveillance-Drone (U.S. Navy)
BBC	British Broadcasting Corporation
BBS	Bangladesh Bureau of Statistics
B.C.	British Columbia
BCA	Border Carbon Adjustment (Carbon BTA)
BCI	Business Confidential Information
bcm	billion cubic meters
BCR	Blue Corner Rebate (Thailand)
BDC	Beneficiary Developing Country
BDS	Boycott, Divestment, and Sanctions
BECA	October 2020 *Basic Exchange and Cooperation Agreement* (U.S.-India)
beIN	beIN Media Group LLC (Qatar)
beoutQ	be out Qatar (Saudi Arabia)
BEPS	tax Base Erosion and Profit Sharing
Berne Convention	1886 (1971) *Berne Convention for the Protection of Literary and Artistic Works*
BFA	*Banana Framework Agreement*
Bhd (BHD)	Berhad (publicly limited company, Malaysia)
BIA	Best Information Available (Pre-Uruguay Round U.S. term for Facts Available)
BILA (ILAB)	Bureau of International Labor Affairs (U.S. DOL OTLA)
BIMSTEC	Bangladesh, Bhutan, India, Myanmar, Nepal, Sri Lanka, and Thailand (*SAARC* minus Afghanistan and Pakistan, plus Myanmar (Burma) and Thailand)
BIS (1st meaning)	Bank for International Settlements

BIS (2nd meaning)	Bureau of Industry and Security (U.S. DOC)
bis (3rd meaning)	second version (of a text), again, repeat
B.I.S.D.	Basic Instruments and Selected Documents
BIT	*Bilateral Investment Treaty*
BJP	*Bharatiya Janata Party* (India)
bn (bln)	billion
BNA	Bureau of National Affairs (International Trade Reporter and International Trade Daily)
BNO	British National (Overseas) passport (Hong Kong)
BOJ	Bank of Japan
BOK	Bank of Korea
Bolero	Bills of Lading for Europe
BOP	Balance Of Payments
BOT	Balance Of Trade
BP	British Petroleum
bpd (b/d)	barrels per day
Brexit	British exit, *i.e.,* withdrawal of the U.K. from EU, effective 31 January 2020, with transition period ended 31 December 2021, following 23 June 2016 U.K.-wide referendum
BRI	Belt and Road Initiative (China)
BRICS	Brazil, Russia, India, China, and South Africa
BRS (*BRS Conventions*)	*Basel*, *Rotterdam*, and *Stockholm Conventions* (Three *MEAs*: 1989 *Basel Convention on the Control of Transboundary Movements of Hazardous Wastes*; 1998 *Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade*; and 2001 *Stockholm Convention on Persistent Organic Pollutants*.)
BSE (1st meaning)	Bombay Stock Exchange
BSE (2nd meaning)	Bovine Spongiform Encephalopathy (Mad Cow Disease)
BSSAC	Beneficiary Sub-Saharan African Country
BSSP	Burmese Socialist Program Party

BTA (1st meaning)	*Bilateral Trade Agreement*
BTA (2nd meaning)	2002 *Bio-Terrorism Act* (*Public Health Security and Bioterrorism Preparedness and Response Act of 2000*)
BTA (3rd meaning)	Border Tax Adjustment
BTD	May 2007 *Bipartisan Trade Deal*
C-4	Cotton Four Countries (Benin, Burkina Faso, Mali, and Chad)
C&F	cost and freight
CAA	1979 *Clean Air Act*
CA$	Canadian Dollar
CAATSA	2017 *Countering America's Adversaries Through Sanctions Act*
CAC	Cyberspace Administration of China
CAD	Canadian Dollar
CAFC	United States Court of Appeals for the Federal Circuit
CAFTA-DR	*Central American Free Trade Agreement – Dominican Republic*
CAI	January 2021 EU-China *Comprehensive Agreement on Investment*
CAIR	Council on American-Islamic Relations
CAN	Community of Andean Nations
CANACAR	*Camara Nacional del Autotransporte de Carga*
CAOI	Civil Aviation Organization of Iran
CAP (1st meaning)	Common Agricultural Policy (EU)
CAP (2nd meaning)	Carolina Academic Press
CAPES	*Centre d'Analyse des Politiques, Economiques et Sociales* (Burkina Faso)
CASA	*Construcciones Aeronáuticas SA* (Spain)
CB	citizens band (radio)
CBA	collective bargaining agreement
CBAM	Carbon Border Adjustment Mechanism
CBC	Canadian Broadcasting Corporation
CBD	U.N. *Convention on Biological Diversity*
CBE	Commander of the Most Excellent Order of the British Empire
CBERA	1983 *Caribbean Basin Economic Recovery Act*

CBI (1st meaning)	*Caribbean Basin Initiative*
CBI (2nd meaning)	Central Bank of Iran
CBO	Congressional Budget Office
CBOT	Chicago Board Of Trade
CBP	U.S. Customs and Border Protection ("U.S. Customs Service" until 1 March 2003)
CBSA	Canadian Border Services Agency
CBTPA	*Caribbean Basin Trade Partnership Agreement*
CC	Cooperative Country (Argentina)
CCB	U.S. Conference of Catholic Bishops
CCC (1st meaning)	U.S. Commodity Credit Corporation (USDA)
CCC (2nd meaning)	Customs Cooperation Council (renamed WCO in 1994)
CCC (3rd meaning)	Commerce Country Chart
CCFRS	Certain cold flat-rolled steel
CCHT	Center for Countering Human Trafficking (U.S. DHS)
CCI (1st meaning)	Competition Commission of India
CCI (2nd meaning)	Countervailing Currency Intervention
CCL	Commerce Control List
CCMC	Communist Chinese Military Company
CCP	Chinese Communist Party (or CPC, Communist Party of China)
CCPA	U.S. Court of Customs and Patent Appeals (abolished 1982; transfer to Federal Circuit)
CCS	Carbon Capture and Storage
CDC (1st meaning)	U.S. Centers for Disease Control and Prevention
CDC (2nd meaning)	Canadian Dairy Commission
CDC (3rd meaning)	Chilean Distortions Commission
CDM	Clean Development Mechanism
CDS	credit default swap
CDSOA	2000 *Continued Dumping and Subsidy Offset Act*

	(*Byrd Amendment*)
CE	*Conformité Européenne* (EU)
CEA	Council of Economic Advisors (U.S.)
CEC	Commission for Environmental Cooperation (*NAFTA*)
CEMAC	*Communauté Économique et Monétaire de l'Afrique Centrale*
CEMS	Continuous Emission Measurement System (EU CBAM)
CENTCOM	United States Central Command
CEO	Chief Executive Officer
CEP	Constructed Export Price
CEPA (1st meaning)	India-UAE *Comprehensive Economic Partnership Agreement*
CEPA (2nd meaning)	Japan-U.K. *Comprehensive Economic Partnership Agreement*
CEPR	Center for Economic and Policy Research
CER	*Australia-New Zealand Closer Economic Relations Trade Agreement* (*ANZCERTA*)
CET	Common External Tariff
CETA	*Comprehensive Economic and Trade Agreement*
CFC	Controlled Foreign Corporation
CFCRL	Federal Conciliation and Labor Registry Center (Spanish acronym, Mexico)
CFE	*Comisión Federal de Electricidad* (Mexico)
CFIUS	Committee on Foreign Investment in the United States
CFO	Chief Financial Officer
C.F.R. (1st meaning)	Code of Federal Regulations
CFR (2nd meaning)	Council on Foreign Relations
CGE	Computable General Equilibrium
CGLO	Central Government Liaison Office (China)
CGTN	China Global Television Network
CH	Order of the Companions of Honor
CHF	Swiss Francs
CHIP 4 (CHIP 4 Alliance)	U.S., Japan, Korea, and Taiwan (forum concerning semiconductor chips)

CHIPS	Clearing House Interbank Payment System
CHIPS Act (*CHIPS for America Act*)	2022 *Creating Helpful Incentives to Produce Semiconductors Act*
CIA	U.S. Central Intelligence Agency
CIC	Citizenship and Immigration Service for Canada
CIDE	Contribution of Intervention in the Economic Domain (Brazil)
CIF (c.i.f)	Cost, Insurance, and Freight
CII	Confederation of Indian Industry
CIP	Chhattisgarh Industrial Program (India)
CISADA	2010 *Comprehensive Iran Sanctions, Accountability, and Divestment Act*
CISG	Convention on Contracts for the International Sale of Goods (U.N.)
CIT	U.S. Court of International Trade (New York, N.Y.)
CITA	U.S. Committee for Implementation of Textile Agreements
CITES	1973 *Convention on International Trade in Endangered Species of Wild Fauna and Flora*
CITT	Canadian International Trade Tribunal
CJ	Commodity Jurisdiction
CKD	Complete knock down
cm	centimeter
CMAA	*Customs Mutual Assistance Agreement*
CME	Chicago Mercantile Exchange
CMI	*Comité Maritime International* (IMO)
CMIC	Chinese Military Industrial Complex Company
CMM	Conservation Management Measures
CMO	Common Market Organization (EU)
CNCE	*Commission Nacional de Comercio Exterior* (Argentina)
CNL	Competitive Need Limitation
CNOOC	China National Offshore Oil Corporation
CNPC	China National Petroleum Corporation
CNY	Chinese *Yuan*
CO_2	Carbon Dioxide

CO_2e	Carbon Dioxide equivalent
CoA	WTO Committee on Agriculture
CoA-SS	Special Session of WTO Committee on Agriculture
COBRA	*Consolidated Omnibus Budget and Reconciliation Act* (multiple years)
COCOM	Coordinating Committee on Multilateral Export Controls
COFINS	Civil Service Asset Formation Program Contribution (Brazil)
COFINS-Importation	*Contribution to Social Security Financing Applicable to Imports of Goods or Services* (Brazil)
COGS	Cost of Goods Sold
COMAC	Commercial Aircraft Corporation of China Ltd.
COMESA	Common Market for Eastern and Southern Africa
CONNUM	Control Number
COO (1st meaning)	Certificate of Origin
COO (2nd meaning)	Country of Origin
COO (3rd meaning)	Chief Operating Officer
COOL	Country of Origin Label
COP (1st meaning)	Conference of the Parties
COP (2nd meaning)	Cost of Production
CORE	corrosion-resistant steel
COS	Circumstances of Sale (dumping margin calculation adjustment)
COSCO	Chinese Ocean Shipping Company
COVAX	COVID-19 Vaccines Global Access
COVID-19	Corona Virus Disease (coronavirus)
CPA (1st meaning)	Certified Public Accountant
CPA (2nd meaning)	Coalition Provisional Authority (Iraq-U.S.)
CPC (1st meaning)	Caspian Pipeline Consortium
CPC (2nd meaning)	U.N. Central Product Classification list
CPC	Communist Party of China

(3rd meaning)	(or CCP, Chinese Communist Party)
CPEC	China-Pakistan Economic Corridor
CPSC	U.S. Consumer Product Safety Commission
CPTPP	*Comprehensive and Progressive Agreement for Trans Pacific Partnership* (entered into force 30 December 2018, informally called *TPP* 11)
CPV	Communist Party of Vietnam (or VCP, Vietnamese Communist Party)
CQE	Certificate of Quota Eligibility
CRO	WTO Committee on Rules of Origin
CROC	Revolutionary Confederation of Laborers and Farmworkers (Mexico, Spanish acronym)
Crop Year 2001 Act	*Crop Year 2001 Agricultural Economic Assistance Act*
CRPF	Central Reserve Police Force (India)
CRRC	China Railway Rolling Stock Corporation
CRS	Congressional Research Service
CRTC	Canadian Radio-Television and Telecommunications Commission
CSA	*Comprehensive Safeguards Agreement* (associated with *NPT*)
CSCL	China Shipping Container Lines
CSI	Container Security Initiative
CSIS	Center for Strategic and International Studies (Washington, D.C.)
CSMS	Cargo Systems Messaging Service (CBP)
CSP (1st meaning)	Conferences of States Parties
CSP (2nd meaning)	Certificate of Supplementary Protection (CETA)
CSPV	Crystalline Silicon Photovoltaic cells, modules, laminates, and panels (solar panels)
CSRC	China Securities Regulatory Commission
CTA	Central Tibetan Administration
CTC	Change in Tariff Classification
CTCSC	Customs Tariff Commission of the State Council (China)
CTD	WTO Committee on Trade and Development
CTESS	WTO Committee on Trade and Environment in Special

	Session
CTF	Customs and Trade Facilitation
CTH	Change in Tariff Heading
CTHA	WTO *Chemical Tariff Harmonization Agreement*
CTIL	Center for Trade and Investment Law (India)
CTPA	*United States – Colombia Trade Promotion Agreement*
C-TPAT (*CTPAT*)	*Customs – Trade Partnership Against Terrorism*
CTSH	Change in Tariff Sub-Heading
CU	Customs Union
Customs Valuation Agreement	WTO *Agreement on Customs Valuation* (*Agreement on Implementation of Article VII of the General Agreement on Tariffs and Trade 1994*)
CUFTA (*CUSFTA*)	*Canada – United States FTA*
CUSMA	*Canada – United States – Mexico Agreement* (revised FTA based on August 2017-September 2018 renegotiations, called *CUSMA* in Canada, *USMCA* in America, called *CUSMA* in Canada, *USMCA* in America, and informally called *NAFTA* 2.0, signed 30 November 2018, signed again after further renegotiations 10 December 2019, and entered into force 1 July 2020)
CV	Constructed Value
CVA	Canadian Value Added
CVD (1st meaning)	Countervailing Duty
CVD (2nd meaning)	Chronic Venous Disorder
CVI	Chronic Venous Insufficiency
CVID	Complete, Verifiable, Irreversible Disarmament
CWP (1st meaning)	Circular Welded carbon quality steel Pipe
CWP (2nd meaning)	Cooperative Work Program (*IPEF*)
CY	Calendar Year
DAHD	Department of Animal Husbandry, Dairying, and Fisheries (India)
DARPA	U.S. Defense Advanced Research Projects Agency
DBT	U.K. Department for Business and Trade (established February 2023 via merger of DIT with certain other government functions)

DCIV	Double Cab In Van
DCR	Domestic Content Requirement
DCS	Destination Control Statement
DDA	Doha Development Agenda
DDTC	U.S. Directorate of Defense Trade Controls (Department of State)
DEA	*Digital Economy Agreement*
DeitY	Department of Electronics and Information Technology (MCIT, India)
DEPA (1st meaning)	*Digital Economic Partnership Agreement* (generally)
DEPA (2nd meaning)	June 2020 *Digital Economic Partnership Agreement* (Chile, New Zealand, Singapore)
DFFT	Data Free Flow with Trust
DFQF	Duty Free, Quota Free
DG	Director General (Director-General)
DGCFMC	WTO Director General's Consultative Framework Mechanism on the development aspects of Cotton
DGFT	Director General of Foreign Trade (part of Ministry of Commerce, India)
DHS	U.S. Department of Homeland Security
DIPAM	Department of Investment and Public Asset Management (India)
DJAI	*Declaración Jurada Anticipada de Importación* (Argentina, Advance Sworn Import Declaration)
DIEM	*Derechos de Importación Específicos Mínimos* (Argentina, Minimum Specific Import Duties)
DIFMER	Difference in Merchandise (dumping margin calculation adjustment)
DIT	Department for International Trade (U.K.)
DIY	Do It Yourself
DM (1st meaning)	Dumping Margin
DM (2nd meaning)	*Deutsche Marks*
DMA (1st meaning)	2022 EU *Digital Markets Act*
DMA (2nd meaning)	Domestic Marketing Assessment
DMZ	De-Militarized Zone

DNA	deoxyribonucleic acid
DNI	Director of National Intelligence (U.S.)
DNR	Donetsk People's Republic
DOC	U.S. Department of Commerce
DOD	U.S. Department of Defense
DOE	U.S. Department of Energy
DOJ	U.S. Department of Justice
DOL	U.S. Department of Labor
DOP	13 September 1993 Israeli-PLO *Declaration of Principles on Interim Self-Government Arrangements* (*Oslo I Accord*, *Oslo I*)
DOS	U.S. Department of State
DOT	U.S. Department of Transportation
DP (DPW)	Dubai Ports Dubai Ports World
DPA (1st meaning)	1950 *Defense Production Act* (U.S.)
DPA (2nd meaning)	Deferred Prosecution Agreement
DPA (3rd meaning)	Data Protection Authority (India)
DPCIA	1990 *Dolphin Protection Consumer Information Act*
DPP	*Dialogue on Plastic Pollution and Environmentally Sustainable Plastics Trade* (WTO)
DPRK	Democratic People's Republic of Korea (North Korea)
DRAM	Dynamic Random-Access Memory
DSM	Dispute Resolution Mechanism (*JCPOA*)
DRAMS	Dynamic Random-Access Memory Semiconductor
DRC	Democratic Republic of the Congo
DSB	WTO Dispute Settlement Body
DSM	Dispute Settlement Mechanism
DST	Digital Sales Tax, Digital Services Tax
DSU	WTO *Dispute Settlement Understanding* (*Understanding on Rules and Procedures Governing the Settlement of Disputes*)
DTA	*Digital Trade Agreement*
DUP	Democratic Unionist Party

	(Northern Ireland)
DUV	deep ultraviolet lithography (systems)
DVD	Digital Video Recording
E3	Britain, France, and Germany
EA	Environmental Assessment
EAA	1979 *Export Administration Act*
EAC (1st meaning)	East African Community
EAC (2nd meaning)	East Asian Community
EAC (3rd meaning)	Environmental Affairs Council (*CAFTA-DR*, *KORUS*)
EADS	European Aeronautic Defense and Space Company NV
EaEU (EAEU)	Eurasian Economic Union
EAF	Electric Arc Furnace
EAGLE Act	2021 *Ensuring American Global Leadership and Engagement Act*
EAPA	2015 *Enforce and Protect Act* (U.S.)
EAR	*Export Administration Regulations*
EBA	*Everything But Arms*
EBOR	Electronic On Board Recorder
EBRD	European Bank for Reconstruction and Development
EC (1st meaning)	European Commission
EC (2nd meaning)	European Communities
ECA (1st meaning)	*Economic Cooperation Agreement*
ECA (2nd meaning)	*Agreement between the Government of the United States of America and the Government of the Republic of Korea on Environmental Cooperation* (*KORUS*)
ECA (3rd meaning)	*Export Controls Act of 2018* (part of 2018 *NDAA*)
ECAT	Emergency Committee for Foreign Trade
ECB	European Central Bank
ECC (1st meaning)	Environmental Cooperation Commission (*CAFTA-DR*)
ECC (2nd meaning)	Extraordinary Challenge Committee (*NAFTA*)

ECCAS	Economic Community of Central African States
ECCN	Export Control Classification Number
ECE	Evaluation Committee of Experts (*NAFTA*)
ECFA	*Economic Cooperation Framework Agreement*
ECG	electrocardiogram
ECHR	European Court of Human Rights
ECJ	European Court of Justice
ECLAC	Economic Commission for Latin America and the Caribbean
E-Commerce	Electronic Commerce
ECOSOC	U.N. Economic and Social Council
ECOWAS	Economic Community of West African States
ECRA	*Export Control Reform Act of 2018* (part of *John S. McCain National Defense Authorization Act for Fiscal Year 2019*, *i.e.,* 20199 *NDAA*)
ECU	European Currency Unit
ED	Economic Development Administration (of DOC)
EDBI	Export Development Bank of Iran
EDC	Export Development Corporation (Canada)
EDI	Electronic Data Interchange
EEC	European Economic Community
EEU	Eurasian Economic Union
EEZ	Exclusive Economic Zone
EFSA	European Food Safety Authority
EFTA	*European Free Trade Association*
EGA	WTO *Environmental Goods Agreement*
EHC	export health certificate (U.K.)
EIB	European Investment Bank
EIF	Enhanced Integrated Framework (formerly "IF," or "Integrated Framework")
EIG	*équipement d'intérêt general* (France)
ELLIE	Electronic Licensing Entry System
ELS	Extra Long Staple (cotton)
EN	Explanatory Note
ENAM	Electronic National Agricultural Market system (India)
ENFORCE Act	2015 *Trade Facilitation and Trade Enforcement Act*

(*TFTEA*, *TEA*)	
EO (*E.O.*)	*Executive Order* (U.S.)
EOBR	Electronic On Board Recorder
EP	Export Price
EPA (1st meaning)	*Economic Partnership Agreement*
EPA (2nd meaning)	U.S. Environmental Protection Agency
EPI	Economic Policy Institute
EPZ	Export Processing Zone
ERC	End-Use Review Committee (U.S. DOC BIS, set forth under *EAR*)
ERP	Effective Rate of Protection
E-SIGN Act	2000 *Electronic Signatures in Global and National Commerce Act*
ESCS	European Steel and Coal Community
ESG	Environmental, Social, and Governance
ESL	English as a Second Language
ESP	Exporter's Sales Price (Pre-Uruguay Round U.S. term for Constructed Export Price)
ESPO	Eastern Siberia Pacific Ocean
ET (EST)	Eastern Time (Eastern Standard Time)
ETA	Employment and Training Administration (DOL)
ETF	exchange traded fund
ETI Act	2000 *Extraterritorial Income Exclusion Act*
ETIM	East Turkistan Islamic Movement
ETP	Eastern Tropical Pacific (Ocean)
ETS	Emission(s) Trading Scheme (System)
EU	European Union
EUR	e*uro*
EUSFTA	*European Union-Singapore Free Trade Agreement*
EUC	End-User Review Committee (U.S.)
EUV	extreme ultraviolet lithography
Eurojust	EU agency for judicial cooperation in criminal matters
Europol	European Union Agency for Law Enforcement Cooperation
EV	Electric Vehicle
Ex-Im Bank	U.S. Export-Import Bank

FACT Act of 1990 (1990 *Farm Bill*)	1990 *Food, Agriculture, Conservation and Trade Act*
FAIR Act of 1996 (1996 Farm Bill)	1996 *Federal Agricultural Improvement and Reform Act*
FAIR Transition and Competition Act	2021 *Fair, Affordable, Innovative, and Resilient Transition and Competition Act* (proposed BCA legislation)
FAO	Food and Agricultural Organization
FAQ	Frequently Asked Question
FAR	Federal Acquisition Regulation (U.S.)
FAS	Foreign Agricultural Service (of USDA)
FAST	Free And Secure Trade
FATA	Federally Administered Tribal Areas (Pakistan)
FATF	Financial Action Task Force
FBI	U.S. Federal Bureau of Investigation
FCC	Federal Communications Commission (U.S.)
FCF	Fong Chun Formosa Fishery (Taiwan)
FCIC	U.S. Federal Crop Insurance Corporation (USDA)
FCLRC	Federal Conciliation and Labor Registration Center (Mexico)
FCPA	1977 *Foreign Corrupt Practices Act*
FCSC	Foreign Claims Settlement Commission (U.S.)
FDA	Food and Drug Administration (U.S.)
FDI	Foreign Direct Investment
FDP Rule	Foreign Direct Product Rule (U.S.)
Federal Circuit	U.S. Court of Appeals for the Federal Circuit (Washington, D.C.)
Fed. Reg.	Federal Register
FEMA	Federal Emergency Management Agency (U.S. DHS)
FEP	Fuel Enrichment Plant (*e.g.*, for UF_6 at Natanz, Iran)
FERC	U.S. Federal Energy Regulatory Commission
FF	*French Francs*

FFI	foreign financial institution
FFPO	Fines, Penalties and Forfeitures Office(r) (U.S. Ports of Entry)
FFTJ	Fittings, flanges, and tool joints
FGUP	State Research Center of the Russian Federation
FICCI	Federation of Indian Chambers of Commerce and Industry
FIFA	*Fédération Internationale de Football Association*
Fimea	Finnish Medicines Agency
FinCEN	U.S. Financial Crimes Enforcement Network (Department of the Treasury)
fintech	financial technology
FIRRMA	*Foreign Investment Risk Review Modernization Act of 2018* (part of 2018 *NDAA*)
FIT	Feed-in tariff
FLETF	Forced Labor Enforcement Task Force (DHS)
FMCSA	Federal Motor Carrier Safety Administration
FMSA	2011 *Food Safety Modernization Act*
FMV (1st meaning)	Foreign Market Value (Pre-Uruguay Round U.S. term for Normal Value)
FMV (2nd meaning)	Fair Market Value
FMVSS	Federal Motor Vehicle Safety Standards
FN4 Entity	Footnote 4 Entity (entity to which Footnote 4 is added to its entry on Entity List)
FOA	Facts Otherwise Available
FOB (f.o.b.)	Free On Board
FOP	Factors of Production
FOREX	Foreign Exchange
FPA	Foreign Partnership Agreement
FPC	U.S. Federal Power Commission (predecessor of DOE)
FPGA	field programmable gate array integrated circuit
FRAND	Fair, Reasonable, and Non-Discriminatory (terms)
FRCP	U.S. *Federal Rules of Civil Procedure*
FRCrimP	U.S. *Federal Rules of Criminal Procedure*
FRE	U.S. Federal Rules of Evidence
FRS	Fellowship of the Royal Society
FRSA	Fellowship of the Royal Society for the Encouragement of Arts, Manufactures, and Commerce

FSA (1st meaning)	U.S. Farm Services Agency
FSA (2nd meaning)	Food Safety Agency (EU)
FSB	Federal Security Service (Russia)
FSC	Foreign Sales Corporation
FSIA	*Foreign Sovereign Immunities Act of 1976*
FSRI Act of 2002 (2002 *Farm Bill*)	2002 *Farm Security and Rural Investment Act*
FTA	Free Trade Agreement
FTAA	*Free Trade Area of the Americas*
FTAAP	*Free Trade Agreement of the Asia Pacific Region*
FTC (1st meaning)	Free Trade Commission (*NAFTA*)
FTC (2nd meaning)	Federal Trade Commission (U.S.)
FTO	Foreign Terrorist Organization
FTSE	Financial Times Stock Exchange Group (“Footsie,” London)
FTZ (1st meaning)	Foreign Trade Zone
FTZ (2nd meaning)	Free Trade Zone
FY	Fiscal Year
FX	Foreign Exchange
G7 (G-7)	Group of Seven Industrialized Nations
G8 (G-8)	Group of Eight Industrialized Nations
G20 (G-20)	Group of Twenty Developed Nations
G33 (G-33)	Group of 33 Developing Countries
G&A	General and Administrative expenses
GAAP	Generally Accepted Accounting Principles
GAFA	Google, Apple, Facebook, and Amazon
GAIN	USDA FAS Global Agricultural Information Network
GAO	U.S. Government Accountability Office
GATB	*General Agreement on Trade in Bananas* (15 December 2009)
GATS	*General Agreement on Trade in Services*
GATT	General Agreement on Tariffs and Trade (GATT 1947 and/or GATT 1994)
GATT 1947	General Agreement on Tariffs and Trade 1947 and all pertinent legal instruments (Protocols, Certifications,

	Accession Protocols, and Decisions) entered into under it before entry into force of the *WTO Agreement* (1 January 1995)
GATT 1994	GATT 1947 plus all pertinent legal instruments (1994 Uruguay Round Understandings and Marrakesh Protocol) effective with the WTO Agreement (1 January 1995)
GAVI	Global for Vaccines and Immunizations
GB	Great Britain
GCAM	General Commission for Audiovisual Media (Saudi Arabia)
GCC (1st meaning)	Global Climate Coalition
GCC (2nd meaning)	Gulf Cooperation Council
GDP	Gross Domestic Product
GDPR	*General Data Protection Regulation* (EU 2016/679)
GE	General Electric
Genocide Convention	1948 U.N. *Convention on the Prevention and Punishment of the Crime of Genocide*
GFCI	Global Financial Centers Index
GI	Geographical Indication
GILTI	Global Intangible Low-Taxed Income
GISAID	Global Initiative on Sharing Avian Influenza Data
GL	General License
GloMag	2016 *Global Magnitsky Human Rights Accountability Act*
GM	Genetically Modified, Genetic Modification
GMO	Genetically Modified Organism
GMT	Greenwich Mean Time
GNH	Gross National Happiness
GNI	Gross National Income
GNP	Gross National Product
GOI	Government of India
GPA	*Government Procurement Agreement* (WTO *Agreement on Government Procurement*)
GPO (1st meaning)	Government Pharmaceutical Organization (Thailand)
GPO (2nd meaning)	Group Purchasing Organization (U.S.)
GPS	Global Positioning System
GPT	General Preferential Tariff

GRI	General Rules of Interpretation (of the HS)
GRP	Good Regulatory Practice
GSM	General Sales Manager
GSP	*Generalized System of Preferences* (U.S.)
GSP+	*Generalized System of Preferences Plus* (EU)
GTA	Global Trade Atlas
GVWR	Gross Vehicle Weight Rating
GW	gigawatt
H5N1	Avian Flu (virus)
H&M	Hennes & Mauritz AB (Swedish MNC)
HALE	High-Altitude, Long, Endurance unmanned aircraft system (drone) (U.S. Navy)
HALEU	high-assay, low-enriched Uranium
HCTC	Health Care Tax Credit
HDC	Holder in Due Course
HDI	U.N. Human Development Index
HDPE	high-density polyethylene
Helms-Burton Act	1996 *Cuban Liberty and Democracy Solidarity (Libertad) Act*
HFCAA	2020 *Holding Foreign Companies Accountable Act*
HFCS	High Fructose Corn Syrup
HHS	U.S. Department of Health and Human Services
HIPC	Highly Indebted Poor Country
HK$	Hong Kong dollar
HKIAC	Hong Kong International Arbitration Center
HKMA	Hong Kong Monetary Authority
HKSAR	Hong Kong Special Administrative Region
HKSE	Hong Kong Stock Exchange
HKU	Hong Kong University (University of Hong Kong)
HLED	High Level Economic Dialogue (*e.g.*, U.S.-Mexico)
HM	Her (His) Majesty
HMG	Her (His) Majesty's Government
HMT	Her (His) Majesty's Treasury (U.K.)
HNW	High Net Worth
HOEP	Hourly Ontario Energy Price

Homeland Security Act	2002 *Homeland Security Act*
HPAE	High Performing Asian Economy
HPAI	High Pathogenic Avian Influenza
HPC	High Performance Computer
HPNAI	High Pathogenic Notifiable Avian Influenza
HQ	Headquarters
HRL	Headquarters Ruling Letter (U.S. Customs Service, CBP)
HS	Harmonized System
HSBC	Hong Kong Shanghai Banking Corporation
HSBI	Highly Sensitive Business Information
HSC	Harmonized System Committee (WCO)
HSI	Homeland Security Investigation (U.S. DHS)
HTS	Harmonized Tariff Schedule
HTSUS	Harmonized Tariff Schedule of the U.S.
HVAC	Heating, Ventilation, and Air Conditioning
IA (1st meaning)	Import Administration (U.S. DOC)
IA (2nd meaning)	Information Available
IA (3rd meaning)	Internal Advice
IAC	Iran Alumina Company (IMIDRO subsidiary)
IADB	Inter-American Development Bank
IAEA	International Atomic Energy Agency
IAR	Internal Advice Response (CBP)
IBRD	International Bank for Reconstruction and Development (The World Bank)
IBT (1st meaning)	International Brotherhood of Teamsters
IBT (2nd meaning)	International Business Transactions
IC (1st meaning)	Indifference Curve
IC (2nd meaning)	integrated circuit
ICs	Indigenous Communities

	(Inuit and other indigenous communities)
ICAC	International Cotton Advisory Committee
ICAO	International Civil Aviation Organization (U.N.)
ICBM	Intercontinental Ballistic Missile
ICC (1st meaning)	International Chamber of Commerce
ICC (2nd meaning)	International Criminal Court
ICE	U.S. Immigration and Customs Enforcement
ICFTU	International Confederation of Free Trade Unions
ICIT	Intergovernmental Commission on International Trade (Ukraine)
ICJ	International Court of Justice
ICOR	Incremental Capital Output Ratio
ICS	Investment Court System
ICSID	International Center for the Settlement of Investment Disputes
ICT	Information and Communications Technology
ICTS	Information and Communications Technology Services
ICTSD	International Center for Trade and Sustainable Development
IDB	Integrated Database
IDF	Israeli Defense Forces
IDP	WTO Informal Dialogue on Plastics Pollution and Environmentally Sustainable Plastics Trade
IE	Information Exchange (MTCR)
IEA	International Energy Agency
IEC (1st meaning)	International Electrotechnical Commission
IEC (2nd meaning)	Importer-Exporter Code (India)
IEEPA	1977 *International Emergency Economic Powers Act*
IFD	WTO *Agreement on Investment Facilitation for Development*
IFPMA	International Federation of Pharmaceutical Manufacturers and Associations
IFPRI	International Food Policy Research Institute
IFSA	2006 *Iran Freedom Support Act*
IFTA	1985 *United States-Israel Free Trade Implementation Act*
IGBA	1970 *Illegal Gambling Business Act*
IGG	*itinéraire à grand gabarit* (France)

IHR	International Health Regulations (WHO)
IIA	*International Investment Agreement*
IIF	Institute of International Finance
IIPA	International Intellectual Property Alliance
IIT	Indian Institute of Technology
ILAB (BILA)	Bureau of International Labor Affairs (U.S. DOL OTLA)
ILC	International Law Commission
ILO	International Labor Organization
ILRF	International Labor Rights Forum
ILSA	1996 *Iran and Libya Sanctions Act* (called *ISA* after *IFSA*)
IMC	Industrial Metal and Commodities
IMF	International Monetary Fund
IMF *Articles*	*Articles of Agreement of the International Monetary Fund*
IMIDRO	Iranian Mines and Mining Industries Development and Renovation Organization
IMO	International Maritime Organization (CMI)
IMTDC	iron mechanical transfer drive component
INARA	2015 *Iran Nuclear Agreement Review Act*
INBAR	International Bamboo and Rattan Organization
Inc.	incorporated (U.S.)
INC	Inter-governmental Negotiation Committee
Incoterms	International Commercial Terms (ICC)
INN	International Non-proprietary Names (WHO)
INOVAR-AUTO	Incentive to the Technological Innovation and Densification of the Automotive Supply Chain (Brazil)
INR (1st meaning)	Initial Negotiating Right
INR (2nd meaning)	Indian *Rupee*
INS	U.S. Immigration and Naturalization Service (reorganized partly into ICE in March 2003)
IO	International Organization
IOR	Importer of Record
IP	Intellectual Property

IPBES	Intergovernmental Science-Policy Platform on Biodiversity and Ecosystem Studies
IPCC	U.N. Intergovernmental Panel on Climate Change
IPEF	*Indo-Pacific Economic Framework*
IPI Tax	Tax on Industrialized Products (Brazil)
IPIC Treaty (*Washington Treaty*)	1989 *Treaty on Intellectual Property in Respect of Integrated Circuits*
IPO	initial public offering
IPOA	International Plan Of Action
IPOA-IUU	International Plan Of Action to Prevent, Deter, and Eliminate Illegal, Unreported, and Unregulated Fishing (FAO)
IPPC	1952 *International Plant Protection Convention*
IPPR	Institute for Public Policy Research
IPR (1st meaning)	Intellectual Property Right
IPR (2nd meaning)	International Priority Right
IPTV	Internet Protocol Television
IRA (1st meaning)	*U.S. Inflation Reduction Act of 2022*
IRA (2nd meaning)	Irish Republican Army (Provisional Irish Republican Army)
IRC	U.S. Internal Revenue Code
IRENA	International Renewable Energy Agency
IRG (IRGC)	Iranian Revolutionary Guard Corps (Islamic Revolutionary Guard Corps)
IRGCN	Islamic Revolutionary Guards Corps Navy (Iran)
IRGC-QF	Islamic Revolutionary Guards Corp *Quds* Forces (Iran)
IRISL	Islamic Republic of Iran Shipping Lines
IRNA	Islamic Republic News Agency (Iran)
IRQ	Individual Reference Quantity
IRS	U.S. Internal Revenue Service
ISA	*Iran Sanctions Act of 1996*, as amended, *i.e.*, *Iran Sanctions Act of 2012* (formerly *ILSA*)
ISDS	Investor-State Dispute Settlement
ISEAS	Institute of Southeast Asian Studies

	(ISEAS-Yusof Ishak Institute, Singapore)
ISI	Inter-Services Intelligence (Pakistan)
ISIL	Islamic State in the Levant (ISIS)
ISIS	Islamic State in Shams (ISIL)
ISO	International Organization for Standardization
ISTC	International Sugar Trade Coalition
IT	Information Technology
ITA (1st meaning)	1996 WTO *Information Technology Agreement*
ITA (2nd meaning)	U.S. International Trade Administration (DOC)
ITA II (*ITA – Exp*)	2015 *Information Technology Agreement* (Expansion of the *Information Technology Agreement*)
ITAR	*International Traffic in Arms Regulations*
ITC (1st meaning)	International Trade Center (joint WTO-U.N. agency)
ITC (U.S.ITC) (2nd meaning)	U.S. International Trade Commission
ITDS	International Trade Data System (electronic single window for import-export data)
ITO	International Trade Organization
ITO *Charter* (*Havana Charter*)	*Charter for an International Trade Organization*
ITRD	International Trade Reporter Decisions
ITSR	Iranian Transactions and Sanctions Regulations (31 C.F.R. Part 560)
ITT	ITT Corporation
ITT NV	ITT Night Vision
ITU	International Telecommunications Union
IUD	intra-uterine device
IUSCT	Iran – U.S. Claims Tribunal
IUU	illegal, unreported, and unregulated
IWC	International Whaling Commission
JADE Act	2008 *Tom Lantos Block Burmese JADE (Junta's Anti-Democratic Efforts) Act*
J&K	Jammu and Kashmir (Indian-Administered Kashmir)
JCPOA	July 2015 *Joint Comprehensive Plan of Action*

	(*Iran Nuclear Deal*)
JeM	*Jaish-e-Mohammed* (“The Army of Muhammad,” Pakistan-based terrorist organization)
JFTC	Japan Fair Trade Commission
JIA	Japanese Investigative Authority
JNPT	Jawaharlal Nehru Port Terminals (Mumbai, India)
JPC	Joint Planning Committee (India)
JSC	Joint Stock Company (Russia)
JSI	*Joint Statement Initiative*
JV	Joint Venture
KAF	Khalid Al Falih (former Saudi Minister of Oil)
KCBT	Kansas City Board of Trade
KDB	Korea Development Bank
KEXIM	Export-Import Bank of Korea
KFC	Kentucky Fried Chicken
KfW	*Kreditanstalt für Wiederaufbau* (Germany, Credit Agency for Reconstruction)
kg	kilogram
KGB	*Komitet Gosudarstvennoy Bezopasnosti* (“Committee for State Security,” Soviet Union)
KH	*Kata’ib Hezbollah* (*Hezbollah* Brigades, Iraq)
km	kilometer
KMA	Kubota Manufacturing of America
KMT	*Kuomintang*
KORUS	*Korea – United States Free Trade Agreement*
KPPI	*Komite Pengamanan Perdagangan Indonesia* (competent international trade authority)
KSA	Kingdom of Saudi Arabia
KU	University of Kansas
kW	kilowatt
kWh	kilowatt hour
L/C	Letter of Credit
LAC	Line of Actual Control (Ladakh-Aksai Chin)

LAN	Local Area Network
LAP	Labor Action Plan (Colombia TPA)
LCA	Large Civil Aircraft
LCD	Liquid Crystal Display
LDBDC	Least Developed Beneficiary Developing Country
LDC (1st meaning)	Least Developed Country
LDC (2nd meaning)	Less Developed Country (includes developing and least developed countries)
LDC (3rd meaning)	Local distribution company
LED	light-emitting diode
LEEM	Licensing and Enforcement Experts Meeting (MTCR)
LegCo	Legislative Council of the Hong Kong Special Administrative Region
LGBTQ+	Lesbian, Gay, Bisexual, Transgender, Queer (or Questioning), and others
LLDC	Landlocked Developing Country
LNG	Liquefied Natural Gas
LNPP	Large Newspaper Printing Press
LNR	Luhansk People's Republic
LOC	Line of Control (Kashmir)
LOT	Level of Trade (dumping margin calculation adjustment)
LPAI	Low Pathogenic Avian Influenza
LPF	level playing field
LPG	Liquefied Petroleum Gas
LPMO	Livestock Products Marketing Organization (Korea)
LPNAI	Low Pathogenic Notifiable Avian Influenza
LPR (1st meaning)	Labor Force Participation Rate
LPR (2nd meaning)	Loan Prime Rate (PBOC)
LRW	Large Residential Washer
LTFV	Less Than Fair Value
LVC	Labor Value Content
LVMH	Louis Vuitton Moët Hennessey

LWR	Light-Walled Rectangular pipe and tube
LWS	Laminated Woven Sacks
M&A	mergers and acquisitions
MAD	Mutually Assured Destruction
MAFF	Ministry of Agriculture, Forestry, and Fisheries (Korea)
MAI	Multilateral Agreement on Investment
MAP	Monitoring and Action Plan
Marrakesh Protocol	*Marrakesh Protocol* to GATT 1994
Maastricht Treaty	1992 Treaty on European Union
MAS	Monetary Authority of Singapore
MBB	*Messerschmitt-Bölkow-Blohm GmbH* (Germany)
MBS	Mohammed Bin Salman (Crown Prince, Saudi Arabia)
MC (MCX)	WTO Ministerial Conference (MC11 means 11th Ministerial Conference, MC12 means 12th Ministerial Conference, MC13 means 13th Ministerial Conference, and so on)
MCF	military-civil fusion (doctrine) (China)
MCIT	Ministry of Communications and Information Technology (India)
MCL	Munitions Control List
MCTL	Military Critical Technologies List
MDG	Millennium Development Goal
MDL	Military Demarcation Line (DMZ)
MEA	*Multilateral Environmental Agreement*
MEC	Myanmar Economic Corporation
MEDT	Ministry of Economic Development and Trade (Ukraine)
MEFTA	*Middle East Free Trade Agreement*
MEHL	Myanmar Economic Holdings Limited
MEK (*PMOI*)	*Mojahedin-e Khalq* (*People's Mojahedin Organization of Iran*, *PMOI*, exiled Iranian opposition group)
MENA	Middle East North Africa
MEP	Member of the European Parliament
METI	Ministry of Economy, Trade, and Industry (Japan, formerly MITI)
MEU	military end user

MFA	*Multi-Fiber Arrangemen*t (1974-2004)
MFN	Most Favored Nation
MGE	Myanmar Gems Enterprise
MHI	Mitsubishi Heavy Industries, Ltd.
MHT	*Matra Hautes Technologies* (France)
MI5	Military Intelligence, Section 5 (U.K. domestic counter-intelligence and security agency)
MI6	Military Intelligence, Section 6 (U.K. foreign intelligence service)
MIIT	Ministry of Industry and Information Technology (China)
MITI	Ministry of International Trade and Industry (Japan)
MLA	Member of the Legislative Assembly (Stormont, Northern Ireland)
mm	millimeter
MMA	Minimum Market Access (quota)
MMBtu	Million British Thermal Unit
MMPA	1972 *Marine Mammal Protection Act*
MMT	million metric tons
mn	million
MNC	Multinational Corporation
MNE	Multinational Enterprise
MOCI	Ministry of Commerce and Industry (India, Saudi Arabia)
MOCIE	Ministry of Commerce, Industry, and Energy (Korea)
MOFAT	Ministry of Foreign Affairs and Trade (Korea)
MOFCOM	Ministry of Commerce (China)
MOGE	Myanma Oil and Gas Enterprise (sometimes referred to as Myanmar Oil and Gas Enterprise)
MOI (MOI Test)	Market Oriented Industry
MOTIE	Ministry of Trade, Industry, and Energy (Korea)
MOU	Memorandum of Understanding
MP	Member of Parliament
MPC	Marginal Propensity to Consume
MPF	Merchandise Processing Fee

MPIA	WTO *Multi-Party Interim Appeal Arbitration Arrangement*
MPS	Marginal Propensity to Save
MRA	*Mutual Recognition Agreement*
MRE	Meals Ready to Eat
MRI	magnetic resonance imaging
MRL	Maximum Residue Level
MRM	Marine Resource Management
mRNA	messenger ribonucleic acid
MRS	Marginal Rate of Substitution
MRT	Marginal Rate of Transformation
MSCI	Morgan Stanley Capital International
MSF	*Médecins Sans Frontières*
MSME	Micro, Small, and Medium Sized Enterprise
MSP (1st meaning)	Minimum Support Price
MSP (2nd meaning)	Ministry of Social Protection (Colombia)
MSS	Ministry of State Security (China)
MST	Minimum Standard of Treatment
MSY	maximum sustainable yield
mt	metric ton
MTA (1st meaning)	Managed Trade Agreement
MTA (2nd meaning)	Metropolitan Transit Authority (New York City)
MTA (3rd meaning)	Multilateral Trade Agreement
MTB	Miscellaneous Trade Bill (multiple years)
MTCR	Missile Technology Control Regime
MTN	Multilateral Trade Negotiation
MTO	Multilateral Trade Organization
MTOP	Millions of Theoretical Operations per Second
MUFG	Mitsubishi UFJ Financial Group Bank, Ltd. (Japan)
MVTO	Motor Vehicles Tariff Order (Canada)
MWh	Mega Watt hour
MY	Marketing Year
NAD Bank	North American Development Bank

	(*NAFTA*)
NAAEC	*North American Agreement on Environmental Cooperation* (*NAFTA Environmental Side Agreement*)
NAALC	*North American Agreement on Labor Cooperation* (*NAFTA Labor Side Agreement*)
NAFTA	*North American Free Trade Agreement* (*NAFTA* 1.0 and/or *NAFTA* 2.0)
NAFTA 1.0	*North American Free Trade Agreement* (original FTA that entered into force 1 January 1994)
NAFTA 2.0	*North American Free Trade Agreement* (revised FTA based on August 2017-September 2018 renegotiations, called *CUSMA* in Canada, *USMCA* in America, and informally called *NAFTA* 2.0, signed again after further renegotiations 10 December 2019, and entered into force 1 July 2020)
NAI	Notifiable Avian Influenza
NAM (1st meaning)	U.S. National Association of Manufacturers
NAM (2nd meaning)	Non-Aligned Movement
NAMA	Non-Agricultural Market Access
NAND	Not AND flash memory chip technology
NAO	National Administrative Office (*NAFTA*)
NATO	North Atlantic Treaty Organization
NASA	U.S. National Aeronautics and Space Administration
NASDAQ	National Association of Securities Dealers Automated Quotations exchange (U.S.)
NBA	National Basketball Association
NBP	National Bank of Pakistan
NC	Net Cost
NCC (1st meaning)	National Chicken Council
NCC (2nd meaning)	Non-Cooperative Country (Argentina)
NCCDA	*National Critical Capabilities Defense Act* (part of *ACA*)
NCM	Non-Conforming Measure
N.C.M.	*Nomenclatura Común MERCOSUR* (*MERCOSUR* Common Nomenclature)
NCSC	National Counterintelligence and Security Center

(1st meaning)	(U.S.)
NCSC (2nd meaning)	National Cyber Security Center (U.K.)
NCTO	National Council of Textile Organizations
NDA	National Democratic Alliance (India)
NDAA	U.S. *National Defense Authorization Act* (annual policy bill for DOD and national security since 1962)
NDC	North Drilling Company (Iran)
NdFeB	neodymium-iron-boron permanent magnets (also called neodymium magnets, neo magnets, or rare earth magnets)
NDRC	National Development and Reform Commission (China)
NEA	1976 *National Emergencies Act*
NEI	National Export Initiative
NEP	New Economic Policy (Malaysia)
nes	not elsewhere specified
NFIDC	Net Food Importing Developing Country
NFTC	National Foreign Trade Council
NG	Natural Gas
NGR	Negotiating Group on Rules (WTO Doha Round)
NHI	National Health Insurance (Korea)
NHS	National Health Service (U.K.)
NHT	National Hand Tools Corporation
NI	Northern Ireland
NIC	Newly Industrialized Country
NICO	Naftiran Intertrade Company
NIDC	National Iranian Drilling Company (NIOC subsidiary)
NIEO	New International Economic Order
NIOC	National Iranian Oil Company
NIST	U.S. National Institute of Standards and Technology
NITC	National Iranian Tanker Company
NJPA	National Juice Products Association
NLC	National Labor Committee (U.S.)

NLCF	National Livestock Cooperatives Federation
NLD	National League for Democracy (Burma)
NLR	No Licence Required (U.S. DOC BIS)
NLRB	National Labor Relations Board (U.S.)
nm	nanometer
NMDC	National Minerals Development Corporation (India)
NME	Non-Market Economy
NMFS	U.S. National Marine Fisheries Service (DOC)
NNSA	U.S. National Nuclear Security Administration (DOE)
NOAA	U.S. National Oceanic and Atmospheric Administration (DOC)
NO_x	Nitrogen oxides
NPA	Non-Prosecution Agreement
NPC (1st meaning)	National People's Congress (China's legislature)
NPC (2nd meaning)	National Petrochemical Company (Iran)
NPCSC	National People's Congress Standing Committee (NPC's top-decision making body)
NPF	Non-Privileged Foreign status
NPL	Non-Performing Loan
NPT	1968 *Nuclear Non-Proliferation Treaty*
NRA	National Rifle Association
NRC	U.S. Nuclear Regulatory Commission
NRI	Non-Resident Indian
NRL	Nuclear Referral List
NSA	U.S. National Security Agency
NSC	National Securities Commission (Argentina)
NS-CMIC List	Non-SDN Chinese Military Industrial Complex Companies List
NSF	U.S. National Science Foundation
NSG	Nuclear Suppliers Group
NSIBR	*National Security Industrial Base Regulations*
NSL	*National Security Law* (2020 *Law of the PRC on Safeguarding National Security in*

	the Hong Kong Special Administrative Region)
NSM	Jawaharlal Nehru National Solar Mission (India)
NSPK	National Payment Card System Joint Stock Company (Russia)
NSPD	National Security Presidential Directive
NSS	WTO SPS National Notification System
NTA	National Textile Association (U.S.)
NTB	Non-Tariff Barrier
NTC	National Trade Council (United States)
NTE (1st meaning)	*National Trade Estimate Report on Foreign Trade Barriers* (USTR)
NTE (NTE sector) (2nd meaning)	Non-Traditional Export (sector)
NTM	Non-Tariff Measure
NTR	Normal Trade Relations
NTSB	National Transportation Safety Board (U.S.)
NV (*N.V.*) (1st meaning)	*Naamloze Vennootschap* (Dutch), a publicly limited liability company, with legal personality, which sells capital that is divided into shares to the public to obtain income.
NV (2nd meaning)	Normal Value
NVOCC	Non-Vessel Operating Common Carrier
NWFP	North West Frontier Province (Pakistan) (Khyber Pakhtunkhwa)
N.Y. Fed (FRBNY)	Federal Reserve Bank of New York
NYSE	New York Stock Exchange
NYU	New York University
NZ$	New Zealand Dollar
NZD	New Zealand Dollar
OAS	Organization of American States
OBE	Officer of the Most Excellent Order of the British Empire
OBRA	*Omnibus Budget and Reconciliation Act* (multiple years)
OCD	Ordinary Customs Duties
OCR	Out of Cycle Review
OCTG	Oil Country Tubular Goods

ODA	Official Development Assistance
ODC	Other Duties and Charges
OECD	Organization for Economic Cooperation and Development
OED	*Oxford English Dictionary*
OEE	U.S. Office of Export Enforcement (BIS)
OEM	Original Equipment Manufacturer
OFA	Other Forms of Assistance
OFAC	U.S. Office of Foreign Assets Control (Department of the Treasury)
OIC	Organization of Islamic Conference
OIE	World Organization for Animal Health (*Office International des Epizooties*)
OLI	Ownership, Location, and Internalization (Theory)
OMA	Orderly Marketing Arrangement
OMB	Office of Management and Budget (U.S.)
OMO	Open Market Operation
OOIDA	Owner-Operator Independent Drivers Association
OPA	Ontario Power Authority (Canada)
OPEC	Organization of Petroleum Exporting Countries
OPIC	U.S. Overseas Private Investment Association (U.S. International Development Finance Corporation)
OPZ	Outward Processing Zone (*KORUS*)
OSINFOR	*Organismo de Supervisión de los Recursos Forestales y de Fauna Silvestre* (Forestry regulator, Peru)
Oslo I Accord (*Oslo I*)	13 September 1993 *Israeli-PLO Declaration of Principles on Interim Self-Government Arrangements* (DOP)
OTC	Over the Counter
OTCA (*1988 Act*)	*Omnibus Trade and Competitiveness Act of 1988*
OTCG	Oil Country Tubular Good
OTDS	Overall Trade distorting Domestic Support
OTEXA	Office of Textiles and Apparel (U.S. DOC)
OTLA	Office of Trade and Labor Affairs (in DOL)
OTR	Off-The-Road

P5+1	China, France, Russia, U.K., and U.S. (five permanent U.N. Security Council members), plus Germany
P&I	protection and indemnity (maritime insurance)
PACOM (USINDOPACOM)	United States Indo-Pacific Command
PADIS	Program of Incentives for the Semiconductors Sector (Brazil)
PAP	People's Action Party (Singapore)
PAPS	Pre-Arrival Processing System
Paris Agreement	December 2015 *Paris Climate Accord*, or *Paris Climate Agreement*, under *UNFCCC*
Paris Convention	1883 Paris Convention for the Protection of Industrial Property
PASA	Pre-Authorization Safety Audit
PATVD	Program of Support for the Technological Development of the Industry of Digital TV Equipment (Brazil)
PBC (PBOC)	People's Bank of China
PBS	Price Band System
PBUH	Peace Be Upon Him
Pub. L. No.	Public Law Number (United States)
PC	Personal Computer
PCA (1st meaning)	Post-Clearance Audit
PCA (2nd meaning)	Permanent Court of Arbitration (The Hague)
PCAOB	Public Company Accounting Oversight Board (United States)
PCAST	President's Council of Advisors on Science and Technology (United States)
PCB	printed circuit board
PCBA	printed circuit board assembly
PCG (PCG fibers)	polyvinyl alcohol (PVA), cellulose, and glass fibers
PDB	President's Daily Brief
PDR	People's Democratic Republic (Lao PDR)
PDV	Present Discounted Value
PDVSA	*Petróleos de Venezuela, S.A.*

	(Venezuelan state-owned oil and natural gas company)
PEESA	*Protecting Europe's Energy Security Act of 2019*, as amended
Pemex	*Petróleos Mexicanos* (Mexico)
PEO	Permanent Exclusion Order
PETA	People for the Ethical Treatment of Animals
PF	Privileged Foreign status
PFC	Priority Foreign Country
Pharma Agreement	WTO *Agreement on Pharmaceutical Products* (Uruguay Round plurilateral sectoral agreement)
PhRMA	Pharmaceutical Manufacturers of America
PI	preliminary injunction
PIS/PASEP	*Social Integration Program/Civil Service Asset Formation Program Contribution* (Brazil)
PIS/PASEP-Importation	*Social Integration and Civil Service Asset Formation Programs Contribution Applicable to Imports of Foreign Goods or Services* (Brazil)
PJSC	Public Joint Stock Company (Russia)
PLA	People's Liberation Army (China)
Plc	public limited company (U.K.)
PLI	Production-Linked Incentive
PLO	Palestine Liberation Organization
PM	Prime Minister
PMC	Popular Mobilization Committee (Iraq)
PME	Pingtan Marine Enterprise (China)
PNTR	Permanent Normal Trade Relations
PNW	Pine wood nematode
POA	Power of Attorney
POC	Point of Contact (MTCR)
POI	Period of Investigation
POR	Period of Review
POW-MIA	Prisoner of War – Missing in Action
PP	Purchase Price (Pre-Uruguay Round U.S. term for Export Price)

PPA	Power Purchase Agreement
PPB	Basic Productive Process (Brazil)
PPE	personal protective equipment
PPF	Production Possibilities Frontier
PPM (1st meaning)	parts per million
PPM (2nd meaning)	process and production method
PPP	Purchasing Power Parity
PPS	Probability-Proportional to Size
PR	public relations
PRC	People's Republic of China
PROEX	*Programa de Financiamento às Exportações* (Brazil)
PRO-IP Act	2008 *Prioritizing Resources and Organization for Intellectual Property Act*
PRS	Price Range System
PSA (1st meaning)	Port of Singapore Authority
PSA (2nd meaning)	production sharing agreement
PSC	Post-Summary Correction (U.S. CBP)
PSH	Public Stock Holding
PSI	Pre-Shipment Inspection
PSI Agreement	WTO *Agreement on Pre-Shipment Inspection*
PSRO	Product Specific Rule of Origin
PSU	Public Sector Unit (India)
PTA (1st meaning)	Preferential Trade Agreement, or Preferential Trading Arrangement
PTA (2nd meaning)	Payable through account
PTO	U.S. Patent and Trademark Office
PUBG	PlayerUnknown's Battlegrounds (Chinese app)
PV	Photovoltaic
PVA (PVA fibers)	Polyvinyl alcohol fibers
PVC	Polyvinyl chloride
PVLT	passenger vehicle and light truck

PwC	PricewaterhouseCoopers
QAI	Quds Aviation Industries (Iran)
QC	Queen's Counsel
QE	Quantitative Easing
QIZ	Qualified Industrial Zone
QR	Quantitative Restriction
Quad	Quadrilateral Security Dialogue (Australia, India, Japan, and U.S.)
R&D	Research and Development
R&TD	Research and Technological Development measures
RAM	Recently Acceded Member (of WTO)
RAN	Radio Access Network
RBI	Reserve Bank of India
RCC	United States – Canada Regulatory Cooperation Council
RCEP	Regional Comprehensive Economic Partnership
RCMC	Registration-cum-Membership Certificate (India)
RDIF	Russian Direct Investment Fund
rDNA	recombinant deoxyribonucleic acid
REACH	Registration, Evaluation, and Authorization of Chemicals (EU)
REC	Regional Economic Community
REER	Real Effective Exchange Rate
Rep.	Representative
RESTRICT Act	U.S. *Restricting the Emergence of Security Threats that Risk Information and Communications Technology (RESTRICT) Act*
RFMO	Regional Fisheries Management Organization
RFMO/A	Regional Fisheries Management Organization or Arrangement
RMA (1st meaning)	Risk Management Association (U.S.)
RMA (2nd meaning)	Risk Management Authorization
RMB	*Ren min bi* ("people's money," the Chinese currency)
RMG	Ready Made Garment
RMI (DRM)	Rights Management Information (Digital Rights Management)
RNG	WTO Negotiating Group on Rules

	(Rules Negotiating Group)
RNRC	Russian National Reinsurance Company
ROA	Return on Assets
ROC (R.O.C.)	Republic of China (Taiwan)
Rome Convention	1964 *Rome Convention for the Protection of Performer, Producers of Phonograms and Broadcasting Organizations*
ROO	Rule Of Origin
ROW	Rest Of World
ROZ	Reconstruction Opportunity Zone
RPC	*RCEP* Participating Country
RPG	Rocket-propelled grenade
RPL	Relative Price Line
RPOC	Reinforced Point Of Contact (MTCR)
RPT	Reasonable Period of Time
RRM	*USMCA* Rapid Response Mechanism
Rs.	*Rupee*
RSS	*Rashtriya Swayamsevak Sangh* (India)
RTA	Regional Trade Agreement
RTAA	Re-employment Trade Adjustment Assistance
Rusi	Royal United Services Institute (U.K.)
RV	Recreational Vehicle
RVC	Regional Value Content
S&D	Special and Differential
S&ED	Strategic and Economic Dialogue (U.S.-China)
S.A.	*Société Anonyme* (French company designation), *Sociedad Anónima* (Spanish company designation), *Sociedade Anónima* (Portuguese company designation)
S.A. de C.V.	*Sociedad Anónima de Capital Variable* (Mexican company designation)
SAA	Statement of Administrative Action
SAARC	*South Asia Association for Regional Cooperation*
SABIC	Saudi Arabian Basic Industry Corporation (Saudi Arabian Basic Industries Corporation)
SAC	State Administration Council (Burma)
SACU	*Southern African Customs Union*

SADC	*Southern African Development Community*
SAF	sustainable aviation fuel (*IPEF*)
SAFE	State Administration of Foreign Exchange (China)
SAFE Port Act	2006 *Security and Accountability for Every Port Act*
SAFTA	*South Asia Free Trade Agreement*
SAGIA	Saudi Arabian General Investment Authority
SAIC	Shanghai Automotive Industry Corporation Motor Corporation Limited (China)
SAM	surface-to-air (missile)
SAMA	Saudi Arabian Monetary Authority
SAP	Structural Adjustment Program
SAPTA	*South Asia Preferential Trading Arrangement*
SAR (1st meaning)	Suspicious Activity Report (FinCEN)
SAR (2nd meaning)	Special Administrative Region (China)
SAR (3rd meaning)	Saudi Arabian *Riyal*
SARS	Sudden Acute Respiratory Syndrome
SASAC	State-owned Assets Supervision and Administration Commission of the State Council (China)
SBV	State Bank of Vietnam
SCC	standard contractual clause
Scexit	Exit of Scotland from the U.K.
SCGP	Supplier Credit Guarantee Program
SCI	*Secretaría de Comercio Interior* (Argentina, Secretary of Domestic Trade)
SCM	Subsidies and Countervailing Measures
SCM Agreement	WTO *Agreement on Subsidies and Countervailing Measures* (*ASCM*)
SCP	Sugar Containing Product
SDF	Steel Development Fund (India)
SDG	United Nations Sustainable Development Goal
SDIC	State Development & Investment Corp. (China)
SDLP	Social Democratic and Labor Party (Northern Ireland)

SDN (SDN List)	Specially Designated Nationals and Blocked Persons (List)
Sdn Bhd (SDN BHD)	Sendirian Berhad (privately limited company, Malaysia)
SDR (1st meaning)	services domestic regulation
SDR (2nd meaning)	IMF Special Drawing Right
SE	*Secretaría de Economía* (Secretariat of Economy, Mexico, formerly *SECOFI*)
SEBI	Securities and Exchange Bureau of India
SEC	U.S. Securities and Exchange Commission
SECOFI	Secretary of Commerce and Industrial Development (*Secretario de Comercio y Fomento Industrial*), *i.e.*, Ministry of Commerce and Industrial Development (Mexico, renamed SE in December 2000)
SED	Strategic Economic Dialogue (U.S.-China)
SEI	Strategic Emerging Industry (SEI Catalogue – China)
SEIU	Service Employees International Union
Sen.	Senator
SENTRI	Secure Electronic Network for Travelers Rapid Inspection
SEP	Standard Essential Patent
SEZ	Special Economic Zone
SFA	Singapore Food Agency
SFO	Serious Fraud Office
SG&A	Selling, General, and Administrative expenses
SG$	Singapore Dollar
SGD	Singapore Dollar
SHIG	Shahid Hemmat Industries Group (Iran)
SIDS	Small Island Developing States
SJM	*Swadeshi Jagaran Manch* (India)
SIE	State Invested Enterprise
SIFI	Systemically Important Financial Institution
SIFMA	Securities Industry and Financial Markets Association
SII	Serum Institute of India
SIL	Special Import License (India)
SIM	*Sistema Informático MARIA*

	(Argentina, AFIP electronic portal information system)
SIMA	*Special Import Measures Act* (Canada)
SKD	Semi-knock down
SKM	*Samyukta Kisan Morcha* (India, umbrella group of approximately 40 farmers unions)
SMART	Secondary Materials and Recycled Textiles Association
SMBC	Sumitomo Mitsui Banking Corporation (Japan)
SME (1st meaning)	Small and Medium Sized Enterprise
SME (2nd meaning)	Square Meter Equivalent
SMIC	Semiconductor Manufacturing International Corp. (China)
SMS	Supply Management System (Canada)
SNAP	Supplemental Nutritional Assistance Program
SNAP-R	Simplified Network Application Process - Redesign
SNB	Swiss National Bank
SNITIS	*Sindicato Nacional Independiente de Trabajadores de Industrias y de Servicios Movimiento 20/32* (independent Mexican labor union)
SNP	Scottish National Party
S.O.	Statutory Order (India)
SOCB	State Owned Commercial Bank (China)
SocGen	*Société Générale* (France)
SOE	State Owned Enterprise
SOF	Special Operations Forces
SOGI	Sexual Orientation and Gender Identity
SPD	Solar Power Developer
SPI (1st meaning)	Seven Pillars Institute for Global Finance and Ethics
SPI (2nd meaning)	Special Program Indicator
SPND	*Sazman-e Pazhouheshhaye Novin-e Defa'i* (Organization of Defensive Innovation and Research, Iran)
SPS (1st meaning)	Sanitary and Phytosanitary

SPS (2nd meaning)	Single Payment Scheme
SPS Agreement	WTO *Agreement on Sanitary and Phytosanitary Measures*
SPV	Special Purpose Vehicle
SRAM	Static Random Access Memory (chip)
SRO	Special Remission Order (Canada)
SS	Special Session(s)
SSA	Sub-Saharan Africa
SSAC	Sub-Saharan African Country
SSF Guidelines	Voluntary Guidelines for Securing Sustainable Small-Scale Fisheries in the Context of Food Security and Poverty Eradication (FAO)
SSG	Special Safeguard
SSM	Special Safeguard Mechanism
SSN	Resolutions of the National Insurance Supervisory Authority (Argentina)
SST	State Sponsor of Terrorism
Stat.	United States Statutes at Large
Stat. Suf.	Statistical Suffix
STB	set-top box
STDF	WTO Standards and Trade Development Facility
STE	State Trading Enterprise
STIP	*U.S.-Kenya Strategic Trade and Investment Partnership*
STO	Special Trade Obligation
SUV	Sport utility vehicle
SVE	Small, Vulnerable Economy
SVP	surge voltage protector
SWAT	Strategic Worker Assistance and Training Initiative
SWIFT	Society for Worldwide Interbank Financial Telecommunications
T&A	Textiles and Apparel
TAA (1st meaning)	Trade Adjustment Assistance
TAA (2nd meaning)	*Trade Agreements Act of 1974*, as amended
TAAEA	2011 *Trade Adjustment Assistance Extension Act*
TAARA	*Trade Adjustment Assistance Reauthorization Act of 2015*
TAA Reform Act	2002 *Trade Adjustment Assistance Reform Act*
TABC	Trans-Atlantic Business Council

(TBC)	(also abbreviated TBC)
TABD	Trans-Atlantic Business Dialogue
TAC	Total Allowable Catch
TACB	technical assistance and capacity building (*IPEF*)
TAIPEI Act	2019 *Taiwan Allies and International Protection and Enhancement Initiative Act*
TB	tuberculosis
TBEA	Tebian Electric Apparatus Co., Ltd. (China)
TBI	traumatic brain injury
TBT	Technical Barriers to Trade
TBT Agreement	WTO *Agreement on Technical Barriers to Trade*
TCA	*U.K.-EU Trade and Cooperation Agreement* (*EU-U.K. Trade and Cooperation Agreement*, *i.e.*, Christmas Eve 2020 *Brexit Deal*, effective 1 January 2020)
TCOM	Total Cost of Manufacturing
TCP (1st meaning)	Third Country Price
TCP (2nd meaning)	*El Tratado de Comercio entre los Pueblos*, ("Trade Treaty for the Peoples")
TCS	Tata Consulting Services
TD	Treasury Decision (U.S.)
TDA	2000 *Trade and Development Act*
TDDS	trade-distorting domestic support
TDEA	1983 *Trade and Development Enhancement Act*
TDI	Trade Defense Instrument
TDIC	Tourism Development and Investment Company (Abu Dhabi, UAE)
TEA (1st meaning)	*Trade Expansion Act of 1962*, as amended
TEA (2nd meaning) (*TFTEA*)	*Trade Enforcement Act of 2015*, as amended (same as *TFTEA*, *Trade Facilitation and Trade Enforcement Act*)
TECRO	Taipei Economic and Cultural Representative Office
TED	Turtle Excluder Device
TEM	Technical Experts Meeting (MTCR)
TEO	Temporary Exclusion Order
ter	third version (of a text)

TESSD	Trade and Environmental Sustainability Structured Discussions (WTO)
TEU	Twenty Foot Equivalent Unit
TFA	WTO *Agreement on Trade Facilitation* (Trade Facilitation Agreement)
TFAF	Trade Facilitation Agreement Facility
TFP	Total Factor Productivity
TFR	Total Fertility Rate
TGAAA	2009 *Trade and Globalization Adjustment Assistance Act*
TGL	Temporary General License
THAAD	Terminal High Altitude Area Defense system
TIEA	*Tax Information Exchange Agreement*
TIES	Threat and Imposition of Economic Sanctions database (University of North Carolina)
TIFA	*Trade and Investment Framework Agreement*
TIPA	*Taiwan Invasion Prevention Act*
TIPI	*Trade and Investment Partnership Initiative*
TISA (*TiSA*, *TSA*)	WTO *Trade in Services Agreement*
TKB	*Transkapitalbank* (Russia)
TMT	thousand metric tons
TN (1st meaning)	*NAFTA* business visa
tn (second meaning)	trillion
TNC	WTO Trade Negotiations Committee
TOT	Terms of Trade
TPA (1st meaning)	Trade Promotion Agreement
TPA (2nd meaning)	Trade Promotion Authority (Fast Track)
TPBI	Thai Plastic Bags Industries
TPC	Technology Partnerships Canada
TPEA	2015 *Trade Preferences Extension Act*
TPF	United States – India Trade Policy Forum
TPL	Tariff Preference Level
TPM (1st meaning)	Trigger Price Mechanism
TPM	Technological Protection Measure

(2nd meaning)	
TPP (1st meaning)	*Trans Pacific Partnership*
TPP (2nd meaning)	Tobacco Plain Packaging For example, Australia's (1) *Tobacco Plain Packaging Act 2011*, (2) *Tobacco Plain Packaging Regulations 2011*, as amended by the *Tobacco Plain Packaging Amendment Regulation 2012* (Number 1), and (3) *Trade Marks Amendment (Tobacco Plain Packaging) Act 2011*.
TPP 11	*CPTPP* (entered into force 30 December 2018)
TPRB	WTO Trade Policy Review Body
TPRM	WTO Trade Policy Review Mechanism
TPSC	Trade Policy Staff Committee (U.S., interagency led by USTR)
TRA (1st meaning)	1979 *Taiwan Relations Act*
TRA (2nd meaning)	Trade Readjustment Allowance
TRB	Tapered roller bearing
TRIA	*Terrorism Risk Insurance Act of 2002*
TRIMs	Trade Related Investment Measures
TRIMs Agreement	WTO *Agreement on Trade Related Investment Measures*
TRIPs	Trade Related Aspects of Intellectual Property Rights
TRIPs Agreement	WTO *Agreement on Trade Related Aspects of Intellectual Property Rights*
TRO	Temporary Restraining Order
TRQ	Tariff Rate Quota
TSA	U.S. Transportation Security Administration
TSMC	Taiwan Semiconductor Manufacturing Co.
TSUS	Tariff Schedule of the United States (predecessor to HTSUS)
TTC	U.S.-EU Trade and Technology Council
TTF	Dutch Title Transfer Facility
T-TIP	*Trans-Atlantic Trade and Investment Partnership*
TV (1st meaning)	Television
TV (2nd meaning)	Transaction Value
TVE	Town and Village Enterprise
TVPA	2000 *Trafficking Victims Protection Act*
TWEA	1917 *Trading With the Enemy Act*

TWN	Third World Network
UAV	Unmanned Aerial Vehicle (drone)
UAW	United Auto Workers
UBC	University of British Columbia
UBS *AG*	Swiss bank resulting from 1998 merger of Union Bank of Switzerland and Swiss Bank Corporation (founded in 1872 and 1862, respectively)
UCC (1st meaning)	Uniform Civil Code (India)
U.C.C. (2nd meaning)	Uniform Commercial Code (U.S.)
UCLA	University of California at Los Angeles
UCP (1st meaning)	Uniform Customs and Practices
UCP (2nd meaning)	Unified Cargo Processing
UE	United Electrical, Radio and Machine Workers of America
UEFA	Union of European Football Associations
UES	United Engineering Steel (U.K.)
UETA	1999 *Uniform Electronic Transactions Act*
UF	Ultra-filtered (milk)
UF_6	Uranium Hexafluoride
UFLPA	2021 *Uyghur Forced Labor Prevention Act*
UHRP	Uyghur Human Rights Project
UI	Unemployment Insurance
UIEGA	2006 *Unlawful Internet Gambling Enforcement Act*
U.K.	United Kingdom
U.K.CA (UKCA)	United Kingdom Conformity Assessed
U.K.CGC	U.K. Carbon & Graphite Company
U.K.SFTA (*UKSFTA*)	*United Kingdom-Singapore Free Trade Agreement*
UMR	Usual Marketing Requirement (FAO)
UMTS	Universal Mobile Telecommunications System
UN	United Nations
UNCAC	*United Nations Convention Against Corruption*
UNCC	United Nations Compensation Commission
UNCDP	United Nations Committee for Development Policy

UNCITRAL	United Nations Commission on International Trade Law
UNCLOS	*United Nations Conference on the Law of the Sea Treaty*
UNCTAD	United Nations Commission on Trade and Development
UNEP	United Nations Environmental Program
UNESCO	United Nations Educational, Cultural, and Scientific Organization
UNFCCC	*United Nations Framework Convention on Climate Change*
UNICA	Brazilian Sugarcane Industry Association
UNITA	National Union for the Total Independence of Angola
UNOCHA	United Nations Office for the Coordination of Humanitarian Affairs
UNODA	United Nations Office of Disarmament Affairs
UNOHCHR (OHCHR)	United Nations Office of the High Commissioner for Human Rights
UPA	United Progressive Alliance (India)
UPOV	*International Union for the Protection of New Varieties of Plants*, referring to 1961 *International Convention for the Protection of New Varieties of Plants* (revised 1972, 1978, 1991)
UPS (1st meaning)	uninterrupted power supply
UPS (2nd meaning)	United Parcel Service
UPU	Universal Postal Union
URAA	1994 *Uruguay Round Agreements Act*
U.S.	United States
USAPEEC	USA Poultry and Egg Export Council
USC	United Shipbuilding Corporation (Russia)
U.S.C.	United States Code
USCBC	U.S.-China Business Council
USCCAN	United States Code Congressional and Administrative News
USCCB	United States Conference of Catholic Bishops
USD (1st meaning)	Union Solidarity and Development Party (Burma)
USD (2nd meaning)	United States Dollar
USDS	United States Data Security (division)
USICA	*U.S. Innovation and Competition Act of 2021* (Senate bill)
USJDTA	*United States – Japan Digital Trade Agreement* (signed 7 October 2019)

USJTA	*United States – Japan Trade Agreement* (signed 7 October 2019, entered into force 1 January 2020)
USMCA	*United States-Mexico-Canada Agreement* (revised FTA based on August 2017-September 2018 renegotiations, called *CUSMA* in Canada, *USMCA* in America, and informally called *NAFTA* 2.0, signed 30 November 2018, signed again after further renegotiations 10 December 2019, and entered into force 1 July 2020)
USML	United States Munitions List
USP	United States Price (Pre-Uruguay Round U.S. term encompassing both Purchase Price and Exporter's Sales Price)
U.S.S.	United States Ship (U.S. Navy)
U.S.S.R.	Union of Soviet Socialist Republics
USTR	U.S. Trade Representative
USVSST	United States Victims of State Sponsored Terrorism Fund
USW (1st meaning)	United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union
USW (2nd meaning)	United Steel Workers of America
UVL	Unverified List
VAT	Value Added Tax
VC	Venture Capital
VCP	Vietnamese Communist Party (or CPV, Communist Party of Vietnam)
VCR	Video Cassette Recorder
VEO	Violent Extremist Organization
VER	Voluntary Export Restraint
VEU	Validated End User
Vienna Convention	1969 *Vienna Convention on the Law of Treaties*
VLCC	Very Large Crude Carrier
VND	Vietnamese *dong*
VNM (VNOM)	Value of Non-Originating Materials
VOC	volatile organic compound
VOD	video on demand
VOM	Value of Originating Materials
VPN	virtual private network
VRA	Voluntary Restraint Agreement
VSD	voluntary self-disclosure

VW	Volkswagen AG
W120	WTO services classification list (based on CPC)
WA	1995 *Wassenaar Arrangement*
WAML	Wassenaar Arrangement Munitions List
WCF	World Cocoa Foundation
WCO	World Customs Organization (formerly CCC until 1994)
WFOE	Wholly Foreign-Owned Enterprise (China)
WFP	World Food Program
WHO	World Health Organization
WIPO	World Intellectual Property Organization
WIV	Wuhan Institute of Virology
WMD	Weapon of Mass Destruction
WMO	World Meteorological Association
WRO	Withhold Release Order
WTO	World Trade Organization
WTO Agreement	*Agreement Establishing the World Trade Organization* (including all 4 Annexes)
WWF	World Wildlife Fund
XITIC	Xiamen International Trade and Industrial Company
XPCC	Xinjiang Production and Construction Corps. (China)
XUAR	Xinjiang Uyghur Autonomous Region (China)
YMTC	Yangtze Memory Technologies Co. (China)
YoY	Year on Year
ZAC	*zone d'aménagement concertée* (France)
ZTE	Zhongxing Telecommunications Corp.
1916 Act	*Antidumping Act of 1916*, as amended (repealed)
1930 Act	*Tariff Act of 1930*, as amended
1934 Act	*Reciprocal Trade Agreements Act of 1934*
1934 FTZ Act	*Foreign Trade Zones Act of 1934*, as amended
1945 UNPA	*United Nations Participation Act of 1945*
1974 Act	*Trade Act of 1974*, as amended
1978 Act	*Customs Procedural Reform and Implementation Act*
1979 Act	*Trade Agreements Act of 1979*

1984 Act	*International Trade and Investment Act of 1984* (*Trade and Tariff Act of 1984*)
1988 Act (1st meaning, *OTCA*)	*Omnibus Trade and Competitiveness Act of 1988*
1988 Act (2nd meaning)	*United States – Canada Free Trade Implementation Act*
1990 Act	*Customs and Trade Act of 1990*
1993 Mod Act	*Customs Modernization Act of 1993*
1993 NAFTA Implementation Act	*North American Free Trade Implementation Act of 1993*
2002 Act	*Trade Act of 2002*
2003 Act	*Burmese Freedom and Democracy Act of 2003*
2007 Act	*Implementing Recommendations of the 9/11 Commission Act of 2007*
2010 Act	*Omnibus Trade Act of 2010*
3D	Three dimensional
3PLs	Third Party Logistics Providers
3Ts (3T Issues)	Taiwan, Tiananmen, and Tibet
4Ts (4T Issues)	Taiwan, Tiananmen, Tibet, and The Party (CCP)

Part One

COUNTRY OF ORIGIN

Chapter 1

COUNTRY OF ORIGIN MARKING[2]

I. Importance of Customs Law

"Customs Law" refers to all of the fees, formalities, and clearance procedures necessary to bring imported articles of merchandise into country of importation. This specialty area within International Trade Law involves checking for appropriate country of origin labeling, following rules and paying fees associated with types of entry, classifying and valuing merchandise for tariff assessment, and adhering to security requirements to protect against dangers from threatening items. Customs Law is a significant, everyday legal practice at every port of entry in every country of the world.

Those fees, formalities, and clearance procedures account for about 10% of the value of any international trade transaction.[3] "Customs facilitation" means simplifying and streamlining fees, formalities, and clearance procedures, to reduce their costs, and thus generate additional trade. Obviously, the longer a shipment of merchandise is held at a port, or by customs authorities, the more it costs the exporter and importer of that merchandise. Every extra day needed to ship merchandise reduces trade by 1%. For agricultural trade between two countries, if the average sea voyage for a farm product is 20 days, then adding just one extra day at sea causes a 4.5% drop in agricultural trade between those countries.

Such delays afflict developing countries and LDCs. The affliction is partly self-inflicted. To ship a container from a port in Southeast Asia costs about U.S. $900. To ship the same container from a port in Africa costs roughly $2,000. Fees, formalities, and clearance procedures, plus corruption (*e.g.*, bribery payments), account for the difference.

"Customs Law" also implicates an array of post-9/11 homeland security measures (discussed in a separate Chapter). And (as also discussed in separate Chapters), closely allied to Customs Law issues are Export Controls, Trade Sanctions, and special trade remedies designed to address threats to the homeland. Thus, in both theory and practice, "Customs Law" and "National Security" are related.

II. Rationales for Country of Origin Marking

If a country of origin marking is accurate, then the purpose acknowledged in the last clause of GATT Article IX:2 is served, namely, assisting consumers. But, it may be

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[2] Documents References:
(1) *Havana (ITO) Charter* Articles 33, 35-37
(2) GATT Articles V, VIII, IX:6
(3) WTO *Agreement on Rules of Origin*

[3] *See* "Lamy Underlines Need to Continue Building Trade Capacity of Developing Countries," Speech of Pascal Lamy, WTO Director-General, to International Trade Centre (ITC) Joint Advisory Group, 21 May 2012, and "Trade Improves the Lives of People," Speech of Pascal Lamy, WTO Director General, to Minnesota Economic Club, Minneapolis, 17 April 2012, both at www.wto.org.

inquired whether this purpose is worthy. That is, do consumers care where merchandise is made, *i.e.*, is origin a factor in consumption decisions? The short answer is that in most cases, it depends on the product. Pencils? No. Eyeglass frames? Not usually. Red wine? Absolutely. Oriental carpets? No question. Cars? Probably. Toys? Maybe. These illustrations suggest a factor as or more important than origin – brand name.

Chocolate is a sweet example. In March 2023, the world-renowned Swiss chocolate company, Toblerone, announced it would remove its famous Matterhorn logo from its packaging. Why? Toblerone (effective later that year) shifted some of its production to Slovakia. Hence, its chocolate would no longer be "Made in Switzerland." Indeed, the chocolate would flunk the criteria of the Switzerland's *Swissness Act of 2017*.

The illustrations also beget examples in which brand name may not matter. Consider the potential benefits to consumers of labeling in the context of a 1988 American case decided by the CIT, *Koru North America v. United States*.[4] Arguably, the decision in this case cuts against consumers who would like to know all the countries that derive a material economic benefit from the sale of imported merchandise.

In *Koru*, fishing vessels chartered to a New Zealand corporation and flying the flags of New Zealand, the former Soviet Union, and Japan caught fish outside of the territorial waters of New Zealand, but within the Exclusive Economic Zone of that country. The fish were cleaned and frozen in this Zone, and then taken to New Zealand for shipment to South Korea. In Korea, the fish were processed and frozen and shipped as fillets to the U.S. The Customs Service – renamed "CBP" effective 1 March 2003, but still occasionally called by its former appellation – argued the fish are the product of New Zealand, the Soviet Union, and Japan, whereas the plaintiff claimed they are the product of New Zealand alone. The CIT arrived at a third solution, finding they are the product of Korea. Some American consumers might prefer the position of the Customs Service, because it provides them with the greatest amount of information. It lists all countries involved in the production process, and thus identifies the economic beneficiary countries.

However, the problem with the Customs Service's argument was its parameters were unclear. Under what circumstances will a country be listed as a country of origin? Must a certain percentage of total value added occur in that country? Or, is any country involved in even the slightest way in the production process a beneficiary? The argument of the Customs Service did not address directly these matters, nor did it have to in *Koru*.

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[4] *See* 701 F. Supp. 229 (CIT 1988).

Another example of the importance of labeling that had little if anything to do with branding is India's insistence that Amazon.com and Walmart's Flipkart enforce rigorously country of origin disclosures by sellers of merchandise sold in India on their websites. India had two concerns in mind: it wanted to be sure consumers knew whether or not goods were made in (1) India or abroad (presumably so they could support local manufacturing); and, second, (2) China, in particular, amidst its lethal border clashes at the LOAC in Aksai Chin-Ladakh with PLA soldiers (so as to reduce imports from China). *See* Nupur Anand, *Amid Tensions with China, India Warns Amazon, Flipkart over Country of Origin Rule*, REUTERS, 17 October 2020, www.reuters.com/article/us-india-ecommerce-warning/amid-tensions-with-china-india-warns-amazon-flipkart-over-country-of-origin-rule-idUSKBN2720CY.

Whatever the interest level and motivation of an individual consumer regarding the country of origin of particular merchandise, the fact is marking requirements are premised on the theory that the ultimate purchaser of an import has a right to know where the item she might buy is made. The markings are data to analyze and synthesize along with other information. In consequence, the consumer should be in a position to make an informed purchase decision. For certain merchandise made in some countries, markings are important for ethical reasons. For example, a prospective purchaser may eschew Persian carpets woven in Pakistan out of concern that child labor is used to weave the carpets. (That concern, for other purchasers, is offset by the possibility the earnings from part-time child labor help a family educate its kids at good quality private schools rather than extremist Islamic *madrassahs* (schools).[5]) Or, a consumer may wish to avoid toys made in China, perhaps because of allegations they are made by prison labor. Similarly, a prospective purchaser may have in mind environmental issues (and thus support eco-labeling, notwithstanding the PPM problem discussed in a separate Chapter), such as supporting sustainable development in a particular country, when examining an origin marking.

But, could marking requirements also reinforce consumer stereotypes and prejudices about products from certain countries? For example, a consumer may believe TVs made in Japan are superior in quality to those from Korea, and so look for Japanese-made TVs. Yet, Korean TVs may be better than those from Japan. Worse yet, could the markings have protectionist effects? No doubt some consumers intentionally search for articles stamped or labeled "Made in U.S.A." and eschew those of foreign origin for reasons that cross the line demarcating patriotic pride from bellicose nationalism.

Interestingly, the intent of the U.S. marking statute – Section 304 of the *Tariff Act of 1930*, as amended – appears to include the protection of American industries.[6] This Statute pre-dates GATT, and permits the "ultimate purchaser" in the U.S. to choose between a domestic and foreign-made product, or between the products of different foreign countries. Quoting from a 1940 case, the CIT observed:

> the primary purpose of the country-of-origin marking statute is to "mark the goods so that at the time of purchase the ultimate purchaser may, by knowing where the goods were produced, be able to buy or refuse to buy them, if such marking should influence his will." (Congress, of course, had in mind a consumer preference for *American made* goods.)[7]

In a 1939 decision, the U.S. Court of Appeals for the Second Circuit rejected the claim of an appellant who pled guilty to criminal charges associated with removing a country of origin marking that the country of origin statute was unconstitutional. The Court stated:

> The requirement that goods at the time of importation bear marks indicating the country of origin appeared first in the *Tariff Act of 1890* (26

5 *See* Raj Bhala, *Poverty, Islam, and Doha*, 36 THE INTERNATIONAL LAWYER 159, 188-192 (2002).

6 *See* 19 U.S.C. § 1304.

7 *National Juice Products Association v. United States*, 628 F. Supp. 978, 988 n. 14 (CIT 1986), *quoting United States v. Friedlaender & Co.*, 27 CCPA 297, 302, C.A.D. 104 (1940). (Emphasis added.)

> Stat. 613) and has been included in all later tariff acts. The purpose was to apprise the public of the foreign origin and thus *to confer an advantage on domestic producers* of competing goods. Congress was aware that many consumers prefer merchandise produced in this country.[8]

Here is judicial recognition of an uncomfortable fact: the purpose of the American marking statute, and by inference Article IX, is based on a false premise. Most modern consumers in the international economy do not care about country of origin labels.

As intimated, from the perspective of many consumers around the world, products are increasingly global in nature. Name brand matters. Bulgari and Chanel, Coca-Cola and Pepsi – such are the labels about which consumers tend to care most. To be sure, from time to time consumer fads arise in certain countries – a "Made in U.S.A." label becomes "cool" in Russia after the collapse of the Soviet Union, or a "Made in France" label is reviled in the midst of a dispute about conflict in Iraq. Nevertheless, in general what may be more important than a country of origin marking is the ability to rely on the authenticity of the merchandise, *i.e.*, not a pirated copy, hence the importance of enforcing IPRs.

Moreover, most consumers are aware (indeed, increasingly so) of the reality of multi-country production, that many products are made in, or using inputs from, more than one country. Suppose a "global" product – a car, computer, or TV – is comprised of components from many countries. Again, the country of origin label may be irrelevant to many consumers. Here, too, consumers care little about the country of origin. They focus on brand name. Choices are based on perceptions of quality associated with firms that have differentiated their product in part through name-brand marketing, not on where the product is made. Typically, it is more important to a consumer to drive a Honda, work on an Apple computer, and run in Saucony shoes than to know the outcome of applying a complicated origin test (*e.g.*, substantial transformation or value added). Indeed, insofar as a ROO imposes compliance costs on a manufacturer or importer that raise retail prices, the consumer may be harmed. In sum, a key issue is whether a country of origin marking requirement and attendant non-preferential rules of origin serve a purpose in an era of globalized, name-brand product differentiation.

Indubitably, manufacturers appreciate these points, as they envision a global market for their wares. The aforementioned brand names sell products in over one hundred countries. In the same or similar product markets, the companies compete with one another in part by differentiating their product through brand name identification. The competition is imperfect, as economists would say, as each producer uses brand recognition as a strategy to acquire some degree of monopoly power. There may be minor deviations in the product a manufacturer sells in one country versus another country. For example, the famous but secret "7X" formula for Coke may be altered for the Chinese market to make the beverage sweeter to accommodate Chinese tastes. Yet, these deviations have no bearing on country of origin. They are important only in differentiating certain export markets on the basis of consumer preferences.

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[8] *See United States v. Ury*, 106 F.2d 28, 29 (2nd Cir. 1939). (Emphasis added.)

III. Marking Requirements

U.S. CUSTOMS AND BORDER PROTECTION, *IMPORTING INTO THE UNITED STATES, A GUIDE FOR COMMERCIAL EXPORTERS* 96-104 (NOVEMBER 2006)

35. Country-Of-Origin Marking

U.S. customs laws require that each article produced abroad and imported into the United States be marked with the English name of the country of origin to indicate to the ultimate purchaser in the United States what country the article was manufactured or produced in. These laws also require that marking be located in a conspicuous place as legibly, indelibly and permanently as the nature of the article permits. Articles that are otherwise specifically exempted from individual marking are also an exception to this rule. These exceptions are discussed below.

[The English name of the country may include variant spellings, such as "Brasil" for "Brazil" and "Italie" for "Italy." But, as per 19 C.F.R., abbreviations are not acceptable unless they "unmistakably indicate the name of a country" to the ultimate purchaser of the product being marked. Thus, for example, CBP has ruled that neither "U.A.E." nor "Emirates" is acceptable in lieu of "United Arab Emirates." *See* HQ H301905 (28 February 2019).]

Marking Required

If the article – or its container, when the container and not the article must be marked – is not properly marked at the time of importation, a marking duty equal to 10 percent of the article's customs value will be assessed unless the article is exported, destroyed or properly marked under CBP supervision before the entry is liquidated.

Although it may not be possible to identify the ultimate purchaser in every transaction, broadly stated, the "ultimate purchaser" may be defined as the last person in the United States who will receive the article in the form in which it was imported. Generally speaking, when an article is imported into and used in the United States to manufacture another article with a different name, character or usage than the imported article, the manufacturer is the ultimate purchaser. If an article is to be sold at retail in its imported form, the retail customer is the ultimate purchaser. A person who subjects an imported article to a process that results in the article's substantial transformation is the ultimate purchaser, but if that process is only minor and leaves the identity of the imported article intact, the processor of the article will not be regarded as the ultimate purchaser.

When an article or its container is required to be marked with the country of origin, the marking is considered sufficiently permanent if it will remain on the article or container until it reaches the ultimate purchaser.

When an imported article is normally combined with another article after importation but before delivery to the ultimate purchaser, and the imported article's country of origin is located so that it is visible after combining, the marking must include, in addition to the country of origin, words or symbols clearly showing that the origin indicated is that of the imported article, and not of any other article with which it has been combined. For example, if marked bottles, drums, or other containers are imported empty to be filled in the United States, they shall be marked with such words as "Bottle (or drum or container) made in (name of country)." Labels and similar articles marked so that the name of the article's country of origin is visible after it is affixed to another article in this country shall be marked with additional descriptive words such as "label made (or printed) in (name of country)" or words of equivalent meaning.

In cases where the words "United States" or "American" or the letters "U.S.A." or any variation of such words or letters, or the name of any city or locality in the United States, or the name of any foreign country or locality in which the article was not manufactured or produced, appear on an imported article or container, and those words, letters, or names may mislead or deceive the ultimate purchaser about the article's actual country of the origin, there shall also appear, legibly, permanently and in close proximity to such words, letters or name, the name of the country of origin preceded by "made in," "product of," or other words of similar meaning.

If marked articles are to be repacked in the United States after release from CBP custody, importers must certify on entry that they will not obscure the marking on properly marked articles if the article is repacked, or that they will mark the repacked container. If an importer does not repack, but resells to a repacker, the importer must notify the repacker about marking requirements. Failure to comply with these certification requirements may subject importers to penalties and/or additional duties.

Marking Not Required

The following articles and classes or kinds of articles are not required to be marked to indicate country of origin, *i.e.*, the country in which they were grown, manufactured, or produced. However, the outermost containers in which these articles ordinarily reach the ultimate purchaser in the United States must be marked to indicate the English name of the country of origin of the articles.

Art…
…
Bags, jute,
…
Bearings, ball, 5/8-inch or less in diameter,
…
Bolts, nuts, and washers,
…
Briquettes, coal or coke,
Buckles, one inch or less in greatest dimension,
…
Buttons,

Cards, playing
Cellophane and celluloid in sheets, bands, or strips,
Chemicals, drugs, medicinals, and similar substances, when imported in capsules, pills, tablets, lozenges, or troches,
Cigars and cigarettes,
…
Effects, theatrical,
Eggs,
Feathers,
Firewood,
Flooring, not further manufactured than planed, tongued and grooved,
Flowers, artificial, except bunches,
Flowers, cut,
Glass, cut to shape and size for use in clocks, hand, pocket, and purse mirrors...
…
Hooks, fish (except snelled fish hooks),
…
Livestock,
Lumber, except finished,
Lumber, sawed,
Metal bars except concrete reinforcement bars, billets, blocks, blooms, ingots, pigs, plates, sheets, except galvanized sheets, shafting, slabs, and metal in similar forms,
…
Monuments,
Nails, spikes, and staples,
Natural products, such as vegetables, fruit, nuts, berries, and live or dead animals, fish and birds; all the foregoing which are in their natural state or not advanced in any manner further than is necessary for their safe transportation,
…
Paper, newsprint, [stencil, or stock]
…
Plants, shrubs, and other nursery stock,
…
Poles, bamboo,
…
Rope, including wire rope, cordage, cords, twines, threads, and yarns,
…
Screws,
…
Skins, fur, dressed or dyed, [and raw fur skins],
…
Sponges
…
Tiles, not over one inch in greatest dimension,

…
Trees, Christmas,
Weights, analytical and precision, in sets,
Wicking, candle,
Wire, except barbed.

Unless an article being shipped to the United States is specifically named in the foregoing list, it would be advisable for an exporter to obtain advice from CBP before concluding that it is exempted from marking. If articles on the foregoing list are repacked in the United States, the new packages must be labeled to indicate the country of origin of the articles they contain. … If they do not package, but resell to repackagers, they must notify repackagers about these marking requirements. Failure to comply with these certification requirements may subject importers to penalties and marking duties.

Other Exceptions

The following classes of articles are also exempt from country-of-origin marking. (The usual container in which one of these articles is imported will also be exempt from marking.)

- An article imported for use by the importer and not intended for sale in its imported or any other form.
- An article to be processed in the United States by the importer or for his account other than for the purpose of concealing the origin of the article and in such manner that any mark of origin would necessarily be obliterated, destroyed, or permanently concealed.
- An article that the ultimate purchaser in the United States, by reason of the article's character or the circumstances of its importation, must necessarily know the country of origin even though the article is not marked to indicate it. The clearest application of this exemption is when the contract between the ultimate purchaser in the United States and the supplier abroad insures that the order will be filled only with articles grown, manufactured, or produced in a named country.

The following classes of articles are also exempt from marking to indicate country of origin:

- Articles incapable of being marked,
- Articles that cannot be marked prior to shipment to the United States without injury,
- Articles that cannot be marked prior to shipment to the United States except at a cost economically prohibitive of their importation,
- Articles for which marking of the containers will reasonably indicate their country of origin,
- Crude substances,

- Articles produced more than 20 years prior to their importation into the United States,
- Articles entered or withdrawn from warehouse for immediate exportation or for transportation and exportation.

Although the articles themselves are exempted from marking to indicate country of origin, the outermost containers in which they ordinarily reach the ultimate purchaser in the United States must be marked to show the articles' country of origin.

When marking an article's container will reasonably indicate its country of origin, the article itself may be exempt from such marking. This exemption applies only when the article reaches the ultimate purchaser in an unopened container. For example, articles that reach the retail purchaser in sealed containers marked clearly to indicate the country of origin fall within this exception. Materials to be used in building or manufacture by the builder or manufacturer who will receive the materials in unopened cases also fall within the exemption. The following articles, as well as their containers, are exempt from country-of-origin marking:

- Products of American fisheries that are free of duty,
- Products of United States possessions,
- Products of the United States that are exported and returned,
- Articles valued at not more than $200 (or $100 for *bona fide* gifts) that are passed without entry.

. Goods processed in *NAFTA* countries are subject to special country-of-origin marking rules that can be found in 19 C.F.R. [Part] 102…. An overview of these rules can be found in *NAFTA: A Guide to Customs Procedures* available at *http://www.cbp.gov/nafta/docs/us/guidproc.html*.

36. Special Marking Requirements

The country-of-origin marking requirements are separate and apart from any special marking or labeling required on specific products by other agencies. It is recommended that the specific agency be contacted for any special marking or labeling requirements.

Certain articles are subject to special country of origin marking requirements: Iron and steel pipe and pipe fittings; manhole rings, frames, or covers; and compressed gas cylinders must generally be marked by one of four methods: die-stamped, cast-in-mold lettering, etching (acid or electrolytic) or engraving. In addition, none of the exceptions from marking discussed above are [*sic*] applicable to iron and steel pipe and pipe fittings. [Additional articles subject to special marking requirements include knives and laboratory, scientific, and surgical instruments. Watches are yet another example. Their cases and movements must bear the manufacturer or purchaser, as well as country of origin, and the movements must state the number of jewels serving a mechanical purpose as frictional bearings.]

37. Marking – False Impression

Section 42 of the *Trademark Act of 1946* (15 U.S.C. 1124) [commonly called the *Lanham Act*] provides, among other things, that no imported article of foreign origin which bears a name or mark calculated to induce the public to believe that it was manufactured in the United States, or in any foreign country or locality other than the country or locality in which it was actually manufactured, shall be admitted to entry at any customhouse in the United States.

In many cases, the words "United States," the letters "U.S.A.," or the name of any city or locality in the United States appearing on an imported article of foreign origin, or on the containers thereof, are considered to be calculated to induce the public to believe that the article was manufactured in the United States unless the name of the country of origin appears in close proximity to the name which indicates a domestic origin.

Merchandise discovered after conditional release to have been missing a required country of origin marking may be ordered redelivered to CBP custody. If such delivery is not promptly made, liquidated damages may be assessed against the CBP bond. …

An imported article bearing a name or mark prohibited by Section 42 of the *Trademark Act* is subject to seizure and forfeiture. However, upon the filing of a petition by the importer prior to final disposition of the article, the CBP port director may release it upon the condition that the prohibited marking be removed or obliterated or that the article and containers be properly marked; or the port director may permit the article to be exported or destroyed under CBP supervision and without expense to the government.

Section 43 of the *Trademark Act of 1946* (15 U.S.C. 1125) prohibits the entry of goods marked or labeled with a false designation of origin or with any false description or representation, including words or other symbols tending to falsely describe or represent the same. Deliberate removal, obliteration, covering, or altering of required country-of-origin markings after release from CBP custody is also a crime punishable by fines and imprisonment (19 U.S.C. 1304[l]).

IV. GIs

Suppose Jane's Jerseys of Hanover, New Hampshire imports baseball jerseys made in Thailand. The front says "Kansas City Royals" and, like authentic Royals jerseys, are blue and white in color. The jerseys lack a country of origin marking, which in itself may violate relevant country of origin marking rules. An additional problem is the jerseys may create a false impression. The name "Kansas City Royals" may be calculated to cause prospective buyers to believe the jerseys are made in the U.S. The lack of a country of origin label in close proximity to the geographic name means it is impossible to discern the true origin of the jerseys. Further, the jerseys may violate Section 42 of the U.S. *Trade-Mark Act of 1946*.[9] That Section provides that violating goods may not be admitted into

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[9] *See* 15 U.S.C. §1124.

the U.S. If the jerseys already were admitted, then CBP could order they be re-delivered to CBP custody. The jerseys could be subject to seizure and forfeiture. Joe's Jerseys may petition CBP to release the jerseys on the condition they are properly labeled "Made in Thailand."

While the drafters of GATT surely were not all baseball fans, they appreciated the issue presented by this illustration – the need to protect consumers from being misled by a geographic name on an article of merchandise, in a label affixed to the article, or both. That is, the drafters foreshadowed one of the modern controversies lying at the intersection of International Trade Law and IPR (especially trademark) protection. Their thoughts on the matter are set out in GATT Article IX:6, which concerns a "geographic indication," also called an "appellation of origin."

These interchangeable terms connote a label revealing the place of origin of a good that has characteristic qualities resulting from that origin. In other words, it is the place name, or the words associated with a place, used to identify merchandise. GIs bespeak (or purport to) a particular quality, reputation, or other characteristic based on the origin of the merchandise. Famous examples would be "Beaujolais," "Bordeaux," "Burgundy," "Champagne," "Pilsen," "Roquefort," and "Tequila." Another illustration of disputes that can arise is a battle lasting over 100 years about the use of the name "Budweiser" between a Czech brewery, Budějovický Budvar AS, and Anheuser-Busch of St. Louis, Missouri.

In at least 100 lawsuits across roughly 30 countries, the two sides have contested who has the trademark right, based on an appellation of origin, to sell beer called "Budweiser" or "Bud." In January 2007, in the case of *Anheuser-Busch Inc. v. Portugal* (Application Number 73049/01), the Grand Chamber of the ECHR agreed with Anheuser-Busch that, as a conceptual matter, an IPR, such as the right to use a trademark or appellation of origin, is a form of right protected by the 1950 *European Convention on Human Rights*.[10] Forty-six countries, including every EU member, are party to the *Convention*, and ECHR decisions are binding on all of them. But, on a 15-2 vote, the ECHR held Anheuser-Busch had no right to re-establish its trademark in Portugal, refusing to second guess a decision of Portugal's Supreme Court that was neither arbitrary nor manifestly unreasonable. (Query whether a reasonable agreement might be one in which Anheuser-Busch would use the name "Budweiser" in North America and the U.K., but "Bud" in continental Europe so as to differentiate it clearly from the Czech "Budweiser" product.) Anheuser-Busch now holds the distribution rights to the Czech beverage in the U.S., causing some beer connoisseurs to wonder whether it might pressure the Czech brewery to alter its strict standards on ingredients and fermentation.

The EU is particularly interested in seeing tighter regulation on the use of place names, especially on wine. At least as to wine, Australia, Canada, New Zealand, and the U.S. support the *laissez-faire status quo* in which a winery can use a place name for its product even regardless of where it makes the wine. (The only multilateral accord in place on the use of GIs for wine is the 1957 *Lisbon Agreement*, which is administered by WIPO.

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[10] *See* Arthur Rogers, *Anheuser-Busch Hails European Court Ruling That Trademark Applications Get Protections*, 24 International Trade Reporter (BNA) 72-73 (18 January 2007).

The *Agreement* obligates countries simply to register with WIPO their use of place names for wine.) Nevertheless, a number of developing and least developed countries complain developed countries benefit from geographic indications by pursuing them aggressively and obtaining some kind of IP protection for them. They are especially concerned about companies from developed countries engaging in such practices with respect to products from developing countries and LDCs. The Doha Round was among many forums in which this concern was expressed. What proposals were made in this Round, why, and for whose benefit?

To take a not-so-hypothetical example, an EU fashion company obtains silk from Rajshahi, Bangladesh, or an EU art dealer buys silkscreen prints from Rajasthan, India. These companies negotiate exclusive arrangements, market the product as "Rajshahi Silk" or "Rajasthani Prints," respectively, and thereby garner monopoly-type profits from sales. The losers in this game, say developing and least developed countries, are the artisans and craftsmen in Bangladesh and India, who do not receive the full value of the product that bears their geographic indication.

The rebuttal is those countries failed to establish an economic climate, legal system, and entrepreneurial culture in which the artisans and craftsmen could identify geographically indicated products, export them, and obtain the profits for themselves. In other words, what kept developing countries and LDCs waiting until MNCs figured out the value of the products?

In GATT Article IX:6, the drafters created no "hard" law. The command of the auxiliary verb "shall" is followed by the intransitive verb "cooperate." The "softness" of Paragraph 6 is further apparent from the second sentence. The same auxiliary verb ("shall") is used, yet followed by "accord full and sympathetic consideration" to GI issues. In brief, under Paragraph 6, WTO Members are to work together to fight use of a trade name that misrepresents the true origin of a product to the detriment of a distinctive geographical name in a Member that is protected by the law of that Member.

To be sure, a "soft" law obligation is not meaningless, particularly if it is paired with another obligation of equal or greater firmness. That is the case with Article IX:6, because it must be read in conjunction with GATT Article XX(d). Paragraph (d) is the "administrative exception" in the laundry list of general exceptions to GATT obligations. It permits deviation from a GATT obligation if (1) "necessary to secure compliance with laws or regulations," (2) the law or regulation itself is consistent with GATT, and (3) the requirements of the *chapeau* to Article XX are satisfied. (The *chapeau* bars a trade measure applied in a way that would constitute "arbitrary or unjustifiable discrimination … or a disguised restriction on international trade….") An express example of a trade measure that might qualify under Article XX(d) is one protecting patents, trademarks, copyrights, or preventing deceptive practices. Thus, a measure adversely affecting certain imports, but necessary to protect GIs, might pass muster under the associated provisions of Article IX:6 and XX(d).

The express prerequisite in Article IX:6 for cooperation is a Member has "legislation" to protect a particular GI. Whether by "legislation" the GATT drafters meant any regulation or rule, or whether they intended the narrow connotation of a bill passed by a legislature and signed by an executive authority, is not clear. That ambiguity aside, there also is an implicit prerequisite in Article IX:6. There must be a credible allegation of infringement, *i.e.*, merchandise bearing a misleading GI is sufficiently like or similar to a *bona fide* item that producers of the latter item are harmed.

Significantly, Paragraph 6 does not contain a *mens rea* element. Whether misrepresentation of the true origin of a product is intentional, or arises from negligence of one form or another, does not matter. Put in Anglo-American Torts lingo, the drafters saw GI infringement as a strict liability offense.

V. Labeling, Misleading Trademark Language, and 2016 *JBLU* Case

JBLU, INC. v. UNITED STATES, UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT, NUMBER 2015-1509, 2 MARCH 2016

Moore, Circuit Judge:

JBLU, Inc. appeals from the United States Court of International Trade ("trial court") decision on summary judgment that U.S. Customs and Border Protection ("Customs") correctly determined that JBLU violated Section 304 of the *Tariff Act of 1930*, as amended, by importing jeans that were not properly marked with their country of origin. We reverse and remand.

Background

JBLU is a California corporation registered to do business as C'est Toi Jeans USA. Between September 11 and October 20, 2010, JBLU imported into the United States jeans manufactured in China, including over 350,000 pairs in the eleven shipments at issue. The jeans were embroidered with "C'est Toi Jeans USA," "CT Jeans USA," or "C'est Toi Jeans Los Angeles" in various fonts on their backs, pocket linings, back waistbands, and hang-tags. JBLU filed trademark applications with the United States Patent and Trademark Office ("PTO") for "C'est Toi Jeans USA" and "CT Jeans USA" on October 8, 2010. The applications indicated that the two marks had been used in commerce since 2005. JBLU did not file a trademark application for "C'est Toi Jeans Los Angeles." It is unclear whether there was evidence of the use of that mark. The imported jeans also had labels on their front waistbands indicating they were "Made in China" in small font. …

When the shipments arrived, Customs inspected samples of the jeans and determined that JBLU violated Section 304 of the *Tariff Act* because the jeans did not comport with the marking requirements of 19 C.F.R. §134.46. Section 304 of the *Tariff Act*, as amended, requires that imported articles be marked with their country of origin:

> Except as hereinafter provided, every article of foreign origin (or its container …) imported into the United States shall be marked in a conspicuous place as legibly, indelibly, and permanently as the nature of the article (or container) will permit in such manner as to indicate to an ultimate purchaser in the United States the English name of the country of origin of the article.

19 U.S.C. §1304(a). Section 304 further provides that the Secretary of the Treasury may by regulation, *inter alia*, "[d]etermine the character of words and phrases or abbreviations thereof which shall be acceptable … and prescribe any reasonable method of marking, …and a conspicuous place on the article (or container) where the marking shall appear." *Id*., §1304(a)(1).

Customs promulgated regulations under this authority in 1968, including the two regulations at issue that were renumbered in 1972 as 19 C.F.R. §§134.46 and 134.47 … Under §134.46, when words, letters, or names referring to a geographical location (*e.g.*, "United States," "American," "U.S.A.") appear on an imported article or its container, and the words, letters, or names "may mislead or deceive the ultimate purchaser as to the actual country of origin of the article," the article must also be marked with its country of origin in a manner that is legible and permanent; "in close proximity to [the location] words, letters or name;" and "in at least a comparable size." 19 C.F.R. §134.46.

Section 134.47 provides more lenient requirements for instances where the location words, letters, or name are "part of a trademark or trade name." 19 C.F.R. §134.47. In such a case, the country of origin marking must be legible and permanent; "conspicuous[];" and either "in close proximity [to the location words, letters, or name] or in some other conspicuous location." *Id*.

Customs determined that because JBLU's jeans were marked with "USA" and "Los Angeles," they must also be marked with their country of origin pursuant to §134.46. It determined that JBLU's "Made in China" labels did not meet the requirements of §134.46 because the country of origin markings were not in close proximity to and of at least the same size as "USA" and "Los Angeles." Customs thus issued Notices to Mark and/or Redeliver to JBLU. JBLU filed protests against the Notices, arguing that "C'est Toi Jeans USA," "CT Jeans USA," and "C'est Toi Jeans Los Angeles" were trademarks such that Customs should have applied the more lenient requirements of §134.47. JBLU argued that its "Made in China" labels met the requirements of §134.47.

Customs agreed that JBLU's "Made in China" labels met the more lenient requirements of §134.47, but determined that §134.47 only applied to the jeans that were marked with "C'est Toi Jeans USA" or "CT Jeans USA" that were imported after JBLU filed its trademark applications for those marks ("the post-application jeans"). It accepted JBLU's protest as to those jeans. Customs determined, however, that §134.46 applied to the jeans that were marked with "C'est Toi Jeans USA" or "CT Jeans USA" and were imported before JBLU filed its trademark applications ("the pre-application jeans"), and to jeans that were marked with "C'est Toi Jeans Los Angeles" ("the no-application jeans").

It determined that JBLU's "Made in China" labels did not meet the more stringent requirements of §134.46. It thus denied JBLU's protest as to the pre-application and no-application jeans.

…

Discussion

…

If a regulation is clear on its face, no deference is given to the promulgating agency's interpretation, and we interpret the regulation in accordance with its unambiguous meaning. *Viraj Grp. v. United States*, 476 F.3d 1349, 1355 (Fed. Cir. 2007). Doing otherwise would allow the agency, "under the guise of interpreting a regulation, to create *de facto* a new regulation." *Christensen v. Harris County*, 529 U.S. 576, 588 … (2000). The fact that a term is not defined by a regulation does not make it ambiguous and entitled to deference. *Executive Jet Aviation, Inc. v. United States*, 125 F.3d 1463, 1468 (Fed. Cir. 1997) ("It is well settled that the legislature's failure to define commonly-used terms does not create ambiguity, because the words in a statute are deemed to have their ordinarily understood meaning." (Internal quotation marks and citations omitted)). If a regulation is ambiguous, we give the promulgating agency's interpretation substantial deference "as long as [it] is neither plainly erroneous nor inconsistent with the regulation." *Gose v. U.S. Postal Serv.*, 451 F.3d 831, 836 (Fed. Cir. 2006).

…

JBLU argues that the trial court erred because an agency's interpretation of a regulation is entitled to deference only if the regulation is ambiguous. It argues that "trademark" in §134.47 unambiguously includes federally registered and common law trademarks. We agree.

The record includes a dictionary definition of "trademark" from the time §134.47 was promulgated as "the name, symbol, figure, letter, word, or mark adopted and used by a manufacturer or merchant in order to designate his goods and to distinguish them from any others." The *Random House Dictionary of the English Language* 1501 (1966). The dictionary definition of record is not limited to registered trademarks or trademarks with a pending application. Indeed, the definition notes that "[a] trademark is *usually* registered with a governmental agency," showing that it does not have to be. *Id.*

The version of the *Lanham Act* in effect at the time §134.47 was promulgated similarly defines "trademark" as "any word, name, symbol, or device or any combination thereof adopted and used by a manufacturer or merchant to identify his goods and distinguish them from those manufactured or sold by others." 15 U.S.C. §1127 (1946). This definition is echoed in the *Lanham Act's* current definition of "trademark" as "any word, name, symbol, or any combination thereof – (1) used by a person, or (2) which a person has a *bona fide* intention to use in commerce and applies to register on the principal register established by this chapter, to identify and distinguish his or her goods." 15 U.S.C. §1127 (2006). Neither definition is limited to registered trademarks or trademarks subject to a pending application.

These definitions are consistent with the fact that trademark rights stem from use, not registration. …

The government offers no competing dictionary or statutory definition of "trademark." *Cf. Viraj*, 476 F.3d 1355 (finding that the term at issue was ambiguous based, in part, on the parties' presentation of competing dictionary definitions). … In fact, the government acknowledges "[t]here is no denying that the *Lanham Act* or a dictionary definition of the term 'trademark' provides for a broader array of marks than those for which recognition by the [PTO] has been formally requested." Government Br[ief]. 11…. The government instead argues that the use of the word "trademark" in the intellectual property context does not inform its meaning in the context of §134.47. We are not persuaded.

The word "trademark" in §134.47 unambiguously includes trademarks without a pending application. This is consistent with the dictionary definition of record and the *Lanham Act* definitions from 1946 and today. We do not see a distinction between the clear meaning of the term in dictionaries and in the intellectual property context and the use of the term in §134.47. There is nothing in the record indicating that the plain meaning of "trademark" is limited to registered trademarks and trademarks with pending applications. Nor is there anything in the record calling into question the unambiguousness of the term "trademark."

…

… The regulations here show that when Customs intended to limit a regulation to "registered trademarks," it expressly did so. Customs did not so limit "trademark" in §134.47. We hold that the term "trademark" in §134.47 is clear on its face. The trial court erred in deferring to Customs' interpretation because "trademark" in §134.47 unambiguously includes unregistered trademarks that are not subject to a pending application.

Customs determined that the "Made in China" labels on JBLU's jeans satisfied the requirements of §134.47. We thus *reverse* the trial court's decision on summary judgment and *remand* for further proceedings consistent with this opinion.

VI. GATT Article IX and 2022 WTO *China-Hong Kong-U.S.* Case

In its 96-page decision, a WTO Panel said the GATT Article XXI national security exception is not self-judging, and that a war or emergency in international relations did not exist, thus again rejecting the American defense thereunder to a violation of a different GATT provision. That was the fifth such rejection in approximately one month (late 2022). In the portion of the Panel Report excerpted below, the Panel held the U.S. country of origin marking requirement concerning Hong Kong violated America's Article GATT Article IX MFN obligation. The Panel's rejection of America's Article XXI defense (Paragraphs 7.253 to 8.4) is excerpted in a separate Chapter.

WTO PANEL REPORT, *UNITED STATES – ORIGIN MARKING REQUIREMENT*, WT/DS597/R (21 DECEMBER 2022, APPEALED)[11]

[11] www.wto.org/english/tratop_e/dispu_e/597r_e.pdf (footnotes omitted). Concerning the appeal, see World Trade Organization, *United States Appeals Panel Report Regarding U.S. Origin Marking for Hong*

7.4.2 Factual background on the measure at issue

7.194. … [T] he measure at issue consists of a requirement that imported goods produced in Hong Kong, China be marked to indicate that their origin is "China" and may no longer be marked to indicate that their origin is "Hong Kong," The 11 August *Federal Register* Notice states that this requirement is "in light of the President's *Executive Order* [Number 13936] on Hong Kong Normalization, issued on July 14, 2020, suspending the application of Section 201(a) of the *United States-Hong Kong Policy Act of 1992* (*1992 Hong Kong Policy Act*) to the marking statute, Section 304 of the *Tariff Act of 1930*, with respect to imported goods produced in Hong Kong."

7.195. Section 304(a) of the *Tariff Act of 1930* requires that every article of foreign origin imported into the United States be marked "in such manner as to indicate to an ultimate purchaser in the United States the English name of the country of origin of the article." Part 134 of Title 19 of the Code of Federal Regulations, which sets forth regulations implementing the country of origin marking requirements, defines "country of origin" as "the country of manufacture, production, or growth of any article of foreign origin entering the United States" and notes that "[f]urther work or material added to an article in another country must effect a substantial transformation in order to render such other country the 'country of origin' within the meaning of this Part."

7.196. Prior to 2020, for goods produced in Hong Kong, China, U.S. CBP accepted marks referring to "Hong Kong" without any additional requirement. This practice appears to have been based on the combined operation of two instruments. First, Section 201(a) of the *1992 Hong Kong Policy Act* provides that, after the resumption of sovereignty over Hong Kong, China by China on 1 July 1997, "the laws of the United States shall continue to apply with respect to Hong Kong … in the same manner as the laws of the United States were applied with respect to Hong Kong before such date unless otherwise expressly provided by law or by *Executive Order* under Section 202." Second, a *Federal Register* Notice of 5 June 1997 specified that "goods produced in Hong Kong which are entered or withdrawn from warehouse for consumption into the U.S. on or after July 1, 1997, shall continue to be marked to indicate that their origin is 'Hong Kong.'" Section 202 of the *1992 Hong Kong Policy Act* refers to this as "treatment … different from that accorded the People's Republic of China."

7.197. … In … *Executive Order* 13936 [dated 14 July 2020], the President determined that Hong Kong, China is no longer "sufficiently autonomous" to justify differential treatment in relation to China and suspended the application of Section 201(a) of the *1992 Hong Kong Policy Act* to certain statutes, including Section 304 of the *Tariff Act of 1930*. As a result, the 11 August *Federal Register Notice* notified the public that goods produced in Hong Kong, China "must be marked to indicate that their origin is 'China' for the purposes of 19 U.S.C. 1304."

Kong, China Goods (30 January 2023), www.wto.org/english/news_e/news23_e/ds597apl_30jan23_e.htm. The GATT Article XXI national security issue in this Panel Report are treated in a separate Chapter.

7.4.3 Whether the challenged measure is a marking requirement under Article IX:1

7.198. Article IX of the GATT 1994 is entitled "*Marks of Origin*." Article IX:1 governs the treatment of products "with regard to marking requirements." The ordinary meaning of "mark" [according to the online OED, which the Panel cited] encompasses "[a] device, stamp, brand, label, inscription, etc., on an article … identifying it or its holder, or indicating ownership, origin, quality, etc." Requirements to mark goods with an origin mark, such as the origin marking requirement at issue in this dispute, fall squarely within the scope of Article IX:1. The parties have not contested this.

7.199. Therefore, we find that the challenged measure is a "marking requirement" that falls within the scope of Article IX:1.

7.4.4 Like products

7.200. … [T] he origin marking requirement at issue applies to "goods produced in Hong Kong." … [P]ursuant to Section 304 of the *Tariff Act of 1930*, the United States requires all imported goods (*i.e.*, goods produced in any country and then imported into the United States) to be marked in such manner as to indicate to an ultimate purchaser in the United States the English name of their country of origin. The two groups of products the treatment of which we need to compare are, therefore: (a) products for which the United States determines that they are produced in Hong Kong, China; and (b) products for which the United States determines that they are produced in any third country.

7.201. In prior cases, where challenged measures have distinguished between products solely on the basis of origin, Panels have suggested that the likeness of the products so distinguished could be presumed. [Most of the Panel Reports the Panel cited arose under GATT Articles I or III.] The rationale behind this presumption of likeness is that where a measure provides for a distinction based solely on origin, there will or can be products that are the same in all respects except for origin. In these circumstances, an analysis of likeness based on a comparison of specific products would be unnecessary.

7.202. The origin marking requirement clearly distinguishes between products on the basis of their origin (Hong Kong, China or not). In addition, the origin marking requirement encompasses trade in virtually all goods of Hong Kong, China imported into the United States. Thus, a product produced in Hong Kong, China, identical in all respects to a product produced in any third country (except for its origin) will be subject to the origin marking requirement, whereas the identical (except for its origin) product produced in any third country will not. In other words, the only distinguishing feature drawn by the origin marking requirement at issue between any product of Hong Kong, China, and any product of any third country in terms of applying the origin marking requirement, is origin.

7.203. For these reasons, we find that, products produced in Hong Kong, China, which are subject to the origin marking requirement, and products produced in any third country, which are not subject to the origin marking requirement, can be presumed to be "like products" within the meaning of Article IX:1.

[Query whether the Panel here makes a mistake that proves fatal to America's case. The Panel seems incapable of appreciating that thanks to the CCP crackdown on Hong Kong, the place once known as "Hong Kong, China" has become indistinguishable from "China." The two are one, and are a single, unified, third country – China. Accordingly, America treats products made in Hong Kong no differently than those in Guangdong, or any other part of the PRC, and the label "Made in China" is accurate – just as it would be for "Made in India" whether the merchandise was produced in Punjab or Karnataka. From the U.S. perspective, there is no discrimination between products made across China, just as there is none in products made across India. Query also the infringement on American sovereignty by the Panel to arrogate to itself the power to decide whether Hong Kong is separate and distinct from the Mainland and worthy of preferential treatment under U.S. law.]

7.4.5 Less favorable treatment

7.4.5.1 Introduction

7.204. Article IX:1 is an MFN obligation similar to other non-discrimination obligations in the GATT 1994. It uses the terms "less favourable treatment" which appear in several provisions of the covered agreements, and which have been extensively interpreted mostly in the context of Article III:4 of the GATT 1994. We consider that these interpretations of the same terms – which serve a comparable function of defining the content of a non-discrimination obligation – may provide useful guidance for the interpretation of the relevant terms in Article IX:1.

7.205. As an MFN obligation, Article IX:1 first requires a comparison between the treatment accorded to imported products from different countries to ascertain whether there is a difference in treatment. A formal difference in treatment between imported products from different countries is, however, neither necessary, nor sufficient to establish that the imported products from the complaining party are accorded less favorable treatment than that accorded to like imported products of any third country. The next step is to assess whether the challenged measure accords less favorable treatment by modifying the conditions of competition in the relevant market to the detriment of the imported products of the complaining party, and thus has a detrimental impact on the competitive opportunities for those products versus other imported products. The parties seemingly agree with the elements of this legal standard.

7.206. However, we understand the United States to argue that an assessment of less favorable treatment, including that under Article IX:1, is a holistic examination requiring assessment of "all the facts and circumstances, including the terms of the measures, its regulatory objectives, as well as the facts and circumstances illuminating such objectives and purposes." We disagree with the United States to the extent that it suggests that the legal standard of "less favorable treatment" under Article IX:1 includes an inquiry as to whether the detrimental impact is related to, or can be explained by, the regulatory objective pursued by the measure at issue. Any such inquiry, in the context of the GATT 1994, takes place in, and is subject to, the conditions of, the exceptions in the GATT 1994.

7.207. Accordingly, we consider that our analysis of the consistency of the origin marking requirement with Article IX:1 must focus on two elements: (a) whether the origin marking requirement accords to products of Hong Kong, China treatment that is different from the treatment accorded to products of other countries; and (b) if so, whether the origin marking requirement, by according such a different treatment, modifies the conditions of competition to the detriment of products of Hong Kong, China. We examine these two elements in turn.

7.4.5.2 Difference in treatment

7.208. Hong Kong, China argues that the origin marking requirement accords less favorable treatment to goods imported from Hong Kong, China because it results in the fact that these goods "may not be marked with the full English name of their actual country of origin," contrary to goods from any third country. Hong Kong, China describes this less favorable treatment with respect to two aspects: (a) "the method of determining the country of origin," because the United States determines that the origin of products manufactured or processed in Hong Kong, China is "China" by applying a condition ("sufficient autonomy" from China) that it does not apply to the goods of other Members (difference in treatment with respect to origin determination); and (b) "the required terminology to indicate that country of origin," because, if the United States determines that the origin of these products is "Hong Kong, China," it prohibits them from being marked with that name (difference of treatment with respect to terminology).

7.209. We understand these two lines of argumentation to be based on two alternative scenarios, which represent mutually exclusive readings of the facts: either the United States determines that the origin of the affected products is "China," or the United States determines that the origin of the affected products is "Hong Kong, China." For that reason, to address Hong Kong, China's two lines of argumentation, we consider it necessary to examine each of the two alternative scenarios and make the relevant factual findings in the process.

[The Panel rejected the first line of argumentation, at Section 7.4.5.2.1 below. In so doing, the Panel muddied up the legal landscape. It conflated the legal reality that (1) using applicable non-preferential or preferential ROOs, a "country of origin" determination is rendered, and (2) the label affixed to merchandise or its container is based on that determination. That is, the Panel separated two inextricably linked processes.]

7.4.5.2.1 Whether there is a difference in treatment with respect to origin determination

…

7.4.5.2.1.2 Panel's assessment

7.216. Hong Kong, China's argument that the origin marking requirement accords less favorable treatment in respect of the method by which the United States determines the country of origin of goods produced in Hong Kong, China is based on the premise that the United States determines the origin of these products to be "China" (and not "Hong Kong, China"). We will therefore begin our analysis by assessing if that premise is correct, from a factual perspective.

7.217. It is undisputed that the origin marking requirement (a) applies to a set of products identified by the common trait of being "goods produced in Hong Kong;" and (b) requires that these products be marked "to indicate that their origin is 'China' for the purposes of 19 U.S.C. 1304."

7.218. The parties disagree whether this factual situation amounts to a determination by the United States that the products subject to the origin marking requirement are of "Hong Kong, China" or of "China" origin. The parties' disagreement appears to stem from their differing views on whether the requirement to use a certain mark of origin (in this case, the mark "China") is indicative of the origin determined by U.S. authorities. Hong Kong, China argues that "the origin mark required by an importing Member indicates that Member's determination concerning the country of origin of the good." The United States argues that "the decision as to the name with which a good must be marked is distinct from a determination as to in what geographic area a good was produced, and the rules applied to make that determination."

7.219. We consider that the determination of the origin of a product is distinct from, and should not be conflated with, the trade policy instrument that makes use of this origin determination. In other words, as the United States and several third parties emphasize, the determination that a specific country is the country of origin for marking purposes is distinct from the requirement to use a mark of origin on imported products. The determination of origin is the result of the application of a Member's origin criteria, which leads to "a conclusion as to the country from which the goods are considered to originate" and allows, on that basis, to "specify to which treatment [a] good will be subjected because of the country it stems from." Origin is used for the implementation of trade policy instruments of various types, including origin marking requirements.

7.220. The distinction between origin determination and the trade instrument that makes use of this origin determination is complicated in the case of origin marking requirements, because these requirements by their nature are intended to indicate the origin of a product. In that sense, a requirement to use the mark of origin "China" could be perceived by purchasers as an indication that the U.S. authorities have determined China to be the product's country of origin. Nevertheless, we do not consider that this should result in a conflation between origin determination and an origin marking requirement, which is a trade policy instrument, in the application of which the origin determination is used.

7.221. We, therefore, turn to the question of what is the origin determination that the United States uses to apply the origin marking requirement at issue. For the purposes of origin marking, the United States considers as the country of origin of a product the country in which this product was manufactured, produced, grown, or substantially transformed. Under U.S. law, only one country of origin can be determined. The United States explains that to determine whether a product is a "product of Hong Kong, China," it applies the same analysis that would apply to determine the origin of any good from any source. We understand this to mean that to establish whether a product would be subject to the origin marking requirement, the United States uses its "normal rules of origin" to determine whether that product was manufactured, produced, grown, or substantially transformed in Hong Kong, China.

7.222. We note a certain level of ambiguity in the specific legal characterizations of that process under U.S. law. It remains unclear to us whether the process of determining that the products subject to the origin marking requirement are manufactured, produced, grown, or substantially transformed in Hong Kong, China, is characterized as a determination of country of origin under U.S. law. It is our understanding that, due to the suspension of differential treatment for origin marking, … it may be impossible for U.S. authorities to determine that Hong Kong, China is a country of origin for origin marking purposes under Section 304. It is in this context that U.S. CBP, referring to "the new policy that was specified in the *Executive Order* and reiterated in the *Federal Register* Notice," states that "[t]he reference to Hong Kong under the current policy may mislead or deceive the ultimate purchaser as to the actual country of origin of the article and, therefore, is not acceptable for the purposes of 19 U.S.C. § 130."

7.223. We understand the complexity of this situation to be related to the status of Hong Kong, China as both a WTO Member in its own right (as a separate customs territory, different from China) and "an inalienable part of the People's Republic of China," and to the United States' assessment that "Hong Kong … is no longer sufficiently autonomous to justify differential treatment in relation to the People's Republic of China" under certain U.S. laws and provisions thereof. We note, in that respect, that the United States refers to its determinations that goods have been manufactured, produced, grown, or substantially transformed in "the geographic region of Hong Kong, China" or "the area of Hong Kong, China."

7.224. Even if the legal characterization of that process under U.S. law is ambiguous, it remains a fact that the United States uses its normal rules of origin to determine that the products were manufactured, produced, grown, or substantially transformed in Hong Kong, China, so as to apply the origin marking requirement at issue. We note that Hong Kong, China is a WTO Member in its own right, separately from China. Furthermore, we understand that any disagreement between the parties on the consistency of the origin marking requirement with Article IX:1 does not extend to a disagreement as to (a) the status of Hong Kong, China as a separate WTO Member and a "country" within the meaning of the *WTO Agreement* and the covered agreements; and (b) the territorial boundaries of Hong Kong, China.

7.225. For these reasons, we find that, to apply the origin marking requirement to a set of products that it has determined have been manufactured, produced, grown, or substantially transformed in Hong Kong, China, the United States first determines that the origin of these products is "Hong Kong, China."

7.226. To sum up, Hong Kong, China's argument that the origin marking requirement accords less favorable treatment in respect of the method by which the United States determines the country of origin of goods produced in Hong Kong, China is based on the premise that the United States determines the origin of these products to be "China" (and not "Hong Kong, China"). We have found that that premise is incorrect. Therefore, we find that there is no difference in treatment with respect to origin determination. We, therefore, turn to examining Hong Kong, China's second argument, that products of Hong Kong, China are accorded different treatment in respect of the required terminology to indicate their country of origin. This argument is based on the premise which we have found to be factually correct, namely that the United States determines the origin of products of Hong Kong, China to be Hong Kong, China.

7.4.5.2.2 Whether there is a difference in treatment with respect to terminology

7.4.5.2.2.2 Panel's assessment

7.229. … [T]he United States requires all imported goods to be marked in such manner as to indicate to an ultimate purchaser in the United States the English name of their country of origin. We understand that when the United States determines that a product has been manufactured, produced, grown, or substantially transformed in a specific country (*i.e.*, the "country of origin" as defined in Part 134 of Title 19 of the Code of Federal Regulations335), it requires that the mark of origin indicate to the ultimate purchaser the name of that country of origin. U.S. law, thus, requires correspondence between the origin as determined by the United States and the origin indicated on the mark.

7.230. We understand the United States to argue that the treatment it accords to products of Hong Kong, China is not different from the treatment it accords to products of any third country. The United States' arguments on this point stem from its assertion that the origin marking requirement involves only the "terminology used for marking goods produced in the geographic area Hong Kong, China." According to the United States, the fact that these goods are marked with "China" simply reflects the fact that all imports must be marked using the terminology determined under U.S. law. On the basis of that assertion, we understand that the United States develops two arguments: first, that origin marks by definition use different terms to indicate different countries, and therefore involve a certain level of difference that cannot be equated to a difference in treatment for the purposes of a non-discrimination provision such as Article IX; and second, that origin marks reflect a name that the adopting Member has chosen to associate with a certain area, and, in the present case, the United States has chosen to associate Hong Kong, China with the name "China."

7.231. We agree with the United States that a measure disciplined under Article IX, by its nature, "makes distinctions on the basis of origin." Given the specific nature of marks of origin, which use different names to indicate different countries of origin, we consider that a purely formal distinction between products originating in different countries does not automatically mean that those two products are accorded different treatment. In other words, pursuant to an origin marking requirement, products originating in country A would be marked with a mark of origin that is different from that required for products originating in country B. However, Hong Kong, China does not take issue with its products not being marked with the same origin mark as products from any third country. Rather, we understand Hong Kong, China's concern to be that while the products of any third country are required (and therefore allowed) to be marked with a mark indicating the name of that country, products of Hong Kong, China are not allowed to be marked with a mark indicating the name "Hong Kong, China" (or any iteration thereof), but are required to be marked with a mark of origin indicating the name of another WTO Member (China).

7.232. This takes us to the second argument raised by the United States – that the treatment it accords to products of Hong Kong, China is not different from the treatment it accords to products of any third country, because the United States has chosen the name "China" to be associated with the region of Hong Kong, China. According to the United States, imports from Hong Kong, China, as imports from other countries, are required to be marked with terminology as determined by the United States. It is factually correct that the United States requires all products, including products of Hong Kong, China, to be marked with a name that the United States has determined. However, we do not understand Hong Kong, China to disagree merely "with the name that the United States has chosen for marking purposes." Rather, Hong Kong, China takes issue with the fact that the United States requires that products of Hong Kong, China be marked to indicate the origin of another WTO Member (China).

7.233. We disagree with the United States to the extent that it appears to suggest that the name "China" may be the United States' way of designating Hong Kong, China rather than the People's Republic of China. This would neither reflect the uncontested evidence of the United States using that name to designate the origin of products from the People's Republic of China, nor would it be consistent with what we understand to be the logic of suspending differential treatment for Hong Kong, China in respect of origin marking. … [T]he complexity of this situation is related to the fact that Hong Kong, China is part of China. We recall, however, that Hong Kong, China is also a separate customs territory WTO Member, distinct from China.

7.234. Therefore, whereas U.S. law provides that for products of all other countries there should be correspondence between the origin determined and the origin marked, it does not provide for such correspondence for products of Hong Kong, China, but instead requires that these products be marked to indicate the origin of another WTO Member. This constitutes different treatment for the purposes of our analysis under Article IX:1.

7.235. We therefore conclude that the United States requires goods of Hong Kong, China to be marked with a mark of origin indicating the name of another WTO Member, whereas the United States requires goods of any third country or Member to be marked with a name that corresponds to their origin. We consider that this amounts to the United States according goods that it identifies as manufactured, produced, grown, or substantially transformed in Hong Kong, China treatment different from that which it accords to goods that it identifies (on the basis of the same rules of origin) as manufactured, produced, grown, or substantially transformed in any third country or Member.

[Query whether the Panel rides roughshod over U.S. sovereignty. The Panel blithely dismisses the American concern that Hong Kong, China, and China, are one and the same. They were distinct, *i.e.*, Hong Kong was a *bona fide* separate customs territory, as of 11 December 2001 when the PRC acceded to the WTO. The U.S. government assessed that no longer was true, so who is the WTO to question that assessment? Consider the same issues, but with respect to Taiwan, which acceded to the WTO on 11 January 2002. Would anyone doubt they – Taiwan and the Mainland – are worthy (dare it be said) two distinct country of origin labels? Query also whether the WTO Panel's ruling is monstrously anti-consumer: buyers world-wide have seen how the CCP has eroded Hong Kong's freedoms (as chronicled in a separate Chapter)? The U.S. measure tells American buyers that after the CCP crackdown in Hong Kong, there no longer is any meaningful distinction between "Hong Kong, China," and "China." The WTO Panel's reliance on Hong Kong being a separate customs territory of China seems naïve, indeed, dangerous.]

7.4.5.3 Detrimental impact

…

7.4.5.3.2 Panel's assessment

7.239. We begin by recalling some of the clarifications that panels and the Appellate Body have made in past cases – and that the parties do not express disagreement with – regarding how the detrimental impact of a measure can be demonstrated and assessed.

[The Panel cited several Appellate Body precedents, some of which are excerpted and/or analysed in separate Chapters, including: Appellate Body Report, *Thailand – Customs and Fiscal Measures on Cigarettes from the Philippines Cigarettes (Philippines)*, WT/DS371/AB/R, paragraphs 128-130, 134 (adopted 15 July 2011) (*Thailand – Cigarettes (Philippines)*); and Appellate Body Reports, *European Communities – Measures Prohibiting the Importation and Marketing of Seal Products*, WT/DS400/AB/R / WT/DS401/AB/R, paragraph 5.101 (adopted 18 June 2015 (*EC – Seal Products*, referring to Appellate Body Report, *United States – Measures Affecting the Production and Sale of Clove Cigarettes*, WT/DS406/AB/R, paragraphs 177, 179) (adopted 24 April 2012) (*U.S. – Clove Cigarettes*), Appellate Body Report, *Korea – Measures Affecting Imports of Fresh, Chilled and Frozen Beef*, WT/DS161/AB/R, WT/DS169/AB/R, paragraph 137 (adopted 10 January 2001) (*Korea – Various Measures on Beef*), and Appellate Body Report, *Japan – Taxes on Alcoholic Beverages*, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, p. 110 (adopted 1 November 1996) (*Japan Alcoholic Beverages*).]

7.240. An assessment of less favorable treatment must be founded on an examination of the design, structure, and expected operation of the measure at issue. Such assessment aims to discern the measure's implications for the equality of competitive conditions between products imported from different countries, and to determine whether the measure modifies the conditions of competition in the market to the detriment of imported products.

Importantly, an analysis of less favorable treatment "does not require … an assessment of the contested measure in the light of evidence regarding the actual effects of that measure in the market," nor should it be "anchored in an assessment of the degree of likelihood that an adverse impact on competitive conditions will materialize." A measure can be found to accord less favorable treatment because of its potential discriminatory impact on imported products from a given Member.

7.241. In light of these elements, we consider that to demonstrate that the origin marking requirement modifies the conditions of competition to the detriment of products of Hong Kong, China *vis-à-vis* products of any third country, Hong Kong, China has to show that the competitive opportunities for products of Hong Kong, China in the U.S. market are adversely impacted by the difference in treatment established by the origin marking requirement.

7.242. We understand the parties to have somewhat diverging views on how Hong Kong, China can demonstrate detrimental impact. In particular, they disagree on whether Hong Kong, China is required to submit evidence regarding, for example, the value of an origin mark "Hong Kong, China" in the U.S. market, or the economic and trade impact ensuing from a requirement to use an origin mark indicating the name of another Member. The United States argues that Hong Kong, China has not produced sufficient evidence to demonstrate such impact and distinguish it from other impacts such as those resulting from the COVID-19 pandemic. While Hong Kong, China presents some elements of evidence in that direction, we understand it to also contend that detrimental impact can be demonstrated, more generally, on the basis of the design, structure, and expected operation of the measure.

7.243. … Hong Kong, China asserts that there is "an inherent advantage for exporters in being able to mark their products with the actual country of origin of the product, as opposed to the origin of a different Member" and that WTO Members and their enterprises have an interest in ensuring that "their goods are accurately marked with the customs origin of the good." We understand Hong Kong, China to make a point of principle, arguing that the competitive opportunities for products of Hong Kong, China in the U.S. market are affected because products of Hong Kong, China are denied an advantage ("to be able to mark their goods with the name of the customs territory in which the goods were manufactured or produced") that products of third countries are accorded.

[Query whether Hong Kong, China's argument is idiosyncratic to the PRC. Would there be a denied advantage if the third country were France or Singapore? Likely not; Hong Kong, China, would welcome the reputational boost of being associated with France or Singapore. Is not, then, the real problem for Hong Kong, China, the drag on its reputation – the reputation of a formerly autonomous Hong Kong – from association with the Mainland?]

7.244. To fully address [*sic*] Hong Kong, China's argument that there is an "inherent advantage," we find it necessary to take a step back and to consider the role that origin and origin marks play as an element of competition. In our view, the origin of a product, and how that origin is indicated to the ultimate purchaser in the import market, affect the competitive relationship between imported products, to the extent that when origin is indicated, it becomes a relevant factor in purchasing decisions. In that sense, an origin mark, as argued by Hong Kong, China, has an inherent value in the import market.

7.245. When a WTO Member requires all imported goods to be marked with a mark of origin, as the United States does, it introduces origin marking, an element that affects the choice of an ultimate purchaser, into the conditions of competition between imported products on the import market. In other words, imported products compete in the U.S. market with an indication of their origin and this indication affects their competitive opportunities.

7.246. Differentiating the application of that element of competition between products imported from different countries logically alters the competitive relationship between those products. In that sense, the origin marking requirement alters the competitive relationship between goods imported from any third country, which can be marked with the name of their country of origin, and like goods of Hong Kong, China, which must be marked as China origin.

7.247. As a result of this alteration, goods of Hong Kong, China are not allowed to compete in the U.S. market with an indication of their origin as it is determined by the United States, *i.e.*, to compete under Hong Kong, China's "own name." [Query whether the Panel behaves as either a fool or a knave with respect to the American argument that this reference is precisely the point – there is no "own name" after the CCP violated its obligations under the Sino-British 19 December 1984 *Joint Declaration* and 1 July 1997 *Basic Law* (as chronicled in a separate Chapter).] This in turn means that, following the introduction of the origin marking requirement, a marking indicating Hong Kong, China as the country of origin of the products is no longer available in the U.S. market. Contrary to exporters of goods of any third country, exporters of goods of Hong Kong, China are denied the possibility to influence, develop, or benefit from, any value that may be attached, currently or in the future, to the origin of their goods. This adversely affects the competitive opportunities of these products in the U.S. market. For products of Hong Kong, China, compliance with the origin marking requirement would thus involve a competitive disadvantage compared with products of any third country. [Note here the redundancy in the Panel's discussion, plus the non sequitur beginning with "This adversely affects …."]

7.248. We consider that Hong Kong, China has therefore demonstrated, on the basis of the design, structure and expected operation of the measure, that the origin marking requirement modifies the conditions of competition to the detriment of products of Hong Kong, China. We consider this to be sufficient to demonstrate detrimental impact.

7.249. We nevertheless note that Hong Kong, China has described several other elements in support of its argument that the origin marking requirement detrimentally modifies the conditions of competition in the US market for products of Hong Kong, China. First, Hong Kong, China asserts that there is often considerable brand and reputational value derived from marking a product with the origin of a particular Member. [Query whether those brands are connected with Hong Kong, or with high-end EU-based fashion houses.] Second, Hong Kong, China asserts that having to mark goods exported from Hong Kong, China as of "China" origin, when destined for the United States, has increased the cost and complexity of exportation for Hong Kong enterprises. [Querty whether that is true: would it not be easier for all producer-exporters from across China, including Hong Kong, to have a single "Made in China" label, rather than have to maintain documentation as to origin in the HKSAR?] Third, in connection with its view about the inherent advantage of exporters being able to mark their products with their actual country of origin, Hong Kong China notes that "inaccurate marking of the customs origin of a good is liable to cause confusion and potential error in the regulatory treatment of that good, and in fact has already had those effects pursuant to the revised origin marking requirement." [Is it not the confusion caused to consumers that "Hong Kong, China" is different from "China" that is the crux of the matter?] As noted above, we do not find it necessary to consider these elements presented by Hong Kong, China for the purposes of assessing whether Hong Kong, China has met its burden of proof of demonstrating detrimental impact. We, however, note that they illustrate – to varying degrees and with varying relevance – the fact that the mere exclusion of the possibility for products of Hong Kong, China origin to compete in the U.S. market with an indication of their origin as determined by the United States, when products of third countries are granted that same possibility, affects the competitive opportunities to the detriment of products of Hong Kong, China.

7.250. For these reasons, we find that the origin marking requirement, by requiring that products of Hong Kong, China compete in the U.S. market with an indication that their origin is that of another WTO Member (China) and not with an indication of their origin as determined by the United States (i.e. Hong Kong, China), modifies the conditions of competition to the detriment of products of Hong Kong, China. [Again, are they really different WTO Members under the CCP?]

7.4.6 Conclusion on Article IX of the GATT 1994

7.251. The origin marking requirement accords to products that the United States has determined to originate in Hong Kong, China treatment that is different from the treatment accorded by the United States to like products of any third country. This difference in treatment results from the United States requiring that products of Hong Kong, China be marked with a mark of origin indicating the name of another WTO Member (China), whereas goods of any third country must be marked with the name of that third country, and not with the name of another WTO Member. This difference in treatment modifies the conditions of competition to the detriment of products of Hong Kong, China, because, as a result, products of Hong Kong, China are required to compete in the U.S. market with an indication that their origin is that of another WTO Member (China) and not with an indication of their origin as determined by the United States (*i.e.*, Hong Kong, China). Those products are thus denied the possibility to compete in the U.S. market under their own name, and thus to influence, develop, or benefit from, any value that may be attached, currently or in the future, to their origin.

7.252. … [T]he origin marking requirement accords to products of Hong Kong, China treatment with regard to marking requirements that is less favorable than the treatment accorded to like products of any third country and is thus inconsistent with Article IX:1 of the GATT 1994.

Chapter 2

NON-PREFERENTIAL ROOs[12]

I. Rationales for ROOs

GATT does not say much about the substantive test or tests to be used to ascertain the country from which a good came, *i.e.*, about how to decide whether a good is from overseas. All efforts in early GATT history to concoct a harmonized definition of "origin" failed. As yet, there is no single harmonized definition of "origin." Efforts began in 1995 pursuant to the WTO *Agreement on Rules of Origin* to achieve harmonized non-preferential country-of-origin rules for over 2,700 articles of merchandise. By December 2011, WTO Members had agreed on harmonized rules for 1,500 products. As to many of the remaining goods, Members could not agree on whether the same, or different, rules should apply in the event of a trade remedy.

As for proof or origin, here again, GATT says essentially nothing, *i.e.*, of what evidence should be presented to demonstrate convincingly the true origin of merchandise. Routinely, customs officials around the world rely on statements presented in shipping documents, most notably, a certificate of origin. Yet, that reliance merely shifts the burden of work from the government to the private sector. The task for international trade counsel advising exporters is to figure out what to declare in a certificate of origin. Put bluntly, neither Article IX nor any other provision of GATT lays out a rule, or rules, of origin.

II. Contexts for ROOs

● Context #1: Non-Preferential

It should be clear there are two contexts in which a Rule of Origin is needed.[13] Consider the following example. Assume (as is true) a book is written at the University of

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[12] Documents References:
(1) *Havana (ITO) Charter* Articles 33, 35-37
(2) GATT Articles V, VIII, IX:6
(3) WTO *Agreement on Rules of Origin*
(4) *USMCA* Chapters 4-5

[13] These contexts, which concern U.S. customs marking rules, concern importation *vis-à-vis* domestic production of merchandise. A different context is fair trading practices, in respect of consumer protection from unfair and deceptive practices – the bailiwick of the FTC. Many firms seek to put "Made in the U.S.A." on their merchandise for an admixture of political and economic reasons, such as to show their connectedness to the homeland and their loyalty to American workers, and to qualify for government procurement contracts and satisfy *DPA* mandates (including those issued via Executive Order during the COVID-19 pandemic, discussed in a separate Chapter). But, doing so is a privilege they can enjoy only if they adhere to FTC "Made in the U.S.A." marking requirements.

In July 2020, the FTC proposed a regulation concerning enforcement of "Made in U.S.A." claims. *See* Federal Trade Commission, *Made in U.S.A. Labelling Rule*, 85 Federal Register number 137, 43162-43165 (16 July 2020), www.govinfo.gov/content/pkg/FR-2020-07-16/pdf/2020-13902.pdf. The FTC invoked its authority under 15 U.S.C. Section 45a to fashion a rule that would deter unlawful "Made in

Kansas, the Kansas City Metropolitan Area (on both sides of State Line Road, which demarcates the States of Kansas and Missouri), as well as in Hong Kong,[14] China, New Delhi, India, and Singapore, not to mention England and Luxembourg, and then edited in Manila, Philippines and Durham, North Carolina. Assume, too, paper is imported from Canada, and the ink from Russia. The paper and ink are processed in the Netherlands. The book then is imported into the U.S., for sale globally.

Of what country is this publication a product? The answer is found by applying a ROO. The purpose of any ROO is to determine the country of origin of an imported good. That is, a ROO is the criterion employed to identify the "nationality" of a product. One context in which this identification is necessary is where no preferential trade benefits, such as duty-free treatment under *NAFTA*, *CAFTA-DR*, or the bilateral U.S. *FTAs*, such as with Australia, Bahrain, Chile, Israel, Jordan, Morocco, and Singapore are at issue. What matters is affixing the proper country of origin marking on the article being imported, in keeping with the requirements of GATT Article IX.

In this first context, the ROOs are accurately called "non-preferential" rules of origin. The importance of such rules cannot be over-emphasized:

> An erroneous determination of the country of origin of imported merchandise can have disastrous consequences for the parties involved in the transaction. For example, merchandise marked with the incorrect

U.S.A." claims, but not impose new burdens on law-abiding companies. Under the proposed FTC regulation, it remained unlawful – a "prohibited act" as an unfair or deceptive act or practice – to put a "Made in U.S.A." label (or, similarly, a descriptive statement such as "True American Quality" or an image such as the American flag) on any product offered for sale in the U.S. unless (1) final assembly or processing of that product occurred in U.S., (2) all significant processing also occurred in the U.S., and (3) all or nearly all of the inputs into the product were made and sourced in the U.S. So, as per the proposal, a marketer (including via mail order) could not make the claim its merchandise is "Made in U.S.A." "unless (1) final assembly or processing of the product occurs in the United States; (2) all significant processing that goes into the product occurs in the United States; and (3) all or virtually all ingredients or components of the product are made and sourced in the United States." *Id*., 43163. That is, the proposed regulation retained the "all or virtually all" requirement the FTC had applied for many years, but was more stringent than before in that it applied this requirement to sales and promotional literature (*e.g.*, a mail order catalogue or promotional material bearing mark, seal, stamp, or tag labelling the article "Made in the U.S.A."). Note the FTC extant and proposed requirements are more stringent than most international trade ROOs (though they do not alter or supersede any other Federal statutory or regulatory COOL rules).

One year later, the FTC published its Final Rule on unqualified "Made in USA" claims on product labels and in promotional materials, increasing the potential civil penalties for improper claims to up to $43,280 per violation. *See* Federal Trade Commission, *FTC Issues Rule to Deter Rampant Made in USA Fraud, Made in USA Labels Will Finally Mean Goods Were Made in America* (1 July 2021), www.ftc.gov/news-events/press-releases/2021/07/ftc-issues-rule-deter-rampant-made-usa-fraud, 86 Federal Register 37022 (14 July 2021).

[14] The use of Hong Kong and China in this hypothetical example should provoke the question whether the two are one or not. Until the entry into force of the *Hong Kong Autonomy Act* (discussed in a separate Chapter), the U.S. treated them as distinct for trade purposes. However, effective 25 September 2020, any merchandise imported into the U.S. from Hong Kong must be marked as originating in China. *See* Department of Homeland Security, U.S. Customs and Border Protection, *Country of Origin Marking of Products of Hong Kong*, 85 Federal Register number 155, 48551-48552 (11 August 2020), www.govinfo.gov/content/pkg/FR-2020-08-11/pdf/2020-17599.pdf.

> country of origin may be subject to seizure or an assessment of supplemental marking duties. The Customs Service may also impose substantial monetary or criminal penalties against the importer if Customs suspects that the importer purposefully obscured, removed, or altered the country-of-origin mark. Finally, the *Trademark Act of 1946* [15 U.S.C. §§ 1051-1127] prohibits the importation of articles of foreign origin which display a name or mark intended to persuade the public to believe that an imported product was manufactured in the United States or in "any foreign country or locality other than the country or locality in which it was in fact manufactured." An article imported in violation of this statute may be detained, seized, or forfeited.[15]

In addition, non-preferential ROOs are needed when countries agree to restrict imports from or exports to certain countries, such as through a VRA (*i.e.*, VER or OMO) governing steel or car exports from Japan to the U.S. The ROO determines whether a steel or car shipment is from Japan and, therefore, subject to the VRA. (Of course, most VRAs are not permitted under Article 11:1(b) of the WTO *Agreement on Safeguards*.)

Non-preferential ROOs are required to enforce effectively AD and CVD orders. For example, suppose an AD or CVD order is issued by Mexico's Ministry of the Economy against the Tianjin Toy Company of Tianjin, China. By means of a ROO, Mexican customs authorities will determine whether toys imported into the U.S. are the product of TTC and, therefore, subject to the remedial duty. Suppose TTC establishes an assembly operation in Lahore, Pakistan, and ships toys to Mexico from that factory. TTC could be attempting to circumvent the duty order by making toy components in China and simply assembling the components in Pakistan. A ROO serves as an anti-circumvention device.

- **Context #2: Preferential**

In the second of two contexts in which a ROO is needed, special trade treatment is at stake – namely, a preference. Illustrations include duty-free treatment under an FTA, CU, or under a program of S&D treatment for poor countries, like the *GSP* or *AGOA*. The purpose of "preferential" ROOs is to determine eligibility for tariff preferences and manage the problem of trans-shipment. (Preferential ROOs are discussed in a separate Chapter.)

It is interesting, and of some practical significance, to consider whether and to what extent non-preferential and preferential ROOs differ from each other. It may be argued that in many instances, in either context, the origin test essentially is a value-added computation, *i.e.*, a country-by-country calculation of the value added to the imported article.

III. Three Basic Types of Non-Preferential ROOs

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[15] Michael P. Maxwell, *Formulating Rules of Origin for Imported Merchandise: Transforming the Substantial Transformation Test*, 23 GEORGE WASHINGTON JOURNAL OF INTERNATIONAL LAW & ECONOMICS 669, 670 (1990). [Hereinafter, Maxwell.]

A myriad of different, specific non-preferential rules of origin exists. (That also is true of preferential rules.) However, in broad, conceptual terms, there are three basic categories of non-preferential ROOs.

- **1st: Goods Wholly Obtained**

The country of origin of imported merchandise is the country in which the article was manufactured, produced, or grown. This rule is relatively straightforward, but it works only where the agricultural or industrial process is not multi-jurisdictional.

Note with respect to farm products there is no tracing back prior to planting. That is, a product originates in the country in which it is planted, grown, and harvested, regardless of the origin of the seeds and fertilizer. For instance, corn planted, grown, and harvested in Brazil from seed and fertilizer made in the U.S. and Russia would be the "Product of Brazil." Yet, meat presents an incongruity. What happens, then, if beef or poultry are reared in Canada or Mexico, but slaughtered in the U.S.? American ranchers have complained the *Packers and Stockyards Act* of 1921[16] allows such meat to be labelled "Product of U.S.A.," thus giving MNCs that raise animals abroad an unfair advantage over them.[17] In 2022, USDA proposed rules to clarify this phrase.

- **2nd: Substantial Transformation**

If merchandise is produced in two or more countries, then its country of origin is the country in which the last "substantial transformation" of the merchandise occurred. This rule has been the subject of much litigation in the U.S., as case law adduces.[18]

- **1908 *Anheuser-Busch* "Change in Name, Character, or Use" Test**

American courts have not found the term "substantial transformation" to be unconstitutionally vague. They have rejected the suggestion that reasonable businessmen would find it ambiguous. As the U.S. Court of Appeals stated in a 1980 decision:

> "Substantial transformation," while not a term or sub-term in common use, is composed of two words in common use. "Transformation," whether or not modified by an adjective, means a *fundamental* change, not

[16] *See* Public Law 67-51, 42 Stat. 159 (15 August 1921), 7 U.S.C. §§181-229b.

[17] Leah Douglas, *Biden Unveils Plan to Boost Competition in U.S. Meat*, REUTERS, 3 January 2022, www.reuters.com/markets/commodities/lack-competition-us-meat-industry-amounts-exploitation-says-biden-2022-01-03/.

[18] The substantial transformation rule also is the subject of countless CBP rulings. In one among many interesting cases, CBP decided that paperback books printed and folded in Hong Kong and then transferred to China for binding and packing were Hong Kong origin. CBP reasoned that the gluing and cutting to bind printed materials, which occurred on the Mainland, did not result in a substantial transformation. *See* HQ H323855, *Re: Country of Origin Marking of a Printed book; Section 301 Measures* (4 April 2022), www.customsmobile.com/rulings/docview?doc_id=HQ%20H323855&highlight=date%3A%5B2015%20TO%20%2A%5D. At issue was whether the books were subject to the Section 301 tariffs the U.S. applied during the Sino-American Trade War (discussed in a separate Chapter).

> a mere alteration, in the form, appearance, nature, or character of an article. As is indicated by its first syllable, it means a change which carries an article or other object *across* from one class to another class. When used to aid in the determination of the appropriate rate of duty under a tariff schedule it means such a change as to move the article either from one to another of the classes established by official tariff schedules, or from one to another of the classes of goods, wares, and merchandise commonly recognized in the commercial markets where such articles are traded. As a modifier of "transformation," "substantial" means more than "fundamental" because if that were its only meaning it would be redundant; it means a very great change in the article's "real worth, value." [Citation omitted.] Hence, … "substantial" has an *economic* meaning. The adjective "substantial" informs us that the degree of change is to be measured with reference to economic value, and the degree must be very great.
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> When read, as it should be, as a unified expression, not as two separate words ... we hold that the sub-term "substantial transformation" means a fundamental change in the form, appearance, nature, or character of an article which adds to the value of the article an amount or percentage in comparison with the value which the article had when exported from the country in which it was first manufactured, produced, or grown.
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> That meaning … is the one which would naturally occur to a person of common education and common sense who realized, as he should from reading the whole of [the relevant Customs rule in the Code of Federal Regulations] … that the general rule was to treat the country where an article was produced as the "country of origin"….[19]

Without doubt, the landmark case on the definition of "substantial transformation" is a 1908 decision of the U.S. Supreme Court in *Anheuser-Busch Brewing Association v. United States*.[20] There, the Court defined "substantial transformation" in terms of a "name, character, or use" test that is applied to this day. To change the country of origin, said the Court, "[t]here must be transformation; a new and different article must emerge 'having a *distinctive name, character, or use*.'"[21]

For example, suppose bamboo is imported from Thailand to Australia. Coffee tables are made from the bamboo in Australia. The tables are exported to the U.S. They are an Australian product, because all three prongs of the test are met (though satisfying one is sufficient) – the name, character and use of the bamboo were changed in Australia. But, like many Supreme Court efforts at clarifying the law, the name, character, or use test is straightforward as a theoretical matter, but difficult to apply in practice:

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[19] *United States v. Murray*, 621 F.2d 1163, 1168-69 (1st Cir. 1980).
[20] 207 U.S. 556, 562 (1908).
[21] Emphasis added.

> In determining whether merchandise has emerged from a manufacturing process with a new name, character, or use, the courts consider (1) the value added to the merchandise at each stage of manufacture, (2) the degree and type of processing that occurred in each country, (3) the effect of processing on the article, (4) the markets in which the article was sold at each stage of production, (5) the capital costs of the processing, (6) the manner in which the article was used before and after processing, (7) the durability of the article before and after processing, (8) the lines of distribution in which the article was sold, (9) the article's name or identity in commerce before and after processing, and (10) the tariff classification of the merchandise before and after processing.[22]

Given the range of potential factors a court might examine, importers have little certainty as to the origin of their merchandise. The fact the design and production of goods is increasingly global in nature further complicates the practical application of the substantial transformation test.

- **3rd: Value Added**

An article is deemed to originate in the country in which a specified percentage of its total value is contributed. Careful attention must be paid to what counts in summing up the value.

- **Assembly?**

Assembly almost never is sufficient to confer origin. Assembling parts imported from one or more countries, into another country, and then putting them together to yield a finished good in that country, does not constitute a substantial transformation – whether via the *Anheuser Busch* test of changing name, character, or use, or via a CTC (CTH or CTSH) ROO. Assembly also does not add much value, in comparison with the value of the components being assembled. Of course, exceptions exist, and it is important to delve into the facts as to what items are being assembled with what other items.

For example, in June 2019, CBP issued a ruling that the country of origin of certain wristwatches was the country of assembly of the watch movements, *i.e.*, wherever those movement pieces were assembled was the originating country.[23] Did this ruling extend to the assembly of the movements, in aggregate, that is, the components (movement, case, and battery) with a watch strap? No – in fact, the components and strap are considered separately. The country of origin of a watch is the country of origin of the components, and the country of origin of the components is the country of assembly of the watch movements. Thus, when a Japanese-origin watch movement was assembled with a Chinese-origin watch band in China, the country of origin of the watches was the country of assembly of the watch movements – Japan. But, what about the strap?

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22 Maxwell, 673.

23 *See* U.S. Customs and Border Protection, *H304105: Country of Origin of Imported Watches*; Section 301 Trade Remedies (14 June 2019), https://rulings.cbp.gov/ruling/H304105.

CBP determined that the watch band was not substantially transformed when the watch movement was assembled with the band; rather, the band remained a Chinese-origin good, and thus was subject to Section 301 duties imposed by the U.S. during the Sino-American Trade War (discussed in a separate Chapter).[24] Consider, then, the marking requirement implications, namely, separate markings for different watch parts based on their origin.

- **Is Substantial Transformation Value Added (in Practice)?**

In studying non-preferential ROOs, consider the relationships among the tests, and especially whether – in practice – an examination of substantial transformation ends up being a value-added test. That is, does the determination of whether a transformation is "substantial" in a particular country get adulterated with an evaluation of how much value is added in that country? Might it be said that, in theory, it is impossible to divorce completely the concepts of "substantial transformation" and "value added," hence, in practice, the two necessarily get commingled?

IV. Policy Neutrality?

What is, and ought to be, the relationship between non-preferential rules of origin and their policy purpose? In particular, to what extent, if any, are these rules "policy neutral"? Consider the following hypothetical illustration.

Assume the U.S. Congress is about to enact steel import quotas for Japanese and Korean steel. The bill requires a ROO to determine whether steel is from Japan or Korea and thereby subject to the quota. Should this non-preferential ROO be related directly to the underlying purpose of the statute, or should it be policy neutral?

It has been argued ROOs should be "keyed" to the underlying purpose of the statute that calls for such rules.[25] Thus, a ROO for a steel import quota should be different from the ROO for computers or agricultural products:

> At present, the substantial transformation test is used to determine the country of origin for purposes of administering restraint agreements for steel, textiles, and machine tools. The test is also applied for marking goods with their country of origin, and in determining the identity of the constituent goods in merchandise eligible for duty-free treatment pursuant to the Generalized System of Preferences and the *Caribbean Basin Initiative*. The different goals animating these programs should be reflected in the criteria used to govern the country-of-origin determinations. Country of origin criteria under the marking statute should reflect the desire to

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24 *See* U.S. Customs and Border Protection*, H306338: Modification of Headquarters Ruling Letter (HQ) H304105; Country of Origin of Imported Watches; Section 301 Trade Remedies* (14 May 2021), https://rulings.cbp.gov/ruling/H306338.

25 Maxwell, 670.

> accurately inform purchasers of the country from which articles are imported. In contrast, the country of origin for products subject to quota agreements should reflect the purpose of the negotiated agreements – to prevent evasion of quotas. Finally, country of origin determinations under trade preference programs should be made in a manner that ensures that the developing nations for which these programs are intended achieve real economic development.[26]

In sum, the argument is ROOs should not be policy neutral. Accordingly, some Courts view the "essence" test as biased in favor of a particular policy. In contrast, such Courts find a ROO based on the name, character, or use of a product as policy neutral.[27]

V. Occupied Territories and "Made in Israel"?

In December 2017, the Administration of President Donald J. Trump (1946-, President, 2017-2021) recognized Jerusalem as the undivided capital of the State of Israel. In March 2019, via *Presidential Proclamation*, it accepted Israel's claims to sovereignty over the southern portion of the Golan Heights, which Israel captured from Syria in the Six Day War , which Arabs prefer to call the June 1967 War, and annexed with its 1981 *Golan Heights Law*.[28] (That annexation was not recognized by the international legal community.) The War was momentous and its consequences enduring, as Michael B. Oren, Senior Fellow, Shalem Center, Jerusalem explains in his masterful book, *Six Days of War – June 1967 and the Making of the Modern Middle East* (2002):

> The [July 1967-August 1970] War of Attrition, the [October 1973] *Yom Kippur* War, the [September 1972 Supper Olympic Games] Munich massacre and Black September, the [June-September 1982] Lebanon War, the controversy over Jewish settlements and the future of Jerusalem, the [September 1978] Camp David Accords, the [September 1973] Oslo Accords, the [December 1987-September 1993 First Palestinian] *Intifāḍa* [Uprising, Rebellion] – all were the result of six intense days in the Middle East in June 1967. Rarely in modern times has so short and localized a conflict had such prolonged, global consequences. Seldom has the world's attention been gripped, and remained seized, by a single event and its ramifications. In a very real sense, for statemen and diplomats and soldiers, the war has never ended. For historians, it has only just begun.
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> …
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> … Great wars *in* history invariably become great wars *of* history, and the Arab-Israeli wars are no exception. For decades now, historian have been battling over the interpretation of those wars, beginning with the

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26 Maxwell, 677.

27 *Compare Ferrostaal Metals Corp. v. United States*, 664 F. Supp. 535 (CIT 1987) *with National Juice Products Association v. United States*, 628 F. Supp. 978 (CIT 1982).

28 *See* The White House, *Proclamation on Recognizing the Golan Heights as Part of the State of Israel*, 25 March 2019, www.whitehouse.gov/presidential-actions/proclamation-recognizing-golan-heights-part-state-israel/.

> [1948] War of Independence, or the Palestine War of 1948, and progressing to the 1956 Suez crisis. Most recently, a wave of revisionist writers, Israelis mostly, have sought to amplify Israel's guilt for those clashes and evince it in the debate over the borders, or even the legitimacy, of the Jewish state. That debate is now sharpening as historians begin to focus on 1967 and the conquest of Arab territories by Israel, some of which – the Golan, the West Bank – it still holds, and whose final disposition will affect the lives of millions.[29]

That uncertain disposition also affects world trade, specifically the matter of country-of-origin labels. Affixing the correct label presumes an accepted definition of the borders of the country in question: if borders are not agreed, then labels on merchandise made in territory the status of which is disputed inevitably are controversial.

To be sure, in September 2020, Israel signed peace agreements with the UAE and Bahrain, and in October did so with Sudan, thus ending a state of war those Arab countries had maintained against Israel for decades, and granting Israel diplomatic recognition by them for the first time since Israel was founded on 14 May 1948.[30] But those deals – the so-called Abraham Accords – did not resolve the labelling issue, nor the underlying problem of Israel's borders. Notwithstanding them, the Palestinians in Gaza and on the West Bank remained wondering what, if anything, was left of the long-sought "two state solution" whereby a Jewish State of Israel and an Arab State of Palestine would live side-by-side in peace. Indeed, the joint normalization statements involving Israel, the UAE, Bahrain, and Sudan seemed to put the Palestinians further than ever from their goal of returning to the *status quo ante*, that is, to the borders as they existed before the June 1967 Six-Day War in which Israel captured East Jerusalem, Golan Heights, Gaza, the West Bank, and the Sinai Peninsula (which it returned to Egypt under the September 1979 *Camp David Accords*, brokered by President Jimmy Carter (1924-, President, 1977-1981).

On 19 November 2020, Mike Pompeo (1963-, Secretary, 2018-2021) became the first American Secretary of State to visit a Jewish settlement on the West Bank:

> Pompeo visited Qasr el Yahud, a site where tradition holds that Jesus was baptized, and then stopped at the Psagot Winery, an establishment that's been at the center of controversy over efforts to boycott settlement-produced goods. The winery named a red wine after him last year [2019], days after he announced the U.S. no longer considered settlements inherently illegal.
>
> Before the Trump Administration, the State Department "took a view that didn't recognize the history of this special place," Pompeo said of the settlements, at a news briefing in Jerusalem before his tour. "Today

[29] (New York, New York: Oxford University Press, 2002). (Emphasis original.)

[30] For a critique of these agreements, see, e.g., *Mitchell Plitnick, Israel, the UAE, & Bahrain Didn't Sign Peace Deals, They're Military Alliances to Counter Iran*, RESPONSIBLE STATECRAFT, 15 September 2020, https://responsiblestatecraft.org/2020/09/15/israel-the-uae-bahrain-military-alliance-counter-iran/.

> the United States Department of State stands strongly to the recognition that settlements can be done in a way that are lawful and appropriate and proper."
>
> …
>
> [T]he winery [was] located on a hilltop overlooking Ramallah, the seat of the Palestinian Authority. Last year [2019], the European Court of Justice ruled that companies like the winery must label any of their products for sale in Europe as having been produced in the settlements.[31]

After his winery tour, Secretary Pompeo announced a reversal to 25 years of U.S. country of origin labelling policy concerning products made in the Occupied Territories (specifically, Gaza and the West Bank).

From 1995-2020, the U.S. mandated a label "Made in West Bank" to products originating in that Occupied Territory. Doing so, without referring to "Israel," supported the two-state solution objective on which the 1993 *Oslo I Accords* was based. But, in 2020, the U.S. said a "Made in West Bank" label could apply only to merchandise made where the Palestinian Authority maintains "relevant authorities." What, exactly, did that mean?

Did it mean the label "Made in West Bank" could be used only with respect to Area A of the West Bank (where the Palestinian Authority is in full civil and military control), and possibly Area B (where the Palestinian Authority holds civil control, but Israel maintains military control), but Area C (which remained under exclusive Israeli control, though the Palestinian Authority provides educational and medical services to Palestinians living there)?[32] Yes. Did it also mean the label "Made in Israel" could be used, as it had been before the *Oslo I Accords*, to products from any settlement located in Area C? Yes. Areas A plus B sum to 39% of the West Bank, whereas Area C – in which roughly 385,900 Israeli settlers and 300,000 Palestinians live[33] – amounts to 61% of that territory.

In turn, did the U.S. policy reversal mean that America no longer saw as realistic the emergence of a viable Palestinian State on all of the West Bank? Arguably, yes, especially in light of the Trump Administration's proposed January 2020 Middle East peace plan that was roundly viewed as favoring Israel.[34] To be sure, America's reversal was incongruous with world opinion:

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[31] Nick Wadhams, *Pompeo Becomes First Top U.S. Diplomat at Israeli Settlement*, BLOOMBERG, 19 November 2020, www.bloomberg.com/news/articles/2020-11-19/pompeo-becomes-first-top-us-diplomat-to-visit-israeli-settlement?sref=7sxw9Sxl. [Hereinafter, *Pompeo Becomes First*.]

[32] For a map of these complexities, see, e.g., United Nations Office for the Coordination of Humanitarian Affairs (UNOCHA), Occupied Palestinian Territory, West Bank Access Restrictions (June 2020), www.ochaopt.org/sites/default/files/westbank_a0_25_06_2020_final.pdf.

[33] Israel Central Bureau of Statistics, *Localities and Population, by Population Group, District, Sub-District, and Natural Region* (2016), www.cbs.gov.il/EN/pages/default.aspx; Amira Hass, *U.N. Report: 300,000 Palestinians Live in Area C of West Bank*, HAARETZ (4 March 2014), www.haaretz.com/.premium-un-300k-palestinians-live-in-area-c-1.5329286.

[34] *See* The White House, *Prosperity to Peace*, www.whitehouse.gov/peacetoprosperity/; Salam Fayyad, *Trump's Middle East Peace Plan: What's There to be Upset About?*, BROOKINGS, 21 February 2020 www.brookings.edu/blog/order-from-chaos/2020/02/21/trumps-middle-east-peace-plan-whats-there-to-be-upset-about/.

> The lenient [U.S.] attitude toward the settlements stands in sharp contrast to international consensus, which regards them as a violation of international law and an obstacle to peace. Israel has built more than 120 settlements in the West Bank, which the Palestinians want as the core of a future state, and has populated them with about half a million people.[35]

Thus, "Nabil Abu Rudeineh, the Spokesman for Palestinian Authority President Mahmoud Abbas, … called the labeling decision 'a flagrant challenge to all international legitimacy decisions' and a 'continuation of the decisions of this [Trump] Administration, which insists on activate participation in the occupation of Palestinian lands.'"[36]

That criticism did not stop Israel – on the last full day of the Trump Administration in office (19 January 2021) – from issuing a call for bids to construct 2,500 new settlement homes on the West Bank:

> Israel's investment in its West Bank settlements between 2017-2019 increased by almost half against the last three years in office of Obama, according to official Israeli data provided to the U.S. State Department….
>
> One day before [Joseph R.] Biden's inauguration [*i.e.*, 19 January 2021], Israel issued tenders for more than 2,500 settlement homes in the occupied West Bank and East Jerusalem, on top of hundreds more announced by Netanyahu last week.
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> …
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> [Incoming U.S. Secretary of State Antony] Blinken [(1962-)] returned to long-standing, pre-Trump, diplomatic norms at his Senate [confirmation] hearing.
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> "The only way to ensure Israel's future as a Jewish, democratic state and to give the Palestinians a state to which they are entitled is through the so-called two-state solution," Blinken said.
>
> But he added: "Realistically it's hard to see near-term prospects for moving forward on that."
>
> …
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> For many Israelis, the Trump brand has not been tarnished by the Capitol Hill riot on Jan. 6 [, 2021].
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> In Trump Heights, a tiny Golan Heights settlement, work is underway to house 20 new families who will move in by the summer. A giant black and gold sign at the gate has been restored after vandals stole the "T."

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[35] *Pompeo Becomes First*.
[36] *Pompeo Becomes First*.

> "We are keeping the name Trump Heights, we are proud of the name. President Trump deserves gratitude for all the good deeds he did for us," Golan Regional Council Head Haim Rokach … declared].
>
> An Israeli Cabinet Minister … reaffirmed his support for Trump's name to adorn a future train terminus near Jerusalem's Western Wall, and at Trump Square roundabout in Petah Tikva he remains popular. "We will miss him," said Alon Sender. "He was good for Israel."
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> But on the other side of the Israeli military barrier 10 km east of Petah Tikva, many Palestinians are glad to see the back of Trump.
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> "For sure, Trump's policy is unfair," said Sumoud Salah, a teenage refugee in Jericho.[37]

(The "Made in Israel" controversy in the context of Israeli-Egyptian relations and QIZs is discussed in a separate Chapter.)

- **U.S. Policy from 1995-2020**

UNITED STATES CUSTOMS SERVICE, DEPARTMENT OF THE TREASURY, *COUNTRY OF ORIGIN MARKING OF PRODUCTS FROM THE WEST BANK AND GAZA*, 60 FEDERAL REGISTER ISSUE 66, 17607-17609 (6 APRIL 1995)[38]

Background

Section 304 of the *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. Failure to mark an article in accordance with the requirements of 19 U.S.C. 1304 shall result in the levy of a duty of ten percent *ad valorem*. Part 134, Customs Regulations (19 C.F.R. Part 134), implements the country of origin marking requirements and exceptions of 19 U.S.C. 1304.

Past Policy

In the past, Customs has taken the position that in order for the country of origin marking of a good which is produced in the West Bank or Gaza Strip to be considered acceptable, it must be marked with the words "Israel,'" "Product of Israel,'" or "Israeli-Occupied West Bank (or Gaza),'" or words of similar meaning. In all such instances,

[37] Maayan Lubell & Rami Ayyub, *Analysis: What Will Survive of U.S.-Middle East Policy Under Biden?*, REUTERS, 29 January 2021, www.reuters.com/article/us-usa-trump-legacy-mideast-analysis/analysis-what-will-survive-of-u-s-middle-east-policy-under-biden-idUSKBN29P1RB

[38] www.govinfo.gov/content/pkg/FR-1995-04-06/html/95-8454.htm.

Customs required that the word "Israel"' must appear in the marking designation. For instance, in HRL 718329 dated December 21, 1981, Customs held that it is acceptable to mark goods which were produced on the West Bank of the Jordan River with the phrase "Israeli-Occupied West Bank,"' "Made in Israel,"' or "Israel"' and to indicate such marking designation on the Certificate of Origin Form A for purposes of the *Generalized System of Preferences* (*GSP* [discussed in a separate Chapter]). In another case concerning goods produced on the West Bank of the Jordan River (HRL 718125 dated November 12, 1981), Customs held that these goods must be marked with the designators "Israeli-Occupied West Bank," "Made in Israel," or "Israel" for purposes of indicating the country of origin of the merchandise pursuant to 19 U.S.C. 1304. In addition, in HRL 730094 dated January 30, 1987, Customs held that the proper country of origin marking designation for soap which is produced in the West Bank is "Israeli-occupied West Bank" or simply "Israel." Finally, in HRL 734609 dated May 26, 1992, which concerned the proper country of origin marking of fruits and vegetables imported into the U.S. from the Gaza Strip, Customs held that the designation "West Bank" is not an acceptable country of origin marking because the United States does not recognize the West Bank territory as an independent political entity. Consequently, Customs stated in HRL 734609 that as the Gaza Strip has a similar status as the West Bank, the country-of-origin markings, "Israel-Occupied Gaza." "Made in Israel," or "Israel" but not simply the word "Gaza" can be used on goods which are produced in Gaza.

Recognition of West Bank and Gaza Strip

The Department of State has advised that in accordance with the *Israeli-PLO Declaration of Principles on Interim Self-Government Arrangements* ("the *DOP*"), which was signed in Washington, D.C. on September 13, 1993 [*i.e.*, the "*Oslo I Accord*," or "*Oslo I*"], Israel has agreed to transfer certain powers and responsibilities to the Palestinian Authority. Under this *Agreement*, Israel has also consented to make a similar transfer to a superseding, elected Palestinian Council, as part of interim self-governing arrangements in the West Bank and Gaza Strip. As part of this Agreement, the Palestinian Authority has agreed to administer its own tariff revenue collection and other customs matters. The Palestinian Authority also acceded to set its own tax policy under the terms of an implementing agreement which was concluded in Cairo on May 4, 1994. In view of these recent developments, the U.S. Department of the State has advised the U.S. Department of the Treasury by letter dated October 24, 1994, that, in their view, the primary purpose of 19 U.S.C. 1304 would be best served if goods which are produced in the West Bank and Gaza Strip are permitted to be marked "West Bank" or "Gaza Strip." The Department of State believes that labeling goods as coming from the "West Bank" or "Gaza" will provide American purchasers with important information indicating their origin, which is the primary purpose of 19 U.S.C. 1304.

Reliance Upon Advice From State Department

Customs has previously relied upon advice received from the U.S. Department of State in making determinations regarding the "country of origin" of a good for marking purposes. In T.D. 49743 dated November 10, 1938, the question was whether products imported from German-occupied territories were regarded as products of Germany for the purposes of the marking provisions of the *Tariff Act of 1930*, and for determining applicable rates of duty. Based upon instructions given by the U.S. Department of State, Customs held that as a result of a change in jurisdiction from Czechoslovak to German in the Sudeten areas which were under German occupation, products which were manufactured in those areas and were exported on or after the date of German occupation were considered products of Germany for purposes of country of origin marking.

In *United States v. Friedlaender & Co., Inc.*, C.C.P.A. (February 26, 1940) [discussed in a separate Chapter], the issue involved the proper country of origin marking of imported merchandise which was wholly manufactured in Czechoslovakia, except at the time the goods were exported, the territory in which the goods were manufactured was under German occupation. Customs held that marking the goods as products of Czechoslovakia was not acceptable, based upon instructions set forth in T.D. 49743. The Court agreed with Customs and held that as the goods were exported at a time when that part of Czechoslovakia in which the goods were manufactured was under German occupation, the marking "Czechoslovakia" was not in compliance with the requirements of the marking statute, and the goods should be marked to indicate "Germany" as the country of origin. However, in a later Treasury Decision (T.D. 51360 dated November 30, 1945), the position taken by Customs in T.D. 49743 was rescinded. In T.D. 51360, Customs stated that the U.S. Department of State advised that the boundaries of Czechoslovakia had been re-established as they existed prior to the date of the occupation by Germany, and that the United States recognized Czechoslovakia as an independent state. Based upon this information, Customs reversed the position taken in T.D. 49743, and concluded that articles which were manufactured or produced in Czechoslovakia after May 8, 1945, should be regarded as products of Czechoslovakia for purposes of the marking provisions of the *Tariff Act of 1930*.

Accordingly, consistent with prior Customs decisions, Customs is relying upon advice from the Department of State for purposes of defining the term "Country" within the meaning of Section 134.1(a), Customs Regulations (19 C.F.R. 134.1(a)).

…

New Position

This document notifies the public that unless excepted from marking, *goods which are produced in the territorial areas known as the West Bank or Gaza Strip shall be marked as "West Bank," "Gaza," or "Gaza Strip" in accordance with the requirements of 19 U.S.C. 1304 and 19 C.F.R. Part 134, and shall not contain the words "Israel," "Made in Israel," "Occupied Territories-Israel," or words of similar meaning*. [(Emphasis added.)] This document also revokes prior ruling letters (HRL's 718329, 718125, 730094, and 734609) regarding the country of origin marking requirements for goods which are produced in the West Bank and Gaza Strip. …

- **November 2020 Trump Administration Policy Reversal**

UNITED STATES DEPARTMENT OF STATE, *MARKING OF COUNTRY OF ORIGIN, PRESS RELEASE*, PRESS STATEMENT, MICHAEL R. POMPEO (19 NOVEMBER 2020)[39]

Today, the Department of State is initiating new guidelines to ensure that country of origin markings for Israeli and Palestinian goods are consistent *with our reality-based foreign policy approach*. [(Emphasis added.)] In accordance with this announcement, all producers within areas where Israel exercises the relevant authorities – most notably Area C under the Oslo Accords –Israel be required to mark goods as "Israel," "Product of Israel," or "Made in Israel" when exporting to the United States. This approach recognizes that Area C producers operate within the economic and administrative framework of Israel and their goods should be treated accordingly. This update will also eliminate confusion by recognizing that producers in other parts of the West Bank are for all practical purposes administratively separate and that their goods should be marked accordingly.

Goods in areas of the West Bank where the Palestinian Authority *maintains relevant authorities* shall be marked as products of "West Bank" and goods produced in Gaza will be marked as products of "Gaza." [(Emphasis added.)] Under the new approach, *we will no longer accept "West Bank/Gaza" or similar markings, in recognition that Gaza and the West Bank are politically and administratively separate* and should be treated accordingly. [(Emphasis added.)]

We remain committed to an enduring and sustainable peace as outlined in President Trump's *Vision for Peace*. [*See* The White House, *President Donald J. Trump's Vision for Peace, Prosperity, and a Brighter Future for Israel and the Palestinian People* (28 January 2020).[40]] We will continue to oppose those countries and international institutions which delegitimize or penalize Israel and Israeli producers in the West Bank through malicious measures that fail to recognize the reality on the ground.

VI. Made in "Republic of China"

The Middle East is not the world's only region in which ROO controversies rage. They occur in the Far East, too. Among the many angry actions the PRC took in August 2022, after the visit to Taiwan of U.S. House of Representatives Speaker Nancy Pelosi (1940-) (Democrat-California) – the highest ranking American official to visit Taiwan in 25 years – concerned labeling of products imported from Taiwan:

> China is moving to tighten the enforcement of existing rules on imports from Taiwan, according to people familiar with the matter, as tensions rise in the aftermath of U.S. House Speaker Nancy Pelosi's visit to the island.
>
> Products labeled as originated from the R.O.C., or the "Republic of China," won't be allowed entry to the mainland China market…. Beijing objects to

[39] www.state.gov/marking-of-country-of-origin/.

[40] www.whitehouse.gov/briefings-statements/president-donald-j-trumps-vision-peace-prosperity-brighter-future-israel-palestinian-people/

> Taiwan's use of "Republic of China" as its official designation because it considers the self-governing democracy part of its territory.
>
> China's labeling rules for Taiwanese imports were first announced in 2015 but had not been strictly enforced until this week. That risk is that products are confiscated unless companies change their labeling to comply with the regulations, … although they expected the overall impact to be modest for now as firms were likely to adjust their packaging quickly.
>
> …
>
> … China is Taiwan's largest trading partner, with bilateral trade rising 26% on year to $328.3 billion in 2021. Taiwan held a sizable surplus against China, with exports from the island exceeding imports by $172 billion…. While Beijing could leverage that advantage by sanctioning exporters, China also relies on Taiwan for semiconductor supplies.[41]

(Other measures are discussed in separate Chapters.) Apply GATT to this fact pattern.

Recall China and Taiwan each are Members of the WTO, since 11 December 2001 and 11 January 2002, respectively. Taiwan's status is as a separate customs territory. China's measure obviously was political, designed to punish Taiwan for hosting Speaker Pelosi. Can political displeasure of an importing country over the nomenclature of an exporting country justify a labelling requirement imposed by the importer and targeted against the exporter? What claims might Taiwan make against the Chinese labelling measure? What defenses might China have to justify its change? Might Taiwan have a GATT Article I:1 MFN claim? Are GATT Articles V, VIII, IX:6 relevant? What about Article III:4, where Taiwan argues China discriminates against "foreign" merchandise, meaning Taiwanese merchandise, in favor of domestic Mainland merchandise (to which no special labelling rules apply)?

[41] Debby Wu & Danny Lee, *China is Moving to Tighten Labeling Rules from Taiwan*, BLOOMBERG, 5 August 2022, www.bloomberg.com/news/articles/2022-08-05/china-tightening-label-rules-on-goods-from-taiwan-sources-say?sref=7sxw9Sxl.

Chapter 3

CLASSIC MARKING DISPUTES[42]

I. Made in Taiwan? 1992 *National Hand Tool* Case

● Facts

The existence of a non-preferential ROO for a particular article hardly guarantees a non-contentious outcome. Applying the substantial transformation test illustrates this point. Consider the 1992 case of *National Hand Tool Corp. v. United States*.[43]

The National Hand Tool Corporation imports nine kinds of components of mechanics' hand tools from Taiwan. The components are further processed and assembled in the U.S. into flex sockets, speed handlers and flex handles. These tools are used for tightening and loosening bolts, and use is predetermined at the time of importation into the U.S.

In addition, the CIT, which heard and decided the case, was presented with the following facts:

(1) In Taiwan, the components are either cold-formed or hot-forged into their final shape before importation, except for speed handler bars, which are reshaped by a large power press after importation.

(2) The grip components of flex handles are knurled in the U.S. by turning a grip portion of the handle against a set of machine dies that form a cross-hatched diamond pattern. This pattern yields a safe and comfortable gripping service.

(3) Some components are heat-treated in the U.S., while others are undergo heat treatment in Taiwan. The heat treatment is designed to strengthen the steel by carburization (*i.e.*, the strengthening of the surface of steel by increasing its carbon content). The heating process changes the micro-structure of the material, but there is no change in the chemical composition of the material.

(4) After the heat treatment, the components are cleaned by sand-blasting, tumbling, and/or chemical vibration. The cleaning process for some components occurs in Taiwan, while for other components it occurs in the U.S.

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[42] Documents References:
(1) *Havana (ITO) Charter* Articles 33, 35-37
(2) GATT Articles V, VIII, IX:6
(3) WTO *Agreement on Rules of Origin*

[43] 16 C.I.T. 308, 1992 Ct. Int'l. Trade Lexis 60 (1992).

(5) The components are electroplated with nickel and chrome to resist rust and corrosion. Some components are electroplated in Taiwan, while others are electroplated in the U.S.
(6) In the U.S., the components are assembled into finished machine tools through a manual assembly operation.

The U.S. Customs Service argued the components should bear a "Made in Taiwan" marking. NTH protested, saying the components are substantially transformed in the U.S. and, therefore, need not bear a country of origin marking, *i.e.*, they are an American product. NTH also argued the value added to the components in the U.S. is relatively significant when compared to the operation in the U.S.

● **Holding and Rationale**

The CIT agreed with the Customs Service. The Court found the pre-importation processing of cold-forming and hot-forging (the first bullet point fact above) is a more complicated function than the post-importation processing. Specifically, the post-importation processing of the components of mechanics' hand tools does not result in a "substantial transformation." The Court found that the name, character, or use did not change, so the components should be marked with a "Made in Taiwan" label.

The CIT reasoned, first, that the components imported into the U.S. had the same name as the completed machine tool. Second, there was no change in the character of the imported components as a result of heat treatment, electroplating and assembly in the U.S. Except for the speeder handle bars, each component was either hot-forged or cold-formed into its final shape in Taiwan. Third, there is no change in the use of the components after importation. The use is predetermined at the time of importation.

Interestingly, the CIT rejected the argument of NTH regarding the value added in the U.S. NTH wanted the court to consider

(1) the invoice purchase price of imported components with the proportionate value of components in its sale price of finished machine tools to U.S. customers, and
(2) all of NTH's costs and profits.

The Court stated if these factors were relevant, then there would be inconsistent marking requirements for importers who perform exactly the same process on imported merchandise but sell at different prices. To avoid such ludicrous results, the Court noted only the character, name, or use test, not a value-added test, is appropriate.

II. Where are Shoes From? 1982 *Uniroyal* Case

UNIROYAL, INC. v. UNITED STATES, UNITED STATES COURT OF INTERNATIONAL TRADE, 542 F. SUPP. 1026, 1027-1030 (1982), _aff'd_ 702 F.2D 1022 (FED. CIR. 1983)

Maletz, Judge:

Footwear uppers consisting of complete shoes except for an outsole are manufactured by plaintiff in Indonesia and imported by it into the United States. After importation, plaintiff sells the uppers to the Stride-Rite Co., which completes the manufacturing process by attaching pre-shaped outsoles to the uppers and then markets the finished shoes to retail establishments.

This case involves 82 pairs of footwear uppers of the type specified above which plaintiff manufactured in Indonesia from leather and other materials of United States origin. Plaintiff sought to import these uppers and sell them to Stride-Rite so that it could attach the outsoles and market the completed shoes in accordance with its normal practice. However, on January 26, 1982, the uppers were excluded from entry when the Customs Service refused to permit them to be withdrawn from warehouse for consumption on the ground that they were not marked with the country of origin as required by Section 304 of the *Tariff Act of 1930*, as amended (19 U.S.C. 1304). Given these considerations, the question is whether Stride-Rite is the ultimate purchaser of the imported uppers so as to exempt them from the country of origin marking requirements. This in turn depends on whether the manufacturing process in which Stride-Rite attaches the outsoles to the imported uppers effects a "substantial transformation" of the uppers.

…

The Facts

… [E]xcept for the absence of an outsole, the upper in its condition as imported is a complete shoe. Thus in its condition as imported, the upper has been substantially transformed in Indonesia from sheets of leather into a substantially complete shoe. And having been "lasted" in Indonesia the upper has already attained its ultimate shape, form and size. In appearance, the upper resembles a moccasin save that it has a stitched seam, and roughing on the bottom to facilitate the attachment of the outsole. Because of these latter characteristics, the upper is not marketable at retail as a complete shoe.

Prior to exportation to the United States, the uppers are packed in cartons which are marked "Made in Indonesia." However, the uppers themselves are not marked with the country of origin.

Subsequent to importation into the United States, plaintiff sells the uppers to Stride-Rite in the cartons marked "Made in Indonesia." Stride-Rite then attaches pre-shaped and pre-sized outsoles to the uppers, cleans and polishes the uppers, and thereafter sells the completed shoes to retail stores under the trade name "Sperry Topsiders."

In the process of attaching the outsole to the upper, Stride-Rite relasts the leather upper, applies cement to the bottom of the upper to provide a temporary bond for the outsole, temporarily bonds the outsole to the upper by an outsole press, removes the last, and then attaches the outsole to the upper by stitching on a "Littleway" machine.

The purpose of relasting – which consists of reinserting a last into the previously completed and lasted upper – is not to give the upper shape, form or size. Rather, it is to hold the upper steady and so facilitate the alignment and temporary cementing of the outsole to the upper. Relasting, though convenient, is not necessary to the attachment of the outsole to the upper inasmuch as hand pressure alone is sufficient to press the upper and outsole together to provide a temporary bond.

The process of combining the uppers to the outsoles is significantly less time consuming than the process of manufacturing the upper. Thus the record shows that it takes more than eight times the amount of time to manufacture the upper than to attach the outsole to the upper. In this connection, a time study shows that it takes some four hours to manufacture twelve pairs of uppers similar to the imported merchandise whereas only one-half hour is required to attach twelve pairs of uppers to the outsoles.

The process of combining the uppers to the outsoles is also significantly less costly than the process of manufacturing the upper, with the record indicating that the cost of direct labor in the manufacture of the upper is about eight times greater than the cost of the direct labor required to attach the outsole to the upper. Also, the cost to Stride-Rite for the imported upper is significantly greater than the cost of the outsole.

In addition, manufacture of the upper requires at least five highly skilled operations including cutting the leather, skiving, stitching the collar, setting up the hand lasting and hand sewing the upper. In contrast, the only highly skilled operation necessary in combining the upper and outsole is the Littleway stitching.

Opinion

Section 304 of the *Tariff Act of 1930*, as amended, requires that with certain specified exceptions, every article of foreign origin imported into the United States be marked with its country of origin in such a manner that its ultimate purchaser in the United States will be aware of the country of origin. The legislative purpose of this enactment … was "to enable the *'ultimate purchaser'* of the goods to decide for himself whether he would 'buy or refuse to buy them.'"

Given the statute and its legislative purpose, plaintiff contends that the uppers are not required to be marked-this on the asserted basis that Stride-Rite is the ultimate purchaser of the uppers. … Stride-Rite, plaintiff argues, is the ultimate purchaser because it allegedly effects a substantial transformation of the uppers into new articles having a different name, character and use, *i.e.*, shoes.

…

… [T]he test to be applied is whether the imported article has undergone a "substantial transformation" which results in an article having a name, character or use differing from that of the imported article. If such substantial transformation occurs, then the manufacturer is the ultimate purchaser and the consumer need not be informed of the country of origin. On the other hand, if the manufacturing or combining process is merely a minor one which leaves the identity of the imported article intact, a substantial transformation has not occurred and an appropriate marking must appear on the imported article so that the consumer can know the country of origin.

…

Examining the facts in the present case, the conclusion is clear that a substantial transformation of the upper has *not* occurred since the attachment of the outsole to the upper is a minor manufacturing or combining process which leaves the identity of the upper intact. Thus the upper – which in its condition as imported is already a substantially complete shoe – is readily recognizable as a distinct item apart from the outsole to which it is attached. And the manufacturing process performed by Stride-Rite is a minor assembly operation which requires only a small fraction of the time and cost involved in producing the uppers.

The fact is that the manufacturing operation performed by Stride-Rite in attaching the outsole to the upper is conceptually no different than (for example) attaching buttons to a man's dress shirt or attaching handles to a finished piece of luggage. To consider attachments of this kind to be a "substantial transformation" would be to open the door wide to frustration of the entire purpose of the marking statute. Thus in the present case it would be misleading to allow the public to believe that a shoe is made in the United States when the entire upper – which is the very essence of the completed shoe – is made in Indonesia and the only step in the manufacturing process performed in the United States is the attachment of an outsole.

III. Where is Juice From? 1986 *National Juice Products* Case

***NATIONAL JUICE PRODUCTS ASSOCIATION v. UNITED STATES*, UNITED STATES COURT OF INTERNATIONAL TRADE, 628 F. SUPP. 978, 980-981, 989-991 (1986)**

Restani, Judge:

This case involves a United States Customs Service (Customs) ruling that country-of-origin marking requirements apply to frozen concentrated orange juice and reconstituted orange juice that contain imported concentrated orange juice for manufacturing. … This ruling is being challenged by plaintiffs, the National Juice Products Association (NJPA) and Citrus World, Inc., Coca-Cola Foods, a Division of the Coca-Cola Company, Lykes Pasco Packing Company, and TreeSweet Products, individually and as members of NJPA. …

…

The controversy underlying this action began on January 16, 1985, when Customs national import specialist, Officer W.J. Springer of the New York Seaport, sent a directive to various Customs ports advising them of his opinion that orange juice products using the imported ingredient of concentrated orange juice for manufacturing (manufacturing concentrate) be marked to indicate foreign origin. …

…

The Customs' ruling at issue involved manufacturing concentrate processed from oranges grown in foreign countries. This manufacturing concentrate is then blended with domestic concentrate. Ratios of 50/50 or 30/70 (foreign/domestic) were represented to be "common." Customs ruled that for purposes of country of origin marking, the manufacturing concentrate is not "substantially transformed" after undergoing the further processing in the United States. Under Customs' ruling, retail packages of frozen concentrated orange juice and reconstituted orange juice must be marked to indicate that the products contain foreign concentrate.

This "name, character, or use" test was applied by Customs in finding that no substantial transformation occurs in the production of retail orange juice products from manufacturing concentrate. Customs' ruling must stand unless it is shown to be arbitrary, capricious, or otherwise not in accordance with the law. …

In its ruling, Customs addressed each of the factors, name, character, and use, in turn. Plaintiffs argued that the name change from "concentrated orange juice for manufacturing" to "frozen concentrated orange juice" and "orange juice from concentrate" was significant to a finding of substantial transformation. The Court agrees with Customs' conclusion that these names, derived from the FDA's [Food and Drug Administration's] standards of identity, "merely refer to the same product, orange juice, at different stages of production." [In footnote 15 of its opinion, the court observed the plaintiffs made much of the fact that the imported and retail products at issue have distinct standards of identity under the ... FDA regulations. For instance, the plaintiffs pointed out that the imported product is called "concentrated orange juice for manufacturing" and the retail products are known and labeled as "frozen concentrated orange juice" and "orange juice from concentrate." However, for two reasons, the Court did not find this argument persuasive and concluded the FDA standards do not bind the Customs Service in determining whether a substantial transformation has occurred. First, the regulations of the FDA and Customs Service are promulgated under completely different statutes. Hence, as a technical matter one agency's regulations could not bind the other agency's regulations. Second, the policies underlying the regulations of the FDA and Customs Service are different. The policy underlying the FDA standards of identity are designed to inform the consumer about ingredients in a product, but not to identify the origin of the product as a whole. The policy underlying the country-of-origin marking statute and the Customs Service's regulations is to facilitate consumer purchasing decisions and to protect American industry. Consequently, the interests of one agency's regulations would not be furthered by relying on the other agency's regulations.] In any case, a change in the name of the product is the weakest evidence of a substantial transformation. *See Uniroyal, Inc. v. United States*, 3 CIT 220, 542 F. Supp. 1026 (1982), *aff'd,* 702 F.2d 1022 (Fed.Cir.1983) (fact that this imported product was called an "upper" and final product called a "shoe" did not affect the court's finding of no substantial transformation)….

Customs also found that the fact that the imported concentrate is sold to producers whereas the retail product is sold to consumers does not constitute a sufficient change in character and use to render the concentrate substantially transformed. Plaintiffs rely on the *Midwood* decision, in which this court's predecessor, the Customs Court, emphasized this transition from producers' goods to consumers' goods in finding that steel forgings are substantially transformed into flanges and fittings. *Midwood Industries, Inc. v. United States*, 313 F. Supp. 951, 957, *appeal dismissed,* 57 CCPA 141 (1970)…. As noted by Customs, however, the significance of this producers' good – consumers' good transformation in marking cases is diminished in light of this court's recent decision in *Uniroyal, Inc. v. United States* [excerpted above].... In *Uniroyal,* the imported article was a leather shoe upper to which an outsole was attached in the United States. Although the upper is not a consumers' good in that it cannot be worn as a shoe, the Court found that there was no substantial transformation…. Under recent precedents, the transition from producers' to consumers' goods is not determinative. Plaintiffs must demonstrate that the processing done in the United States substantially increases the value of the product or transforms the import so that it is no longer the essence of the final product. *United States v. Murray,* 621 F.2d 1163, 1170 (1st Cir.1980) (Chinese glue blended with other glues in Holland were not substantially transformed because although it was transformed from a processors' good to an end-users' good there was no evidence that the glue had increased in value); *Uniroyal* … (imported upper was "the very essence of the completed shoe," Court also found the attachment of uppers to outsoles "significantly less costly" than the process of manufacturing the upper).

Plaintiffs in the instant case offer evidence that they claim demonstrates that domestic manufacturing substantially increases the value of the product from the manufacturing concentrate stage to the retail product stage. Contrary to plaintiffs' claim, however, the evidence offered indicates that the manufacturing concentrate constitutes the majority of the value of the end products. In fact, according to plaintiffs' evidence, the values added to the products involved here by the addition and blending of the orange essences, orange oil, and water, and related production range from 6.68 to 7.57%. This increase in value may be significant with regard to other products, but here the sum of all of the activities contributing to the added value are relatively minor, much like the addition of the outsoles in *Uniroyal*. In fact, plaintiffs' evidence shows that the addition of the oils and essences, the primary basis for plaintiffs' claim that substantial transformation has occurred, contributes only 1.75 to 1.86% to the value of the end products.

…

It is unclear whether plaintiffs contend that the addition of water constitutes a substantial change. The court believes it does not, in and of itself, constitute such a change in the context of the products under discussion. The Court, however, did consider the value added by the addition of water together with the oils, essences and the overall blending process. Considering the process as a whole, the court concludes that Customs could rationally determine that the major part of the end product, when measured by cost, value, or quantity, is manufacturing concentrate and that the processing in the United States is a minor manufacturing process.

The court also finds reasonable Customs' conclusion that the manufacturing concentrate "imparts the essential character to the juice and makes it orange juice" … Thus, as in *Uniroyal*, the imported product is "the very essence" of the retail product…. The retail product in this case is essentially the juice concentrate derived in substantial part from foreign grown, harvested, and processed oranges. The addition of water, orange essences, and oils to the concentrate, while making it suitable for retail sale, does not change the fundamental character of the product, it is still essentially the product of the juice of oranges. The court concludes that Customs' ruling that manufacturing juice concentrate is not substantially transformed when it is processed into retail orange juice products is not arbitrary or capricious, but is in accordance with applicable law. The orange juice processors are not the ultimate purchasers of the imported product because consumers are the last purchasers to receive the product in essentially the form in which it is imported. In accordance with 19 U.S.C. § 1304, the retail packaging must bear an appropriate country-of-origin marking.

IV. Who is Ultimate Purchaser and is Label Conspicuous? 1986 *Pabrini* Case

***PABRINI, INC. v. UNITED STATES*, UNITED STATES COURT OF INTERNATIONAL TRADE, 630 F. SUPP. 360, 361-363 (1986)**

DiCarlo, Judge:

Umbrellas from Taiwan entered at Port of Los Angeles were assessed country of origin marking duties of ten percent *ad valorem* pursuant to Section 304 of the *Tariff Act of 1930*, as amended, 19 U.S.C. § 1304 (1982), when liquidated in April 1982 by the United States Customs Service.... Section 304 requires that all imported merchandise be marked in a manner "conspicuous" to the "ultimate purchaser." Plaintiff protested assessment of the marking duties and filed this action following denial of the protest. …

… Plaintiff contends that (1) the umbrellas need not be individually marked since they were distributed as gifts by a donor who was the "ultimate purchaser" and was aware of the country of origin, and (2) a small label sewn to one of the seams inside the umbrellas sufficiently identifies the country of origin. The Court disagrees with both contentions. …

"Ultimate purchaser"

Plaintiff alleges that the umbrellas were distributed without further charge to patrons of the Hollywood Park Race Track paying the regular admission fee. Plaintiff argues that the "ultimate purchaser" of the umbrellas within the meaning of Section 304 was not the racetrack patron, but the racetrack, which was aware of the umbrellas' country of origin, and the umbrellas are therefore excepted from the marking requirement. …

The current language of the first paragraph of Section 304 was enacted as part of the *Customs Administrative Act of 1938*…. Previously, the marking statute did not mention an end user or "purchaser" of the article. The statute provided simply that "[e]very article imported into the United States … shall be marked….” The principal purpose of the 1938 revision of Section 304 was to eliminate the previous requirement that the article, its immediate container, and the outer package all be marked with the country of origin.

“As in all cases involving statutory construction, ‘our starting point must be the language employed by Congress.’” Amer*ican Tobacco Co. v. Patterson,* 456 U.S. 63, 68 (1982)... (quoting *Reiter v. Sonotone Corp.,* 442 U.S. 330, 337 (1979)…). *Webster's Second New International Dictionary* 2015 (1934), published four years before the enactment of the statute, defines “purchaser” as “one who purchases,” and “purchase” as “to obtain (anything) by paying money or its equivalent.” Thus, the question before the Court is whether by paying admission to the racetrack the racetrack patrons obtained the umbrellas by paying “money or its equivalent.”

Under federal common law at the time the statute was enacted, consideration was defined as “some … benefit or advantage conferred upon the promisor … or any detriment … suffered or undertaken by the promisee.” *Cuneo Press v. Claybourn Corp.,* 90 F.2d 233, 236 (7th Cir.1937). … By purchasing a ticket to the racetrack, the patrons paid one consideration for two promises by the racetrack: admission to the racetrack and transfer of an umbrella.

The Court holds that racetrack patrons receiving the umbrellas as a condition to payment of the regular price of admission were not donees of gifts but “ultimate purchasers” of the imported merchandise within Section 304. …

“Conspicuous place”

Plaintiff also contends that a label sewn to one of the seams inside the umbrella measuring approximately 1 d inches by d inches printed with the words “100% NYLON MADE IN TAIWAN” is “conspicuous” within the meaning of the statute.

…

Whether the marking is conspicuous is a question of fact.

…

The Court finds as a matter of fact that the small label cannot be seen easily and without strain. The label cannot be seen unless the umbrella is opened, and even then it is difficult to find. The Court holds that the marking is not “conspicuous” within the meaning of Section 304. …

Since the Court finds that the umbrellas were not marked in a manner conspicuous to the ultimate purchaser, summary judgment for defendant is granted. …

V. Substantial Transformation, Essence Test, and “*Buy America*:” 2016 *Energizer Battery* Case

In its December 2016 Energizer Battery decision (excerpted below), the CIT provided a so-called “pre-determined end-use component analysis,” which CBP applied in several subsequent rulings.

After studying this decision, consider a February 2023 CIT case, *Cyber Power Systems (USA) Inc. v. U.S.* (also excerpted below). Power supplies imported into the U.S. from the Philippines were the merchandise in question in *Cyber Power*. At issue was whether these power supplies were substantially transformed in the Philippines. The CIT held that one of an importer's power supplies was substantially transformed in the Philippines, but the other power supply and surge protectors were products of China. The CIT applied the "substantial transformation" test, but in so doing it rejected an "essence" test, *i.e.*, it rejected a component-by-component analysis. Instead, CIT looked at the totality of the evidence. The Court said the importer failed to present at trial a preponderance of evidence detailing the specific assembly operations in the Philippines.

Does the CIT's rationale in *Cyber Power* suggest a change to its *Energizer Battery* approach to defining whether a substantial transformation has occurred in a third country? Is the Sino-American Trade War (discussed in separate Chapters) relevant in framing the CIT's reasoning? Put bluntly, by examining the totality of the evidence, is it easier for the CIT to decide a substantial transformation has not occurred in a third country, hence the merchandise in question is "Made in China" and subject to America's Section 301 tariffs? Or, was the Trade War irrelevant – what really mattered was the quality and quantity of evidence adduced at trial to show whether a substantial transformation had been made in the Philippines of components from China to produce a new article for shipment to America?

ENERGIZER BATTERY, INC., v. UNITED STATES, UNITED STATES COURT OF INTERNATIONAL TRADE, NUMBER 13-00215 (7 DECEMBER 2016)

Mark A. Barnett, Judge:

Plaintiff, Energizer Battery, Inc. ("Energizer"), challenges the final determination issued by U.S. Customs and Border Protection ("CBP" or "Customs") on April 29, 2013 ("Final Determination") concerning the country of origin of a second generation military flashlight produced by Energizer ("Generation II flashlight") for purposes of government procurement under the *Trade Agreements Act of 1979* ("*1979 Act*"). … [T]he Court grants Defendant's motion for summary judgment and denies Plaintiff's motion for summary judgment.

Background

Energizer submitted a request for a final determination of country of origin of its Generation II flashlight and replacement lens head subassembly to CBP on March 28, 2012. …

In its Final Determination, CBP found:

> virtually all of the components of the military Generation II flashlight, including the most important component, the LED, are of Chinese origin.

> All of the components arrive in the United States ready for assembly into the Generation II flashlight. Only the assembly process is done in the United States … [M]ost of this work consists of rather simple insertions, relatively simple attaching and fastening of the components and parts together.
>
> … As a result, CBP determined:
>
> the imported components of the flashlight and replacement lens head subassembly are not substantially transformed as a result of the described assembly operations and programming operations performed in the United States. The country of origin for government procurement purposes of the Generation II military flashlight is China. …

Material Facts Not in Dispute

The Generation II flashlight is comprised of approximately fifty different components. … It contains five light-emitting diodes ("LEDs") in white, red, green, blue, and infrared. … Other than the white LED and the hydrogen getter, all components of the Generation II flashlight are of Chinese origin. …

The white LED wafer in the Generation II flashlight is grown and sliced into dies, and then tested and sorted in the United States, in Durham, North Carolina. … The sorted dies are then sent to China for packaging. … During packaging in China, each die is glued to an aluminum pad, a thermally conductive pad with an electrically nonconductive coating. … Two small wires are attached to each side of the LED and phosphor is sprayed on the LED die to convert the light it emits from blue to white. … At this stage, the LED has "terrible irregular light radiation patterns." … [*quoting* Defendant's Response to Plaintiff's Statement of Facts] The irregular light radiation pattern is corrected by the addition of a TIR (total internal reflection) lens at Energizer's Vermont facility ("Vermont facility"). …

All of the components that comprise the Generation II flashlight, other than the electrical wire and red LED, are specifically designed for use in the Generation II flashlight. … The electrical wires are cut to lengths specific to the Generation II flashlight and the red LED is soldered to the Generation II flashlight printed circuit board prior to importation. … The lens head subassembly of the Generation II flashlight is also partially assembled in China, prior to importation into the United States. This partial assembly consists of attaching the red, green, blue, and infrared LEDs to the head printed circuit board ("head PCB"), soldering six of the multi-cord wires to the head PCB, and running all eight of the multi-cord wires through one hole of the yoke and one hole of the head with overmold. …

The final assembly and packaging of the Generation II flashlight occurs at two work stations ("Work Station I" and "Work Station II") at Energizer's facility in Vermont. … At Work Station I, a worker completes assembly of the lens head subassembly (imported from China partially assembled). … At Work Station II, a worker assembles the lens head subassembly with the remaining Generation II flashlight components, tests the final product, and places the finished Generation II flashlight in a box. …

The assembly, testing and boxing of a Generation II flashlight at the Vermont facility takes approximately seven minutes and ten seconds. … Energizer submitted a digital video recording (DVD) of its process at both work stations. … The assembly in the video is at a slower pace than regular operations because it is not performed by fully trained operators under production conditions; rather, it is performed to demonstrate more clearly the steps involved. … The assembly process, as shown on the DVD, takes approximately thirteen and a half minutes, including testing, which takes approximately three and a half minutes.

…

The assembly operations performed at the Vermont facility do not require a change in the shape or material composition of any imported component. … At the time of importation, each component used in producing the Generation II flashlight is intended for use in a finished Generation II flashlight. … As a result of the assembly operations performed at the Vermont facility, each of the imported components become part of a finished Generation II flashlight. …

The finished cost of a Generation II flashlight is $23.55, including parts and U.S. production costs, 45 percent of which is attributed to U.S. production costs. … The total landed value of the imported components used in the production of the Generation II flashlight, including parts, duties, transportation and all costs is $12.96. …

…

Statutory and Regulatory Framework

This case concerns the government procurement provisions of the *Trade Agreements Act of 1979*, the so-called "*Buy America Act*" provisions. 19 U.S.C. §§ 2511-2518. [The 1933 *Buy American Act* requirements, set out at 41 U.S.C. § 8301 *et seq*., are distinct from the "*Buy America*" requirements of the 1982 *Surface Transportation Assistance Act*, 49 U.S.C. § 5323(j). The 1933 *Buy American Act* rules apply to all direct federal procurement projects. The 1982 *Buy America* rules, which this case implicates, mandate a preference for products made in the United States, but only in the context of rail transportation, road transportation (including highways), mass transit, and water projects.] The *Act* defines "eligible product" as a "product or service" of a country or instrumentality covered by the *Act*, 19 U.S.C. § 2518(4)(A), and explains the "rule of origin" as follows:

> An article is a product of a country or instrumentality only if (i) it is wholly the growth, product, or manufacture of that country or instrumentality, or (ii) in the case of an article which consists in whole or in part of materials from another country or instrumentality, it has been substantially transformed into a new and different article of commerce with a name, character, or use distinct from that of the article or articles from which it was so transformed.

19 U.S.C. § 2518(4)(B). Accompanying regulations do not provide further guidance on interpreting the term "substantial transformation." …

The Court of International Trade has not previously interpreted the meaning of "substantial transformation" as used in the *1979 Act*. The relevant regulations repeat the statutory language, providing that the transformation must result in a "new and different article of commerce with a name, character, or use distinct from that of the article or articles from which it was so transformed." *See* 19 U.S.C. § 2518(4)(B); 19 C.F.R. §177.22. The Court, therefore, will look to similar country-of-origin statutes and regulations to assist in its interpretation of the statutory provisions in question. *See Brown v. Duchesne*, 60 U.S. 183 … (1856) ("it is well settled that, in interpreting a statute, the court will not look merely to a particular clause in which general words may be used, but will take in connection with it the whole statute (or statutes on the same subject) and the objects and policy of the law"); *American Airlines, Inc. v. United States*, 551 F.3d 1294, 1303 (Fed. Cir. 2008) ("the plain language of analogous statutory language is normally read in the same way"); *Ashland Chem. Co. v. United States*, 7 C.I.T. 362, 365, 367 (1984) (prior judicial interpretation of identical terms in analogous statutes is relevant); *United States v. Freeling*, 31 F.R.D. 540, 549 (S.D.N.Y. 1962) ("by well established canons of statutory construction statutes which use identical words in the same sense are to be construed *in pari materia* [on the same subject, of the same matter], or with reference to one another" [*i.e.*, statutes *in pari materia* have a common purpose for comparable fact patterns and, therefore, must be interpreted in light of each other; simply put, to statutes on the same subject must be analyzed together]).

Discussion

I. CBP's Final Determination

Plaintiff challenges CBP's Final Determination and argues that CBP gives undue weight to the "essential character" analysis in reaching its conclusion. … Defendant responds that "in its ruling, Customs discussed all of the relevant factors, including the fact that nearly every component of the [Generation II] flashlight is Chinese, that the components arrive ready for assembly, and that the assembly process is not complex and requires only a few minutes," leading to CBP's conclusion that "U.S. assembly operations were insufficient to substantially transform the foreign components."

…

In the Final Determination, CBP described the substantial transformation analysis as one that is based on the "totality of circumstances" and that is conducted on a "case-by-case" basis. … CBP further noted that "[t]he country of origin of the item's components, extent of the processing that occurs within a country, and whether such processing renders a product with a new name, character and use are primary considerations in such cases." … While no factor is decisive, the "key issue is the extent of operations performed and whether the parts lose their identity and become an integral part of the new article." … Applying the above to the Generation II flashlight, CBP determined that the "foreign made components and parts do not undergo a substantial transformation when they are assembled together in the United States." … CBP further described the assembly process as "putting together a number of different parts to produce the flashlight" and stated that "most of this work consists of rather simple insertions, relatively simple attaching and fastening of the components and parts together … following a fairly straightforward routine and [it] does not seem to be exceptionally complex, and it only takes several minutes to complete." …

CBP's Final Determination, regardless of its ultimate conclusion, does not apply the substantial transformation test with clarity. The statute and regulations require that, in order for a product to be substantially transformed, it must become a "new and different article of commerce with a name, character, or use distinct from that of the article or articles from which it was so transformed." 19 U.S.C. §2518(4)(B). While the Final Determination identifies the proper test, it does not examine in detail whether the imported components of the Generation II flashlight undergo a change in name, character, or use. Instead, the Final Determination focuses its analysis on the complexity of assembly operations and makes repeated reference to the origin of the LED for the "essential character" it imparts to the final product. … [T]he nature of the post-importation processing provides useful context for the name, character, or use test, but it is not the sole determining factor of the test. Similarly, "essential character" is not an established factor in the substantial transformation analysis, although some courts have looked to the "essence" of a finished article in order to evaluate whether there has been a change in character as a result of post-importation processing. …

II. Substantial Transformation

Plaintiff argues that the Generation II flashlight is a U.S. origin product pursuant to the *1979 Act* because the Chinese components were substantially transformed when assembled into the flashlight in the United States. … Energizer asserts that the assembly process is "not a simple screwdriver assembly of a few components, but requires trained operators at two separate workstations working for approximately seven minutes per flashlight." … Additionally, Energizer argues that the large number of parts required for the "two-stage production process" show there is a substantial transformation, and "the costs associated with the [Generation] II flashlight" further support this conclusion. … Defendant argues that the imported "components are not substantially transformed simply by being assembled into the very article they were designed and intended to create," and that Energizer's processing is "too minimal" to substantially transform the components into a U.S. product. … Defendant argues that Generation II flashlight components have the same name, character, and use as various flashlight parts upon importation as they do after the assembly process, but that "they have just been combined into a collective article; *i.e[.]* a flashlight."

Substantial transformation is a concept frequently used in customs law; however, to-date, only the Court of Federal Claims has interpreted substantial transformation pursuant to the *1979 Act*. *See Ran-Paige Co., Inc. v. United States*, 35 Fed. Cl. 117 (1996); *see also Klinge Corp. v. United States*, 82 Fed. Cl. 127 (2008) (plaintiff sought injunctive relief on a bid protest). The Court, therefore, looks to judicial interpretations of identical language in cases involving country-of-origin marking, duty drawback, transshipment, voluntary restraint agreements, and the *Generalized System of Preferences* ("*GSP*").

Regardless of the applicable statutory provision, substantial transformation analysis is fact-specific and cases that are analogous in terms of the nature of post-importation processing are particularly useful to the court's analysis.

The "name, character, or use" test can be traced back to a Supreme Court decision in a drawback case in which the Court was asked to determine the meaning of "manufacture" for the purpose of determining the country of origin. *See, e.g., Anheuser Busch Brewing Ass'n v. United States*, 207 U.S. 556 … (1908). The Court found that, in order for an article to be the growth, product or manufacture of a country, it must undergo processes that result in transformation such that "a new and different article must emerge, having a distinctive name, character, or use." *Id*. at 562. The *Anheuser-Busch* test has since "evolved into a highly flexible 'name, character or use' test, also known as the 'substantial transformation' test," that is used to determine whether an article has been "subjected to a process which results in the article having a name, character or use different from that of the imported article." *Precision Specialty Metals, Inc. v. United States*, … 116 F. Supp. 2d 1350, 1364 (2000) (considering whether stainless steel scrap was manufactured or produced within the meaning of the manufacturing substitution drawback statute). Use of this test to determine whether a substantial transformation has occurred has been confirmed by the Federal Circuit. *See, e.g., Belcrest Linens v. United States*, 741 F.2d. 1368, 1372 (Fed. Cir. 1984) (substantial transformation occurs when there has been a change in name, character or use, and this test has been developed in customs law generally); *Superior Wire v. United States*, 867 F.2d 1409, 1414 (Fed. Cir. 1989) (in determining country of origin pursuant to a voluntary restraint agreement, the court confirmed that "substantial transformation requires that there must be a transformation; a new and different article must emerge, having a distinctive name, character, or use") ….

In applying the substantial transformation test, courts generally agree that each case must be decided on its facts. *See Nat'l Hand Tool Corp.*, 16 CIT at 311(in a case involving some post importation heat treatment and electroplating of hand tool components that were then assembled to produce flex sockets, speeder handles and flex handles in a process that required some skill and dexterity to put components together with a screw driver; the court noted that "each case must be decided on its own particular facts"); *Uniroyal, Inc.*, … 542 F. Supp. at 1029 (in a case in which imported shoe uppers were attached to soles in the United States, the court noted the fact-specific nature of the inquiry). Federal Circuit case law also discusses the fact-specific nature of substantial transformation cases, noting that "Courts have been reluctant to lay down specific definitions in this area of the law other than to discuss the particular facts of cases." *Belcrest Linens*, 741 F.2d at 1372. The case law also indicates that a determination of substantial transformation must be based on a totality of factors. *See, e.g., Nat'l Hand Tool Corp.*, 16 CIT at 312; *Ran-Paige*, 35 Fed. Cl. at 121.

Courts have primarily focused on changes in use or character. *Precision Specialty*, 116 F. Supp. 2d at 1364. "The name criterion is generally considered the least compelling of the factors which will support a finding of substantial transformation." *Ferrostaal Metals Corp. v. United States*, … 664 F. Supp. 535, 541 (1987) (subject merchandise was not covered by an arrangement between the governments of Japan and the United States because annealing and galvanizing operations performed in New Zealand had substantially transformed the Japanese cold rolled steel sheet); *see also Superior Wire, a Div. of Superior Prods. Co., a Michigan Corp. v. United States*, … 669 F. Supp. 472, 480, (1987), *aff'd*, 867 F.2d 1409 (Fed. Cir. 1989) (when only a change in name is found, "such a change has rarely been dispositive").

"Character" is defined as the "mark, sign [or] distinctive quality" of a thing. *Webster's Third New Int'l Dictionary of the English Language Unabridged* (2002) at 376. For courts to find a change in character, there often needs to be a substantial alteration in the characteristics of the article or components. *See, e.g., Ran-Paige*, 35 Fed. Cl. at 121; *Nat'l Hand Tool*, 16 CIT at 311. Changes that are deemed cosmetic are insufficient for a finding of substantial transformation. *See, e.g., Superior Wire*, 867 F.2d at 1414. The court previously has found a change in character when a "continuous hot-dip galvanizing process transforms a strong, brittle product which cannot be formed into a durable, corrosion-resistant product which is less hard, but formable for a range of commercial applications," *Ferrostaal Metals*, 664 F. Supp. at 540, but not when the "form of the components remained the same" and a heating process "change[d] the microstructure of the material, but there was no change in the chemical composition" such that, while there were changes in the "characteristics of the material, they d[id] not change the character of the articles." *Nat'l Hand Tool*, 16 CIT at 311.

In other cases, the Court has looked to the "essence" of a completed article to determine whether an imported article has undergone a change in character as a result of post-importation processing. *See Uniden America Corp. v. United States*, … 120 F. Supp. 2d 1091, 1095-1098 (2000) (in a *GSP* case in which a cordless telephone consisted of 275 parts sourced in the Philippines and third-countries and an A/C adapter imported pre-assembled in China, the court found that the A/C adapter did not impart the essential character of the cordless telephone and thus, did not undermine the conclusion that the cordless telephone's other imported parts, once assembled together, had undergone a substantial transformation and were a product of a beneficiary developing country ("BDC")); *see also Uniroyal*, 542. F. Supp. at 1030 (imported shoe uppers were the "essence of the finished shoe" and were not substantially transformed by the addition of an outer sole in the United States). When, as here, the post-importation processing consists of assembly, courts have been reluctant to find a change in character, particularly when the imported articles do not undergo a physical change. *See, e.g., Uniroyal*, 542 F. Supp. at 1031.

In analyzing any change in use, the court has previously found that such a change occurred when the end-use of the imported product was no longer interchangeable with the end-use of the product after post-importation processing. *See Ferrostaal Metals*, … 664 F. Supp. at 540-41 (the Court found "substantial changes in the use of the [imported cold-rolled] steel sheet as a result of the continuous hot-dip galvanizing process" because "the frequency with which the two types of steel compete with or are interchangeable with each other is 'very limited,' perhaps less than one or two percent."). However, when the end-use was pre-determined at the time of importation, courts have generally not found a change in use. *See, e.g., Nat'l Hand Tool*, 16 CIT 311-312 (when post-importation processing primarily consisted of an assembly process, having one pre-determined end-use at the time of importation does not preclude a finding of substantial transformation; however, based on the totality of the evidence, the court did not find substantial transformation had occurred); *see also Ran-Paige*, 35 Fed. Cl. at 121-122 (when post-importation processing consisted primarily of attaching handles to pans and covers the court likened it to *Nat'l Hand Tool* when "plaintiff did not change the use of the components, especially given the fact that the use was predetermined at the time of importation"); *Uniroyal*, … 542 F. Supp. at 1031 (the court did not find substantial transformation when the imported upper underwent no physical change, "[n]or was its intended use changed. It was manufactured by plaintiff in Indonesia to be attached to an outsole; it was imported and sold to Stride-Rite for that purpose; and Stride-Rite did no more than complete the contemplated process").

In addition to name, character, and use, courts have also considered subsidiary or additional factors, such as the extent and nature of operations performed, value added during post-importation processing, a change from producer to consumer goods, or a shift in tariff provisions. Consideration of subsidiary or additional factors is not consistent, and there is no uniform or exhaustive list of acceptable factors. For example, the court is split on whether to consider value added or costs incurred as a factor. *See Superior Wire*, … 669 F. Supp. at 478 ("[a]n inquiry that is sometimes treated as a type of cross-check or additional factor to be considered in substantial transformation cases is whether significant value is added or costs are incurred by the process at issue"); *but see Nat'l Hand Tool*, 16 CIT at 312 (rejecting value added as a factor because it "could lead to inconsistent marking requirements for importers who perform exactly the same processes on imported merchandise but sell at different prices"). In particular, Courts have attempted to distinguish between minor manufacturing and combining operations or simple assembly, and processing that is more complex. *See, e.g., Uniroyal*, … 542 F. Supp. at 1031; *Belcrest Linens*, 741 F.2d at 1371; *Ran-Paige*, 35 Fed. Cl. at 121.

In cases in which the post-importation processing entails assembly, courts have considered the nature of the assembly together with the name, character, or use test in making a substantial transformation determination. *See Ran-Paige*, 35 Fed. Cl. at 121; *Belcrest Linens*, 741 F.2d at 1371; *Uniroyal*, … 542 F. Supp. at 1031. The Federal Circuit, in *Belcrest Linens*, considered the difference between minor manufacturing and combining operations and substantial transformation when stenciled, marked and embroidered bolts of cloth were cut into individual pieces, scalloped, folded, sewn, pressed and packaged, and found that substantial transformation had occurred based on "the extent of the operations performed and whether the parts lose their identity and become an integral part of a new article." *Belcrest Linens*, 741 F.2d at 1373. However, when assembly operations were manual and required some "skill and dexterity to put components together with a screw driver" but the names of each article and the form and character of each component remained unchanged, and the use of the imported articles was predetermined at the time of importation, the court did not find that substantial transformation had occurred. *Nat'l Hand Tool*, 16 CIT at 310-313. The court has sometimes compared the degree of operations in pre-versus post-importation processing to evaluate whether a substantial transformation occurred. For example, in *Nat'l Hand Tool*, the court contrasted the pre-importation processing of cold forming and hot-forging and noted that it required more complicated functions than post-importation processing, which included heat treatment and electroplating. 16 CIT at 311; *see also Uniroyal*, … 542 F. Supp. at 1029-31 (comparing a post-importation "minor manufacturing or combining process" in which imported shoe uppers were attached to outsoles with "complex manufacturing processes" that occurred pre-importation when the imported uppers were produced). In a *1979 Act* case concerning substantial transformation, the Court of Federal Claims did not focus on the nature of assembly operations except for characterizing them as an "attachment process," *Ran-Paige*, 35 Fed. Cl. at 119-122, but found there was no substantial transformation because the name and character of the imported articles (pans and handles) did not change, and the end-use of the imported articles was pre-determined at the time of importation. … While courts consider the nature of post-importation processing in their substantial transformation analysis, there is no bright line rule on the number of components required or the minimum amount of time spent on assembly before an assembly process is no longer considered "simple assembly" or "combining operations" and is, instead, considered substantial transformation.

Based upon the application of the above guidance to the undisputed facts of this case, the court finds that the assembly operations at the Vermont facility do not result in a substantial transformation of the imported components. Plaintiff and Defendant agree that the post-importation assembly operations do not result in a change in the shape or material composition of any imported component. … As such, there is no change in character as a result of Energizer's assembly operations. Thus, whether there has been a substantial transformation depends on whether there has been a change in the name or use of the components. Plaintiff argues that the Generation II flashlight's imported components undergo a change in name and use, specifically, that none of the components could function as a flashlight prior to assembly and that they become integral parts of a new product as a result of the assembly. … Plaintiff's arguments are unavailing.

Plaintiff's imported components do not undergo a change in name when they are assembled into a flashlight at the Vermont facility. While the court is not bound by *Nat'l Hand Tool*, that case is exactly on point. In *Nat'l Hand Tool*, the "name of each article as imported" remained the same as that article in the "completed tool." 16 CIT at 311. For instance, a lug, called a "G-head" at the time of importation, was still called a "G-head" even after it was assembled into a completed flex handle. *Id*. Plaintiff argues that none of Energizer's articles are called "flashlight" at the time of importation, but that is a simplistic reading of *Nat'l Hand Tool*. The issue is not whether Plaintiff imported approximately fifty "flashlights," but rather whether the Plaintiff's imported components retained their names after they were assembled into the Generation II flashlight. Thus, the proper query would be whether the "lens ring with overmold" or the "switch lever" or the "TIR lens" or any of the LEDs or any other components would still be called by their pre-importation name after assembly into the finished flashlight, or whether they would be indistinguishable in name from the finished product. The constitutive components of the Generation II flashlight do not lose their individual names as a result the post-importation assembly. The court finds, based on the undisputed facts presented, that no such name change occurred.

Energizer's imported components also do not undergo a change in use as a result of the post-importation processing at its Vermont facility. Arguing that its assembly process is meaningful and transformative, Plaintiff claims that none of the Generation II flashlight components could function as a flashlight at the time of importation and all of them become integral parts of a new commercial product. … However, in doing so Plaintiff misconstrues the holdings in *Nat'l Hand Tool* and *Ran-Paige*. The proper query for this case is not whether the components as imported have the form and function of the final product, but whether the components have a pre-determined end-use at the time of importation. When articles are imported in prefabricated form with a pre-determined use, the assembly of those articles into the final product, without more, may not rise to the level of substantial transformation. *See, e.g., Uniroyal*, … 542 F. Supp. at 1031. Plaintiff imports a partially assembled lens head, with four of the five LEDs pre-attached and pre-cut wires soldered to the head PCB. … The partially assembled lens head and remaining Generation II flashlight components are then assembled into the Generation II flashlight at the Vermont facility. … All of Plaintiff's imported components have a pre-determined end-use as parts and components of a Generation II flashlight at the time of importation. Even the imported wire has been pre-cut to the particular lengths needed to assemble the flashlight. … Thus, the court finds, based on the undisputed material facts before it, that Plaintiff's imported components do not undergo a change in use due to Energizer's post-importation assembly process.

Finally, the Court finds that Plaintiff's post-importation processing is not sufficiently complex as to constitute a substantial transformation. Plaintiff argues that its operations are not simple assembly but rather "complex, meaningful and transformative." However, as proof of the complexity of its assembly process Plaintiff offers only the length of time it takes to assemble the Generation II flashlight and the total number of components involved. … [T]here is no bright line rule for the minimum number of components required for an assembly process to constitute a substantial transformation. … Moreover, Plaintiff's assembly process, regardless of length of time or number of components does not rise above simple assembly. Plaintiff claims that the Generation II flashlight is comprised of approximately fifty components, including a lens head subassembly that is in fact imported from China in partially pre-assembled form. … Nineteen of the approximately fifty components (*i.e.*, almost 40 percent) are screws, washers, or nuts. *Id.* The wires used in the Generation II flashlight are imported "pre-cut" to lengths specifically required for the Generation II flashlight assembly. … As Defendant notes, these components are "the mechanisms by which the other components are held together." … Both Plaintiff and Defendant agree that the number of screws, washers or nuts is not outcome determinative and that the court should instead focus on the complexity and meaningfulness of the operations performed. … While the court agrees that the number of screws, washers or nuts is not outcome determinative, the high proportion of such connective parts relative to other components supports the court's finding that the imported components do not undergo a change in character and, instead, are simply held together as an aggregate product after assembly.

Plaintiff also argues that the length of time it takes to complete the assembly operation and its complexity should lead the court to find that there is a substantial transformation. … Plaintiff states that its assembly process is conducted by "trained technicians" and takes approximately seven minutes (including testing) but there is no evidence as to the level or type of training required of the technicians. … In fact, the same assembly process completed by technicians that Plaintiff stated were not fully trained only took six minutes longer (including testing and packaging) in the demonstrative DVD submitted to the court. … When asked to describe the assembly process for the court, Plaintiff used the following terms: selects, places, assembles, solders, inserts, screws, align[s], stretche[s], twist[s], connects, attaches, feeds, presse[s] together, places, fasten[s], rotate[s] and test[s]. … Thus, the post-importation processing can take anywhere from seven to thirteen and a half minutes, including testing and packaging, depending on the technician's level of training, and the nature of the assembly is broadly described as assembling, screwing, connecting and soldering approximately fifty components, many of which are simple attaching mechanisms. None of these factors suggest an assembly process that is complex. Indeed, the court has viewed the DVD provided as an exhibit and is persuaded that it is a simple, screwdriver assembly akin to those described in *Ran-Paige* and *Nat'l Hand Tool*. Given the relative simplicity of the assembly process, as evidenced by the language used to describe it, the length of time it takes, and the proportion of components that can be categorized as attaching mechanisms, the court finds that the imported parts do not undergo a substantial transformation.

Plaintiff cites to *Belcrest Linens* for the proposition that "in determining whether the combining of parts or materials constitutes a substantial transformation, the issue has been the extent of the operations performed and whether the parts lose their identity and become an integral part of a new article." … However, in *Belcrest Linens* the operations performed resulted in a bolt of cloth being cut, scalloped and sewn into pillowcases. … Similarly, in a Customs Court case cited by *Belcrest Linens, Carlson Furniture Indus. v. United States*, 65 Cust. Ct. 474 … (1970), the court found that the imported articles were not chairs in unassembled form but "at best[,] the wooden parts which go into the making of chairs," and that most of the chair parts still required surface finishing and upholstering, the chair legs needed to be cut to length, leveled and fitted with glides and casters, and plaintiff had to then assemble, fit, glue and pin the various parts together. 65 Cust. Ct. at 482. The Court found that these operations were substantial in nature and more than the mere assembly of parts together. *Id.* In contrast, given that Plaintiff's assembly process is a fitting together of parts and that all its components are imported with a pre-determined end-use and arrive ready for assembly, the court finds the present case distinguishable from *Belcrest Linens* and *Carlson Furniture*. Unlike the wooden parts in *Carlson Furniture* or the marked bolts of cloth in *Belcrest Linens*, Energizer does no further work on the imported components except assemble them together.

Finally, Plaintiff cites to its U.S. production cost and *NAFTA* guidance on assembly to argue that its operations rise to the level of substantial transformation. … Plaintiff's arguments are unavailing. Plaintiff notes that "U.S. production cost is, by far, the single largest cost in the production of the Gen[eration] II flashlight" and that "of the Gen[eration] II flashlight's combined $23.55 in parts and U.S. production costs, 45 [percent] is U.S. production costs." … However, cost of U.S. production is, at best, a subsidiary factor in a substantial transformation analysis, and the Court in *Nat'l Hand Tool* specifically rejected

U.S. expenditures as a basis for determining substantial transformation. *Nat'l Hand Tool*, 16 CIT 312. Plaintiff states that forty-five percent of the total cost of the Generation II flashlight is attributable to U.S. labor and production (including direct labor, variable expenses and fixed costs). … Defendant asserts that Plaintiff "compares aggregated labor costs with disaggregated parts costs" and leaves out the "costs associated with the partial assembly of the lens head in China." … Thus, Defendant argues, that "no valid conclusions can be drawn from Energizer's comparison of the costs of labor and parts." … Regardless of the exact numbers, when U.S. costs are attributed to approximately seven minutes of labor, the Court will not accord undue weight to the value of that labor for the purposes of its substantial transformation analysis.

Similarly, Plaintiff cites to the "more concrete rules of free trade agreements, such as *NAFTA*, for guidance," in which simple assembly is defined as the "fitting together of five or fewer parts," to support its claim that the operations at its Vermont facility are more than simple assembly. … 19 C.F.R. §102.1(o). However, this comparison is inapposite because *NAFTA* is a specialized trade regime, the benefits of which do not mirror the more generalized "most favored nation" treatment afforded to countries not party to the agreement in question. This is consistent with the object and purpose of the *1979 Act*, which is to give preferential status to certain designated countries, most of which have a pre-existing agreement with the United States and offer reciprocal government procurement benefits. Thus, the more permissive understanding of "simple assembly" found in regulations pertaining to *NAFTA* may have been intentionally designed to relax the rules on country of origin in order to facilitate trade with the agreement partners; however, the same cannot be said of the concept of country of origin in the *1979 Act*.

The Court finds that Energizer's imported components do not undergo a change in name, character, or use as a result of the post-importation processing in the United States, and that the nature of Energizer's post-importation assembly process is not sufficiently complex to give rise to a substantial transformation. Based on the totality of the undisputed material facts before the Court, Energizer's post-importation processing at its Vermont facility does not result in a substantial transformation of the Generation II flashlight components imported by Plaintiff. China is the correct country of origin of the Generation II flashlight pursuant to the government procurement provisions of the 1979 *Act*.

VI. Substantial Transformation and Totality of the Evidence? 2023 *Cyber Power* Case

CYBER POWER SYSTEMS (USA), INC., v. UNITED STATES, UNITED STATES COURT OF INTERNATIONAL TRADE, NUMBER 20-00124 (SLIP OPINON 23-24, 27 FEBRUARY 2023)[44]

Leo M. Gordon, Judge:

Plaintiff Cyber Power Systems (USA) Inc. ("Cyber Power") commenced this action contesting a denied protest regarding the country of origin marking of five models of

44 www.cit.uscourts.gov/sites/cit/files/23-24.pdf. (Footnotes omitted.)

uninterruptible power supplies ("UPS") and one model of surge voltage protectors ("SVP"). Upon entry of the subject merchandise, which Plaintiff had marked as "Made in the Philippines," U.S. Customs and Border Protection ("Customs") determined that the country of origin for the five UPSs and one SVP was China and excluded their entry when Cyber Power refused to change its markings. Cyber Power contended before Customs, and now before the court, that its operations in the Philippines, conducted by Cyber Power Systems Manufacturing, Inc. ("Cyber Power Philippines"), resulted in a "substantial transformation" of the merchandise into Philippine origin, having a name, character, and use different from each device's Chinese components.

… For the reasons that follow, the Court enters judgment for Plaintiff as to the Philippine origin of one model of subject merchandise, UPS Model No. CP600LCDa, and judgment for Defendant as to the Chinese origin of the remaining five models.

…

I. Standard of Review and Legal Framework

…

B. The Marking Statute (19 U.S.C. § 1304(a))

Section 304(a) of the *Tariff Act of 1930*, as amended, 19 U.S.C. § 1304(a), requires that all merchandise imported into the United States be marked permanently, legibly, indelibly, and in a conspicuous place, to indicate to the ultimate purchaser the English name of the product's country of origin. The implementing regulation, 19 C.F.R. § 134.1(b), defines the term "country of origin" as "the country of manufacture, production, or growth of any article of foreign origin entering the United States." Section 134.1(b) explains that "[f]urther work or material added to an article in another country must effect a substantial transformation in order to render such other country the 'country of origin' within the meaning of this part." 19 C.F.R. § 134.1(b). (Emphasis added.) Simply stated, imported merchandise originates for marking purposes in the last country in which it underwent a "substantial transformation" prior to importation into the United States. Merchandise not marked with the proper country of origin may be excluded by Customs from entry into the United States. …

C. Substantial Transformation

Plaintiff must establish by a preponderance of the evidence that its subject merchandise is substantially transformed in the country it wishes to represent as the merchandise's country of origin. *See* 28 U.S.C. § 2639(a)(1)….

A substantial transformation occurs "when an article emerges from a manufacturing process with a name, character, or use which differs from those of the original material subjected to the process." *Torrington, Co. v. United States*, 764 F.2d 1563, 1568 (Fed. Cir. 1985) (citing *Tex. Instruments, Inc. v. United States*, 681 F.2d 778, 782 (C.C.P.A. 1982)); see also *United States v. Gibson-Thomsen Co.*, 27 C.C.P.A. 267, 273 (1940) (clarifying that marking statute did not "require that an imported article, which is to be used in the United States as material in the manufacture of a new article having a new name, character, and use, and which, when so used, becomes an integral part of the new article, be so marked as to indicate to the retail purchaser of the new article that such imported article or material was produced in a foreign country"). Substantial transformation is fact-specific and determined on a case-by-case basis. See *Belcrest Linens v. United States*, 741 F.2d 1368, 1373 (Fed. Cir. 1984).

While the test is expressed in the disjunctive, Courts consider all three factors, and have generally found a change in name to be "the weakest evidence of substantial transformation." See, e.g., *Koru N. Am. v. United States*, … 701 F. Supp. 229, 234 (1988) (quoting *Nat'l Juice Prods. Ass'n v. United States*, … 628 F. Supp. 978, 989 (1986)). Indeed, a finding of substantial transformation frequently rests on multiple factors because a change in character often results in a change in use, and a change in character or use generally necessitates a change in name. *See id.* … , 701 F. Supp. at 235 ("The fish's name has been changed as the result of the processing method which occurred in Korea. … The fish's character, after its journey through Korea, is also vastly different.'" …; see also *Belcrest Linens*, 741 F.2d at 1374 ("[T]he identity of the merchandise changed as did its character and use: embroidered fabric was transformed into pillowcases which are clearly distinguishable in character and use from the fabric of which they were made."); *Ferrostaal Metals Corp. v. United States*, … 664 F. Supp. 535, 541 (1987) ("Based on the totality of the evidence, showing that the continuous hot-dip galvanizing process effects changes in the name, character and use of the processed steel sheet, the Court holds that the changes constitute a substantial transformation and that hot-dipped galvanized steel sheet is a new and different article of commerce from full hard cold-rolled steel sheet."); *Uniden Am. Corp. v. United States*, … 120 F. Supp. 2d 1091, 1095 (2000) ("Here, each cordless telephone has experienced a change in both name and use from its original materials.").

In applying the test, the U.S. Court of Appeals for the Federal Circuit has emphasized the requirement that there be a "new and different" article that emerges from the manufacturing process. See, e.g., *Acetris Health LLC v. United States*, 949 F.3d 719 (Fed. Cir. 2020); *Zuniga v. United States*, 996 F.2d 1203 (Fed. Cir. 1993); *Azteca Milling Co. v. United States*, 890 F.2d 1150 (Fed. Cir. 1989); see also *Anheuser-Busch Brewing Ass'n v. United States*, 207 U.S. 556, 562 (1908) ("There must be transformation; a new and different article must emerge.").

III. Discussion

The dispositive question in this action, as noted over the course of the litigation, is whether the subject merchandise was substantially transformed at the Cyber Power Philippines factory. …

B. Conclusions of Law

…

1. UPS Model No. CP600LCDa Was Substantially Transformed in the Philippines

… [T]he substantial transformation test is not straightforward to apply. … Nevertheless, Courts deciding issues of substantial transformation have established several guiding tenets and consistently emphasized the case-by-case nature of the test. See, e.g., *Nat'l Hand Tool v. United States*, 16 CIT 308, 311 (1992), aff'd 989 F.2d 1201 (Fed. Cir. 1993) ("To determine whether a substantial transformation of an article has occurred . . . each case must be decided on its own particular facts." (quoting *Uniroyal, Inc. v. United States*, … 542 F. Supp. 1026, 1029 (1982))).

The Court reiterates its prior rejection of two potential alternatives to the substantial transformation test of name, character, or use: first, an "essence"-based approach that would look only to whether the essential or critical component of a product had been transformed; and second, an approach that would *per se* decide whether substantial transformation had occurred on a component-by-component basis. … The Government's approach does not promote uniformity, consistency, and predictability in the application of the substantial transformation test. Consequently, the Court does not read the prior caselaw on that test as having altered the fundamental requirements of "name, character, or use" by narrowing it to an essence- or component-based interpretation.

Rather, a change in name, character, or use turns on the nature of the potentially transformative processing, considered in the context of the particular kind of merchandise being manufactured. See *Meyer Corp., U.S. v. United States*, 43 F.4th 1325, 1331 (Fed. Cir. 2022) (holding that "the trial court correctly focused its inquiry on manufacturing steps that changed the shape, form, chemical properties, and mechanical properties" of a product).

Because the Court finds that the entirety of the CP600LCDa's manufacture occurred in the Philippines, the Court need not make a determination as to whether its UPS assembly process alone constituted a substantial transformation. The CP600LCDa began its manufacturing journey in the Philippines as a set of components not yet functional as a power source of any kind. … After several stages of manufacturing, each involving numerous steps directed toward changing the electronic properties of the device as a whole, the CP600LCDa left the Philippines as a fully functioning UPS. It is undisputed that that the CP600LCDa is capable of providing "battery backup (using simulated sine wave output) and surge protection for desktop computers, workstations, networking devices, and home entertainment systems," and that, thanks to its programming, "is able to provide real time status and alerts of potential problems." … Even without detailed evidence describing the assembly stage of UPS production, the change from all of its components to its ultimate finished product as a UPS device is a change so marked as to shift the burden of proof in Plaintiff's favor.

Thus, the Court holds that Cyber Power's operations in the Philippines resulted in a "new and different article": the CP600LCDa. Indeed, the CP600LCDa's Philippine manufacture satisfies all three prongs of the substantial transformation test: a change in name (from a set of PCBA and UPS component parts to the finished, functioning UPS Model No. CP600LCDa), a change in character (from component parts not yet capable of being electronically programmed to a device capable of performing a number of intelligent functions), and a change in use (from component parts to a device geared towards a specifically identified purpose: protecting against power outages).

Accordingly, the subject UPS Model No. CP600LCDa devices should be marked as products originating from the Philippines under 19 U.S.C. § 1304(a).

2. Plaintiff Failed to Carry Its Burden of Proof as to UPS Model Nos. CBN50U48A-1, CST135XLU, OR500LCDRM1U, SX650U, and SVP Model No. HT1206UC2RC1

The Court now turns to the country of origin of the remaining models of subject merchandise. … [T]he Court determined that Plaintiff's evidence in this case is undercut by its lack of connection to the subject merchandise and the existence of unanswered questions and unresolved conflicts among the documentary evidence, Mr. [Chi-Ting (Tim)] Huang's testimony, and Plaintiff's contentions in its Proposed Findings of Fact and Conclusions of Law. [Mr. Huang worked for Cyber Power Systems Inc., that is, Cyber Power Taiwan, and served as General Manager of Cyber Power Philippines.]

Before trial, the court was faced with many questions pertaining to the subject UPS and SVP devices: how the production process in the Philippines evolved as more of Cyber Power's operations shifted there; when and where discrete steps of the so-called "assembly" process, such as firmware burning, were taken; and whether Plaintiff could submit evidence of assembly procedures that depicted the manufacturing process of the subject merchandise.

Based on Mr. Huang's testimony and Plaintiff's admitted exhibits, the trial did not provide answers to these questions. The Court thus holds that Plaintiff has failed to prove, by a preponderance of the evidence, that five of the six subject models are products of the Philippines. The Court cannot reliably discern how the parts of the remaining four UPS devices, or the single SVP device at issue, were assembled into fully functioning products. Plaintiff failed to present the specific testimony describing the assembly process of the subject devices for the relevant time period, and instead focused on a general overview of its product types and manufacturing operations. … Thus, no witness with personal knowledge confirmed that the assembly operations depicted in the documentary exhibits fully reflected the manufacture of the subject merchandise. Without such testimony, the documentary evidence alone does not establish what the assembly process for the subject UPS and SVP devices looked like in early 2020.

Furthermore, discrepancies between the exhibits and Mr. Huang's testimony with respect to where and at what stage certain steps were performed, along with the absence of dates, quantities, and other merchandise-specific information, leave the court unable to determine whether the devices were substantially transformed in the Philippines. That the devices left the Philippines with new names cannot suffice to prove that "new and different article[s] emerged" from the operations at Cyber Power Philippines factory. Simply put, with the exception of the CP600LCDa, this is a case in which Plaintiff has failed in its burden of proof from the outset.

III. Conclusion

For the foregoing reasons, the Court finds that country of origin for UPS Model No. CP600LCDa is the Philippines, and the country of origin for the remaining five models of subject merchandise is China. …

Part Two

ENTRY OF MERCHANDISE

Chapter 4

TYPES OF ENTRY[45]

I. Entry for Consumption

U.S. CUSTOMS AND BORDER PROTECTION, *IMPORTING INTO THE UNITED STATES, A GUIDE FOR COMMERCIAL EXPORTERS* 11-13 (NOVEMBER 2006)

When a shipment reaches the United States, the importer of record (*i.e.*, the owner, purchaser, or licensed customs broker designated by the owner, purchaser, or consignee) will file entry documents for the goods with the port director at the goods' port of entry. Imported goods are not legally entered until after the shipment has arrived within the port of entry, delivery of the merchandise has been authorized by CBP, and estimated duties have been paid. It is the importer of record's responsibility to arrange for examination and release of the goods.

Pursuant to 19 U.S.C. 1484, the importer of record must use reasonable care in making entry.

… In addition to contacting CBP, importers should contact other agencies when questions arise about particular commodities. For example, questions about products regulated by the Food and Drug Administration should be forwarded to the nearest FDA district office … or to the Import Division, FDA Headquarters…. The same is true for alcohol, tobacco, firearms, wildlife products (furs, skins, shells), motor vehicles, and other products and merchandise regulated by the other federal agencies for which CBP enforces entry laws. …

…

Goods may be entered for consumption, entered for warehouse at the port of arrival, or they may be transported in-bond to another port of entry and entered there under the same conditions as at the port of arrival. Arrangements for transporting the merchandise in-bond to an in-land port may be made by the consignee or by a customs broker or by any other person with an interest in the goods for that purpose. …

Goods to be placed in a foreign trade zone are not entered at the customhouse. …

Evidence Of Right To Make Entry

Goods may only be entered by their owner, purchaser, or a licensed customs broker. When the goods are consigned "to order," the bill of lading, properly endorsed by the

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[45] Documents References:
(1) *Havana (ITO) Charter* Articles 33, 35-37
(2) GATT Articles V, VIII, IX:6
(3) WTO *Agreement on Rules of Origin*

consignor, may serve as evidence of the right to make entry. An air waybill may be used for merchandise arriving by air.

In most instances, entry is made by a person or firm certified by the carrier bringing the goods to the port of entry. This entity (*i.e.*, the person or firm certified) is considered the "owner" of the goods for customs purposes.

The document issued by the carrier for this purpose is known as a "Carrier's Certificate." … In certain circumstances, entry may be made by means of a duplicate bill of lading or a shipping receipt. When the goods are not imported by a common carrier, possession of the goods by the importer at the time of arrival shall be deemed sufficient evidence of the right to make entry.

Entry For Consumption

Entering merchandise is a two-part process consisting of: (1) filing the documents necessary to determine whether merchandise may be released from CBP custody, and (2) filing the documents that contain information for duty assessment and statistical purposes. Both of these processes can be accomplished electronically via the Automated Broker Interface (ABI) program of the Automated Commercial System (ACS).

Entry Documents

Within 15 calendar days of the date that a shipment arrives at a U.S. port of entry, entry documents must be filed at a location specified by the port director. These documents are:

- Entry Manifest (CBP Form 7533) or Application and Special Permit for Immediate Delivery (CBP Form 3461) or other form of merchandise release required by the port director,
- Evidence of right to make entry,
- Commercial invoice or a pro forma invoice when the commercial invoice cannot be produced,
- Packing lists, if appropriate,
- Other documents necessary to determine merchandise admissibility.

If the goods are to be released from CBP custody at the time of entry, an entry summary for consumption must be filed and estimated duties deposited at the port of entry within 10 working days of the goods' entry.

Surety

The entry must be accompanied by evidence that a bond has been posted with CBP to cover any potential duties, taxes, and charges that may accrue. Bonds may be secured through a resident U.S. surety company, but may be posted in the form of United States currency or certain United States government obligations. In the event that a customs broker is employed for the purpose of making entry, the broker may permit the use of his bond to provide the required coverage. [Notably, in 2006, bond limits were raised to cover potential antidumping (AD) or countervailing duty (CVD) liability, even absent a preliminary affirmative dumping margin or subsidy determination.]

Entry Summary Documentation

Following presentation of the entry, the shipment may be examined, or examination may be waived. The shipment is then released if no legal or regulatory violations have occurred. Entry summary documentation is filed and estimated duties are deposited within 10 working days of the entry of the merchandise at a designated customhouse. Entry summary documentation consists of:

- Return of the entry package to the importer, broker, or his authorized agent after merchandise is permitted release,
- Entry summary (CBP Form 7501),
- Other invoices and documents necessary to assess duties, collect statistics, or determine that all import requirements have been satisfied. This paper documentation can be reduced or eliminated by using features of the ABI.

II. Immediate Delivery

U.S. CUSTOMS AND BORDER PROTECTION, *IMPORTING INTO THE UNITED STATES, A GUIDE FOR COMMERCIAL EXPORTERS* 13-14 (NOVEMBER 2006)

An alternate procedure that provides for immediate release of a shipment may be used in some cases by applying for a special permit for immediate delivery on CBP Form 3461 prior to arrival of the merchandise. Carriers participating in the Automated Manifest System can receive conditional release authorizations after leaving the foreign country and up to five days before landing in the United States. If the application is approved, the shipment will be released expeditiously after it arrives. An entry summary must then be filed in proper form, either on paper or electronically, and estimated duties deposited within 10 working days of release. Immediate-delivery release using Form 3461 is limited to the following types of merchandise:

- Merchandise arriving from Canada or Mexico, if the port director approves it and an appropriate bond is on file,
- Fresh fruits and vegetables for human consumption arriving from Canada or Mexico and removed from the area immediately contiguous to the border and placed within the importer's premises within the port of importation,
- Shipments consigned to or for the account of any agency or officer of the U.S. government,
- Articles for a trade fair,
- Tariff-rate quota merchandise and, under certain circumstances, merchandise subject to an absolute quota. Absolute-quota items require a formal entry at all times,

- In very limited circumstances, merchandise released from warehouse followed within 10 days by a warehouse withdrawal for consumption,
- Merchandise specifically authorized by CBP Headquarters to be entitled to release for immediate delivery.

III. Entry for Warehouse

U.S. CUSTOMS AND BORDER PROTECTION, *IMPORTING INTO THE UNITED STATES, A GUIDE FOR COMMERCIAL EXPORTERS* 14 (NOVEMBER 2006)

If one wishes to postpone release of the goods, they may be placed in a CBP bonded warehouse under a warehouse entry. The goods may remain in the bonded warehouse up to five years from the date of importation. At any time during that period, warehoused goods may be re-exported without paying duty, or they may be withdrawn for consumption upon paying duty at the duty rate in effect on the date of withdrawal. If the goods are destroyed under CBP supervision, no duty is payable.

While the goods are in the bonded warehouse, they may, under CBP supervision, be manipulated by cleaning, sorting, repacking, or otherwise changing their condition by processes that do not amount to manufacturing. After manipulation, and within the warehousing period, the goods may be exported without the payment of duty, or they may be withdrawn for consumption upon payment of duty at the rate applicable to the goods in their manipulated condition at the time of withdrawal. Perishable goods, explosive substances, or prohibited importations may not be placed in a bonded warehouse. Certain restricted articles, though not allowed release from custody, may be warehoused.

Information regarding bonded manufacturing warehouses is contained in section 311 of the *Tariff Act* [*of 1930*, as amended] (19 U.S.C. 1311). [Note there are several different classes of bonded warehouse, including a specific class for duty-free shops at airports and other ports of entry. Precisely what kind of economic activity can be done in a warehouse depends, in part, on the category of that warehouse.]

IV. Bonded Warehouses, National Security, and Iran Sanctions

There is an under-appreciated connection between bonded warehouses and national security. In July 2019, following strengthening by the U.S. of its sanctions regime against Iran (as discussed in a separate Chapter), millions of barrels of oil began piling up in Chinese bonded warehouses.[46] From January-May 2019, 12 million barrels of Iranian crude oil was offloaded in China, but only 10 million barrels were cleared by Chinese customs authorities, the General Administration of Customs. The gap suggested two million barrels flowed into bonded storage.

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[46] *See Millions of Barrels of Iranian Oil Are Piled Up in China's Ports*, BLOOMBERG, 22 July 2019, www.bloomberg.com/news/articles/2019-07-22/millions-of-barrels-of-iranian-oil-are-piled-up-in-china-s-ports.

Technically under general Customs Law principles concerning bonded warehouses, oil in storage tanks in bonded warehouses meant it was in transit – it had not entered the customs territory of the PRC. And, the oil remained owned by Iranian shippers. Apparently, China – the world's largest oil importer – stockpiled oil, but did not want to run afoul of U.S. sanctions by explicitly importing the oil stockpiled oil. Moreover, the oil was transported by Iranian vessels, which once offloaded in the Chinese bonded warehouse storage facilities were freed from having to themselves as storage vessels, and free to transport yet more oil – in possible breach of the sanctions.

V. Transportation of Merchandise in Bond

U.S. CUSTOMS AND BORDER PROTECTION, *IMPORTING INTO THE UNITED STATES, A GUIDE FOR COMMERCIAL EXPORTERS* 16-17 (NOVEMBER 2006)

Not all merchandise imported into the United States and intended for domestic commerce is entered at the port where it arrives. The importer may prefer to enter the goods at a different location in the United States, in which case the merchandise will have to be further transported to that location. In order to protect United States revenue in these cases, the merchandise must travel in a bonded status from the port of arrival to the intended port of entry. This process is referred to as *traveling under Immediate Transportation procedures* and is accomplished by the execution of CBP Form 7512 (Transportation Entry and Manifest of Goods Subject to CBP Inspection and Permit). The merchandise is then placed with a carrier who accepts it under its bond for transportation to the intended destination, where the normal merchandise entry process will occur.

VI. Warehouse Manufacturing and 1992 *Tropicana* Case

***TROPICANA PRODUCTS, INC. v. UNITED STATES*, UNITED STATES COURT OF INTERNATIONAL TRADE, 789 F. SUPP. 1154, 1155-1159 (1992), *AFF'D WITHOUT OPINION* 983 F.2d 1001 (FED. CIR. 1992)**

Newman, Senior District Judge:

Introduction

Presented for determination is the dutiable status of frozen concentrated orange juice for manufacturing ("manufacturing concentrate") imported from Brazil in 1981 by Tropicana Products, Inc. ("Tropicana") and processed in its "Class 8" Customs bonded warehouse.

… The merchandise was entered at the port of Tampa, Florida in 1981, and after processing in and withdrawal from Tropicana's bonded warehouse was assessed with duties at the rate of 35 cents per gallon as "concentrated" fruit juices….

The importer insists that … Customs should have classified the imports as "not concentrated" (their condition as withdrawn from bonded warehouse), dutiable … at the lower rate of 20 cents per gallon.

Under 19 U.S.C. § 1562 … with Customs' permission, imported goods may be entered in a bonded warehouse and "cleaned, sorted, repacked, or *otherwise changed in condition, but not manufactured*." (Emphasis added.) If the statute has been complied with, Customs must classify the imports in conformity with their condition as withdrawn from the warehouse rather than in their condition as they arrived in the United States.

On August 7, 1981 the Customs Service promulgated a ruling that Tropicana's bonded warehouse processing of its manufacturing concentrate was a "manufacture for purpose of 19 U.S.C. 1562 and is not a permissible manipulation." C.S.D. 82-24, 82 Cust. Bull. 713 (1982). Tropicana protested, [the] ... protests were denied, and this action followed.

…

Findings of Fact

…

1. The manufacturing concentrate at issue was produced in Brazil by removing water from natural strength fresh juice extracted from oranges having a Brix value (measure of the concentration of soluble solids) of 11.8°, concentrating the juice to a Brix value of 65°, and then freezing the concentrate. [Brix, calibrated in degrees and symbolized by a small circle (°), measures the concentration of dissolved solids in a liquid. In specific, it measures the mass ratio of dissolved sucrose, *i.e.*, sugar, to water in a particular fluid. For example, a liquid with a Brix value of 30° means that per 100 grams of solution, there are 30 grams of sugar and 70 grams of water. Brix value is used (*inter alia*) to measure the amount of sugar in fruit juices, soda, and wine. For instance, a fruit juice with 1° Brix value, which indicates 1-2 percent sugar by weight, is considered appropriately sweet.]

2. The frozen manufacturing concentrate was shipped to Tropicana in 55 gallon drums. When Tropicana's 65° Brix value manufacturing concentrate arrived at the port of entry, Tampa, Florida, its condition was concededly "concentrated" ….

3. The imports comprised identifiable lots of manufacturing concentrate with varying chemical characteristics affecting taste, such as Brix to acid ratios (a measure of the sweetness of the juice). …

…

5. Unblended manufacturing concentrate is the basic orange juice raw material, which by blending of lots having different Brix to acid ratios and dilution (with treated water or single strength juice) to reduce the Brix value, several orange juice products are produced for the retail market: 41.8° Brix value frozen concentrated orange juice (from which a retail consumer makes a single strength orange juice by adding three cans of water to the retail package), and 11.8° Brix value orange juice from concentrate (a single strength juice consumed directly from the retail package without further dilution with water). …

6. Tropicana used the imported manufacturing concentrate to produce an 11.8° Brix value orange juice from concentrate for sale at retail in an essentially two phase production process, utilizing a bonded warehouse for the initial phase and unbonded facilities to complete the product for retail sale. The initial phase – processing in the bonded warehouse – is the focus of this case.

7. In the initial, or bonded warehouse, phase … Tropicana produced essentially an intermediate product, a 17.3° Brix value partially reconstituted precursor of the retail 11.8° Brix value orange juice from concentrate product. …

8. In producing the 17.3° Brix value precursor, Tropicana performed two distinct steps in its bonded warehouse – blending and dilution – which, if not independently, surely in combination, constituted "manufacturing" for purposes of § 1562:

> (a) *Blending*: After thawing the frozen imported concentrate to make it processable, Tropicana selected identifiable lots having varying Brix to acid ratios and other chemical composition characteristics for quality controlled blending to create the desired characteristics (flavor, density and sweetness, as measured by an index) of the end or finished product – orange juice from concentrate. When imported, these lots were distinguishable by color coded barrel tops. Typically two to ten lots were blended. Tropicana's assertion that this quality controlled blending to specification was simple, unsophisticated "mixing" is facetious.
>
> (b) *Dilution*: In the second major phase of the bonded warehouse operations, domestically purchased water that was specially treated and filtered was added to be blended 65° Brix value manufacturing concentrate diluting its concentration to a Brix value of 17.3°, thus producing an intermediate stage partially reconstituted orange juice from concentrate precursor for further processing in Tropicana's unbonded facilities.

9. At the time of the entries in issue (1981), orange juice was classified by Customs under either of two items of the TSUS, dependent upon the Brix value of the imported product: [o]range juice having a Brix value 17.32° or less was classifiable as "not concentrated," dutiable under item 165.30; orange juice having a Brix value of more than 17.32° was classified as "concentrated," dutiable under item 165.35.

10. Tropicana's 17.3° Brix value precursor product withdrawn from its bonded warehouse was made to precise specifications and subjected to stringent quality controlled highly automated blending and dilution processes designed to accomplish *two objectives*: (1) duty reduction by conformance with the 17.32° Brix value threshold concentration for classification of the juice as "not concentrated" (item 165.30) when withdrawn from the bonded warehouse; and (2) compatibility of the intermediate 17.3° Brix product in the standard of quality and specifications for subsequent advancement to the 11.8° Brix retail orange juice from concentrate product.

11. Tropicana's bonded warehouse processing effected a fundamental change in the character and use of the imported manufacturing concentrate.

12. The 17.3° Brix value partially reconstituted product of the bonded warehouse was not a standard orange juice product or marketable by Tropicana, but required certain finishing operations. In Tropicana's unbonded facilities, the 17.3° precursor was further diluted with treated water to 11.8° Brix, ingredients of minor value (orange oils, and occasionally pulp and essences for flavoring) were added, the orange juice from concentrate was then Pasteurized, chilled and packaged for sale at retail.

Conclusions of Law and Discussion

1. Under the tariff provision captioned "Manipulation in warehouse," 19 U.S.C. § 1562, imported "merchandise may [with Customs' permission and supervision] be cleaned, sorted, repacked, or otherwise changed in condition, *but not manufactured*, in bonded warehouses." (Emphasis added.)

2. Except for scouring or carbonizing of wool, which § 1562 expressly excludes from the term "manufactured," the latter term was left undefined by Congress. The provisions of § 1562 have been administered by Customs for some 70 years and the agency has been regularly required to determine on a case by case basis whether a myriad of manipulations performed in bonded warehouses constitute "manufacturing." As used in § 1562, ... the term "manufactured" has not previously been construed by the courts, and hence this case involves an issue of first impression.

3. Tropicana posits and defendant disputes that the "substantial transformation" test long applied by the courts to country of origin, drawback, Generalized System of Preferences and other tariff provisions should now be applied to construing the term "manufactured" in § 1562. Citing *National Juice Products Association v. United States* 628 F. Supp. 978 (1986) [excerpted above], … Tropicana argues that its bonded warehouse operations did not result in a "substantial transformation" of the imported merchandise and therefore it did not "manufacture" in its warehouse. Defendant and counsel for *Amicus Curiae* Florida Citrus Mutual, on the other hand, maintain that the "substantial transformation" test applied in *National Juice* for purposes of country-of-origin marking is inapplicable to the term "manufactured" as used in § 1562; and, even if applicable, there was a substantial transformation of the imports in the bonded warehouse. The court agrees, on both counts, with defendant's contentions.

4. "Substantial transformation is a concept of major importance in administering the customs and trade laws. ***: There must be transformation; a new and different article must emerge, 'having a distinctive name, character, or use.' The criteria of name, character and use continue to determine when substantial transformation has occurred ***." *Ferrostaal Metals Corp. v. United States*, 664 F. Supp. 535 (1987)….

5. The substantial transformation test itself may lead to differing results "where differences in statutory language and purpose are pertinent." *National Juice*…. "[C]ourts

have been reluctant to lay down specific definitions in this area [manufacturing] other than to discuss the particular facts of cases *under the particular tariff provisions involved*." *Belcrest [Linens v. United States]*, 741 F.2d 1368 [(CAFC 1984)] (Emphasis added.)…. …

The short of the matter: the criterion of whether goods have been "manufactured" serves different purposes under different statutes, particularly § 1562 on the one hand and statutes concerned with country-of-origin marking, Generalized System of Preferences and drawback on the other; substantial transformation criteria cannot be applied indiscriminately in the identical manner across the entire spectrum of statutes for which it is necessary to determine whether merchandise has been "manufactured."

6. To interpret "manufacturing" – an expressly prohibited manipulation under § 1562 – as requiring a high threshold of transformation (*viz*., a substantial transformation as stringently required in country of origin and drawback cases), would negate the evident legislative intent of the statute to permit only very minor or rudimentary manipulations in bonded warehouses – akin to the exemplars (cleaning, sorting and repacking). Hence, in the context of § 1562, the prohibited manipulation, manufacturing, may be contravened at a relatively low threshold of "transformation."

7. Acceptance of Tropicana's broadly expansive construction of a permissible "change in condition" under § 1562, coupled with its restrictive construction of prohibited "manufacturing" as contravened only at a substantial or high threshold of transformation, would make the statute's exemplar rudimentary manipulations (cleaned, sorted, repacked) meaningless.

8. While the term "manufactured" commonly connotes a "transformation" of an import to a "new and different article" *(Anheuser-Busch Brewing Assn. v. United States,* 207 U.S. 556 (1908)…), for purposes of the particular statute here under consideration a low threshold of transformation satisfies the meaning of "manufactured." …

9. For purposes of § 1562, merchandise may be "manufactured" even if transformation results in merely a material for further manufacture. …

10. "While to constitute an article a manufacture, it may be necessary to convert the article into an entirely different article, *it is only necessary that the article be so processed that it be removed from its crude or primary state, though it remain a variety of the original material, to be manufactured*." *United States v. C.J. Tower & Sons*, 44 CCPA 1, C.A.D. 626 (1956). (Emphasis added.) …

11. Under § 1562, an intermediate material in process or precursor product resulting from a "transformation" of an imported raw material, although requiring further processing or fabrication to produce a finished article of commerce, may itself be regarded as "manufactured" for purposes of § 1562.

12. The fact that Tropicana's 17.3° Brix partially reconstituted orange juice from concentrate was a nonstandard and unmarketable product and not an "article of commerce,"

does not preclude "transformation" and thus manufacture of the imported manufacturing concentrate into a new article for purposes of § 1562. In tariff parlance, there is a fundamental differentiation between the terms "manufactured" and "manufactures of." The former describes a processing operation while the latter refers to a completed article of commerce.

13. Tropicana's duty-reduction motivation for its bonded warehouse processing of the manufacturing concentrate is neither proscribed by § 1562 nor any other provision of the tariff laws. In that connection, the court observes the fundamental right of an importer to so fashion his goods as to obtain the lowest possible rate of duty, absent any fraud, deception or artifice concerning the condition of the goods. …

14. Although under § 1562 the tariff classification of imported merchandise may be changed by permissible manipulations in a Customs bonded warehouse, an importer may not fashion his goods or change their condition in a bonded warehouse to obtain a lower rate of duty by impermissible manipulations. In this case, Tropicana "fashioned its merchandise" in its bonded warehouse by manufacturing, which is expressly prohibited.

15. Under the rule of *ejusdem generis* ["of the same kind"] (where the statute's particular words of description are followed by general terms), the scope of permissible manipulations falling within the language "otherwise changed in condition," must be construed not only with reference to the immediately following qualifying language, "but not manufactured," but also in the context of the common characteristic of the statute's antecedent specific permissible exemplars, "cleaned, sorted, repacked." … [That is, under the statutory construction canon of *ejusdem generis*, if a list of particular terms or items is followed by a general term or item, then that general term or item applies only to terms or items that are similar to the particular ones listed.] The exemplars are, obviously, all very rudimentary forms of manipulation that do not alter the merchandise *per se*. Tropicana's bonded warehouse operations … are not literally, analogous to or *ejusdem generis* with "cleaned, sorted, repacked," and therefore are not within the scope of "otherwise changed in condition."

…

Conclusion

Based on the record before the court, the particular language and evident purpose of § 1562, Tropicana's 17.3° Brix value product was "manufactured" in its Class 8 Customs bonded warehouse for purposes of § 1562, whether or not "substantially transformed" for purposes of country of origin marking, drawback, *GSP* and other unrelated statutory provisions. The imported merchandise was, therefore, properly assessed with duties at the rate of 35 cents per gallon as concentrated juices….

VII. JANUARY 2016 CBP SECURITY GUIDELINES FOR BONDED FACILITIES

In January 2016, CBP issued Guidelines to enhance the physical security of bonded facilities.[47] They reflect the post-9/11 paradigm shift (discussed in a separate Chapter) concerning the central role of CBP and thrust of Customs Law. The objective of the Guidelines is to:

> To provide bonded facility proprietors with guidelines to ensure security of cargo handling facilities and cargos from point of receipt to shipping. It is incumbent upon bonded facility proprietors to develop and implement a sound security plan to demonstrate compliance with security criteria as identified by CBP. "Bonded facilities" as defined in this Guideline are facilities that are used to store and stage international cargo, both bonded and non-bonded cargo, and domestic cargo for export. [They include FTZs.]

The Guidelines incorporate security criteria and best practices set out in *C-TPAT* (also discussed in a separate Chapter).

The Guidelines call for a written security plan applicable to any employee, visitor, vendor, or outside carrier engaged with a bonded warehouse or FTZ. Under the plan, "[c]argo handling and storage facilities must have physical barriers and deterrents that guard against unauthorized access." In addition, the plan should include:

> **Alarm Systems and/or Video Surveillance Cameras**
> Alarm systems and video surveillance cameras should be utilized to monitor premises and prevent unauthorized access to cargo handling and storage areas. Retrieval of recorded activities should be maintained for a reasonable period.
>
> **Building Structure**
> Buildings must be constructed of materials that resist unlawful entry and protect from outside intrusion. The integrity of structures must be maintained by periodic inspection and repair.
>
> **Facility Protection Systems**
> Facility protection systems, such as fire suppression and alarm systems, hazardous gas detection systems, and air scrubbers should be secured and monitored for unauthorized tampering or shut-down by an approved remote alarm company. The integrity of such monitored alarms should be periodically tested.
>
> **Yard Security**
> Perimeter fencing should enclose the area around cargo handling and storage facilities. In the event there is no perimeter fencing, procedural

[47] *See* CBP, BONDED WAREHOUSE MANUAL FOR CUSTOMS AND BORDER PROTECTION OFFICERS AND BONDED WAREHOUSE PROPRIETORS, Physical Security Guidelines for CBP Bonded Facilities, Appendix B, 20 January 2016, www.millerco.com/pdfdocuments/Physical Security Guidelines.pdf.

practices to secure the yard from unlawful entry and protection outside intrusion must be documented.

Gates and Gate Houses
Where there are gates through which vehicles and/or personnel enter or exit, they must be manned and/or monitored. The number of gates should be kept to the minimum necessary for proper access and safety.

Lighting
Adequate lighting must be provided inside and outside the facility including the following areas: entrances and exits, cargo handling and storage area, fence lines and parking areas.

Locking Devices and Key Controls
All external and internal windows, gates and fences must be secured with locking devices. Management or security personnel must control the issuance of all locks and keys.

Parking
Private passenger vehicles should be prohibited from parking in or adjacent to cargo handling and storage areas. Visitor parking should be separated from employee and container parking.

Manifesting Procedures
To help ensure the integrity of cargo, procedures must be in place to ensure that information received from business partners is reported accurately and timely.

Physical Access Controls
Access controls prevent unauthorized entry to a facility, maintain control of employees and visitors, and protect company assets. Access controls must include the positive identification of all employees, visitors and vendors at all points of entry. Bonded facility proprietors must establish secured waiting areas where drivers can be identified and allowed limited access for confirmed pickups and deliveries.

Shipping and Receiving
Arriving cargo must be reconciled against information on the cargo manifest. The cargo must be accurately described, and the weights, labels, marks and piece count indicated and verified. Departing cargo must be verified against purchase or delivery orders. Drivers delivering or receiving cargo must be positively identified before cargo is received or released.

Conveyance Security
The following elements outline a sound conveyance security process:

> Procedures for the inspection of conveyance (trailers and containers) prior to loading with the awareness that no hidden compartments could conceal contraband;
> Procedures for the inspection of vehicles of conveyance prior to loading to ensure that un-manifested materials are not shipped;
> A process is in place for the refusal of vehicles of conveyance if they do not meet internal guidelines;
> A process is in place to prevent unauthorized persons from gaining access to empty conveyance vehicles on the site;
> A process is in place to prevent unauthorized persons from gaining access to conveyance vehicles which have been loaded and are ready for removal from the site;
> A process is in place for approving and certifying transporting materials;
> A process is in place for ensuring that only certified carriers have access to material from the site.

In addition, the security plan must should provide for employees of bonded warehouses and FTZs to receive regular security awareness training that covers the "threat posed by terrorists at each point in the supply chain," and guards against "internal conspiracies." Background checks, investigations, and pre-employment verifications should be part of the plan, too. Any non-company employee visiting a facility must present proper government issued photo identification, unauthorized persons must be challenged and removed, and IT security must be enhanced through frequent password changes and "appropriate disciplinary actions for abuse" by "system violators."

Consider the relationship between these Guidelines and other post-9/11 security initiatives, especially *C-TPAT* and *CSI*. The goal is to create a secure domestic and international supply chain for internationally traded merchandise. What are the specific vulnerabilities in this chain?

Chapter 5

FOREIGN TRADE ZONES[48]

I. Nature and Policy Goals

The *Foreign Trade Zones Act of 1934*, as amended, authorizes establishment of FTZs.[49] An FTZ is a special enclosed, secure (*i.e.*, restricted access) area within or adjacent to a U.S. port of entry.[50] For example, an FTZ may be at an industrial park or in a terminal warehouse facility. The policy goal they are supposed to advance is to attract and promote international trade, and thus boost economic activity in the U.S. yielding higher output and employment.

With certain exceptions, any foreign or domestic merchandise can be brought into a FTZ for a variety of purposes: (1) Assembly; (2) Breaking up; (3) Cleaning; (4) Distribution; (5) Destruction; (6) Exhibition; (7) Grading; (8) Further Manipulation or Processing; (9) Manufacturing; (10) Mixing with Foreign or Domestic Merchandise; (11) Repacking; (12) Sale; (13) Sorting; (14) Storage; and (15) Testing. In 1970 the U.S. Court of Appeals in *Armco Steel Corp. v. Stans*, validated the use of FTZs for manufacturing to avoid customs duties.[51] Foreign merchandise may be brought into an FTZ from overseas or from a bonded warehouse (though if it is transferred from a bonded warehouse, it must be re-exported, destroyed, or stored permanently in the FTZ, and cannot be imported into the U.S. customs territory). It may remain in the FTZ for an unlimited period. There is no deadline for importing foreign merchandise in an FTZ into U.S. customs territory, or for re-exporting or destroying the merchandise.

- **Success of FTZs**

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48 Documents References:
(1) *Havana (ITO) Charter* Articles 33, 35-37
(2) GATT Articles V, VIII, IX:6
(3) WTO *Agreement on Rules of Origin*

49 *See* 19 U.S.C. §§ 81a-81u.
In December 2021 the ITC was requested to provide a comprehensive analysis of FTZs. The ITC did so, in April 2023, issuing a 361-page document (including 201 tables, 27 figures, and 9 box insets). Overall, this *Report* was a positive chronicle of employment, investment, and growth of the Zones, and provided the first-ever comparison of U.S. with Canadian and Mexican Zone-like programs, plus assessed Duty Deferral under *USMCA*. *See* U.S. International Trade Commission, *Foreign Trade Zones (FTZs): Effects of FTZ Policies and Practices on U.S. Firms Operating in U.S. FTZs and under Similar Programs in Canada and Mexico*, Publication Number 5423, Investigation Number 332-588 (April 2023), https://usitc.gov/publications/332/pub5423.pdf.

50 Several WTO Members have FTZ schemes. For an analysis of Jordan's FTZ's and whether they comport with the WTO *SCM Agreement*, see Bashar Malkawi, *From Proof of Concept to Scalable Policies: The Tale of Free Trade Zones and WTO*, 29 INTERNATIONAL TRADE LAW AND REGULATION issue 4, 181-195 (2023).

51 *See* 431 F.2d 779 (2d Cir. 1970).

Judging from the number of FTZs, it appears the aforementioned policy goals have been served. In 1970 there were seven general purpose FTZs and three sub-zones. By 1987, there were 138 general purpose FTZs, and 101 sub-zones. As of 2007, there were 250 general purpose FTZs and 450 sub-zones. And, as of 2012, over 2,400 American companies and 320,000 American workers were engaged in work in an FTZ. However, with respect to all of the aforementioned advantages, query what benefits exist from an FTZ for goods originating in a country with which the U.S. has an FTA?

- **Kansas City FTZ**

Notably, Kansas City is one of the largest zone operators in the country, with over 17.6 million square feet. Kansas City is a distributed zone, which includes several zones and sub-zones in the area. The Kansas City trade zone handles more volume than the FTZs of Chicago, Dallas, Denver, Minneapolis, and St. Louis. Among the companies with warehouses in the Kansas City FTZ are Bayer, Ford, Kawasaki, Midwest Quality Gloves, Pfizer, and Yulshin USA.

II. Supervision and Basic Requirements

Every officially designated U.S. port of entry is entitled to at least one FTZ. A corporation or political subdivision (*e.g.*, a state) may apply for permission to establish a "general purpose" FTZ or a "sub-zone." The application is reviewed by the Foreign Trade Zone Board, which consists of the Secretary of Commerce, who serves as the chairperson, and the Secretary of the Treasury. A general purpose FTZ allows more than one company to operate in the zone, whereas a sub-zone is used by an individual firm. Only a previous grantee of a general purpose FTZ can apply to establish a sub-zone. A sub-zone helps a firm that cannot take advantage of an existing general purpose FTZ because, for example, it cannot relocate its operations to the general purpose zone.

Thus, a general purpose FTZ must be within 60 miles or 90 minutes' drive of the CBP supervising office. There is no such limit on a sub-zone. Indeed, typically sub-zones are located in the private facility of the individual user firm. In general, the Foreign Trade Zones Board approves applications to establish a general FTZ or sub-zone so long as the intended operations are not detrimental to the public interest.[52] Unless local domestic industries or labor groups are sensitive to imports, an application is not controversial.

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[52] In February 2012, the International Trade Administration of the DOC issued the first revision of its FTZ regulations in over 20 years. The revisions cut by over 50% the regulatory burden on FTZ applicants and users. The revision simplified the process for (1) designating a new FTZ location for an individual company, and (2) manufacturers to follow to enjoy FTZ benefits. The key changes were:

(1) Harmonizing definition of "production" that includes substantial transformation and processing.
(2) Cutting the time to obtain relevant approvals from one year to four months.
(3) Limiting fines for an untimely annual report.
(4) Reducing the requirements for applying for an FTZ sub-zone.
(5) Providing guidance on grantee liability, public utility concerns, and uniform treatment.

The new regulations replaced in its entirety the prior version of 15 Code of Federal Regulations Part 400.

The CBP supervises the operation of FTZs. Specifically:

> CBP is responsible for activating foreign-trade zones, securing them, controlling dutiable merchandise moving in and out of them, protecting and collecting the revenue, assuring that there is no evasion or violation of U.S. laws and regulations governing imported and exported merchandise, and assuring that the zones program is free from terrorist activity.[53]

Technically every FTZ is outside the customs territory of the U.S. for purposes of customs entry procedures. So, foreign merchandise brought into a FTZ is not subject to a duty, quota, or formal entry procedure unless and until it is subsequently imported into the customs territory for domestic consumption. The fundamental legal advantage of an FTZ is foreign merchandise is brought into it without being subject to U.S. Customs Law. (The goods are subject to all other federal laws, *e.g.*, the *Food, Drug, and Cosmetic Act*.)

III. Privileged versus Non-Privileged Foreign Status

● Difference between "Privileged" and "Non-Privileged"

In respect of tariff treatment of foreign merchandise brought into an FTZ, CBP makes a critical threshold inquiry: is the merchandise "Privileged Foreign" or "Non-Privileged Foreign"? The status of merchandise as PF or NPF is relevant to its tariff treatment if and when it is subsequently imported into the U.S. The CBP renders a determination on the basis of an application filed by the importer of the merchandise. In general, only foreign merchandise that has not yet been manipulated or manufactured so as to effect a change in its HTS tariff classification is eligible for PF status. In contrast, foreign merchandise in an FTZ that already has been manipulated or manufactured, recovered waste, and merchandise that no longer can be identified as domestic merchandise are deemed to be NPF foreign merchandise.

The CBP appraises and classifies PF merchandise when merchandise enters an FTZ. Accordingly, the importer of PF merchandise pays a previously determined tariff

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It was unclear whether the extant policy of allowing FTZ users to import inputs subject to AD duties or CVDs, without paying those remedial duties unless and until they sell the finished merchandise into the U.S., would continue. A December 2010 DOC proposal to subject imported inputs to AD duties and CVDs met with the objection that levying such duties would constitute a *de facto* trade remedy without either (1) a full, fair legal proceeding or (2) ascertaining whether denial of duty-free status to the inputs was in the public interest. Would the streamlined regulations require an American manufacturer using an FTZ to get advanced approval before bringing goods into an FTZ that were subject to an AD or CVD?

Later in February 2012, the DOC cleared up the matter. Issuing a final rule, the DOC replied "no," *i.e.*, there would be no need to get advanced approval before bringing merchandise subject to an AD or CVD into an FTZ. The extant policy of allowing FTZ users to import and use subject merchandise without paying remedial duties, unless the user imports a finished product into the U.S. containing that merchandise as an input, would remain. *See* 77 Federal Register 12,112 (28 February 2012). The amount of merchandise subject to an AD or CVD order imported into an FTZ for use as an input into a finished product is small.

[53] UNITED STATES CUSTOMS AND BORDER PROTECTION, IMPORTING INTO THE UNITED STATES 152 (November 2006).

when bringing the merchandise into U.S. customs territory. The fact the merchandise may have been manipulated, even manufactured, in the FTZ does not alter the amount of the tariff for which the importer ultimately is liable, *i.e.*, any alteration or production of the PF merchandise with other foreign Privileged merchandise, or domestic merchandise, does not affect tariff liability.

Simply put, PF status means the rate of duty and tariff classification is frozen at the time, and based on the condition, of the merchandise when it is admitted to the FTZ. Subsequent work on the merchandise in the FTZ does not un-freeze the duty or classification, regardless of when the merchandise is withdrawn from the FTA and entered into the U.S. customs territory. (Domestic merchandise – other than wine, beer, distilled spirits, and a few other items – can be taken into an FTZ and combined with, or made part of, other articles. As long as the identity of the domestic merchandise is maintained in accordance with CBP regulations, it can be returned to U.S. customs territory free of duty.) Consequently, the dutiable value of a finished product that is processed in an FTZ is the value attributable to the foreign components that entered and were used in the FTZ, not the value added in the FTZ.

Conversely, NPF merchandise (*e.g.*, merchandise composed entirely of foreign NPF or domestic merchandise, or of a combination of PF and NPF merchandise) is appraised and classified by CBP when it is transferred out of an FTZ. Therefore, the tariff owed on NPF merchandise depends on its classification and valuation when it is imported into the U.S. customs territory, not when it enters an FTZ.

● **Tariff Minimization**

Ultimately, election of PF or NPF status is left to the importer. Typically, it makes the choice at the time of admitting goods into an FTZ. If the importer does not want PF status for foreign merchandise, then it will not file an application for this status with CBP when it brings the merchandise into an FTZ. The flexibility afforded the importer is significant because it means the importer can pay duty either on components and raw materials, or on a completed article. That is, the FTZ allows the importer to minimize its duty liability – an obvious goal of every importer. However, CBP may require certain commodities to be placed in PF status because of a trade remedy at issue, such as an AD duty or CVD.

Suppose an importer faces an "inverted tariff," which is common with respect to high technology merchandise. An inverted tariff occurs when the tariff applicable to components or raw materials is higher than the duty on a completed article. (This scenario is the opposite of tariff escalation, where the applicable duty rate rises with the degree of processing of the parts making up a finished product.) The importer can minimize its tariff liability by (1) bringing higher-duty foreign components into an FTZ, (2) not filing an application for PF status with the Customs Service, and (3) manufacturing or assembling the higher-duty components in the FTZ into a lower-duty product. In other words, to minimize tariff liability where there is tariff inversion, NPF status is desirable (to obtain the lower duty on the finished product manufactured in the FTZ); where there is tariff escalation, PF status is desirable (to lock-in the lower duty on the components brought into the FTZ).

There is another way in which an importer of foreign merchandise may save money by using an FTZ. When merchandise enters a FTZ, it may contain moisture, dirt, or broken contents. If the merchandise were imported directly into U.S. customs territory, then these imperfections might lead to a higher tariff bill – for example, because they increase the amount (in terms of weight or volume) of the shipment. While in an FTZ, drying, evaporation, cleaning, and so forth can occur. In addition, the ultimate purchaser of the merchandise may complain, and the importer might have to provide the buyer with replacement merchandise. In contrast, while in the FTZ, the importer can remove imperfections in its merchandise and, possibly, avoid such problems.

- **Other Advantages**

In addition to minimizing tariff liability, FTZs boast 4 further benefits. First (as indicated at the outset), they expedite and encourage foreign commerce. An importer (or foreign exporter) that plans to begin or expand operations in the U.S. might bring its merchandise into an FTZ and await the development of a favorable market in the country. By bringing the merchandise to the threshold of the American market, the importer ensures it can deliver the merchandise to buyers immediately, thereby avoiding the risk that buyers might cancel their purchase orders owing to shipping delays. (This same advantage exists for merchandise destined ultimately for a nearby country, say Canada or Mexico.) Moreover, FTZs encourage importers to market foreign merchandise.

Second, FTZs facilitate marketing. An importer may display merchandise within an FTZ for the benefit of interested buyers. Exhibiting merchandise within an FTZ for an unlimited time period, with no requirement of exportation or duty payment, is permitted. (The merchandise exhibited is held under a bond posted by the exhibit operator.) Retail trade is prohibited, but the importer may sell from stock in the FTZ in wholesale quantities.

Third, FTZs promote assembly and manufacturing operations in the U.S. In turn, American workers are employed in such operations. In fact, in 1996 Congress amended the *Foreign Trade Zones Act* (via the *Miscellaneous Trade and Technical Corrections Act*) to permit deferral of payment of duty on certain production equipment admitted into an FTZ.[54] (Technically, merchandise imported into an FTZ that is to be used therein, such as production equipment or construction materials, must be entered for consumption before it is taken into the FTZ. Accordingly, without the amendment, tariffs would be owed.) The tariff on imported production equipment and components installed in an FTZ is not due until the equipment and components are ready to be placed into use for production. Consequently, a manufacturer can assemble, install, and test the equipment and components before duties are owed – thus encouraging production in the FTZ.

Fourth, suppose a finished product is made for the American market from foreign and domestic components. Conducting assembly or manufacturing operations in an FTZ

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[54] *See* Public Law Number 104-295.

means there is no need to bear costs (*e.g.*, freight) and risks (*e.g.*, loss, damage, or delay, or political risk) of shipping domestic components to an overseas production facility.

Part Three

CUSTOMS CLASSIFICATION

Chapter 6

TARIFF SCHEDULES[55]

I. HS and HTSUS

HOUSE COMMITTEE ON WAYS AND MEANS, 111TH CONGRESS, 2ND SESSION, OVERVIEW AND COMPILATION OF U.S. TRADE STATUTES, PART I OF II, 1-4 (COMMITTEE PRINT, DECEMBER 2010)

Historical Background

The Harmonized Tariff Schedule of the United States (HTS [or, more precisely, the HTSUS[56]]) was enacted by Sub-Title B of title I of the *Omnibus Trade and Competitiveness Act of 1988* [Public Law Number 100-418, approved 23 August 1988] and became effective on January 1, 1989 [via Presidential Proclamation Number 5911, 19 November 1988]. The HTS replaced the Tariff Schedules of the United States (TSUS), enacted as Title I of the *Tariff Act of 1930* (19 U.S.C. 1202) by the *Tariff Classification Act of 1962* [Public Law 87-456, approved 24 May 1962]; the TSUS had been in effect since August 31, 1963. [For a pre-Uruguay Round discussion of the TSUS and HTS, see Peggy Chaplin, *An Introduction to the Harmonized System*, 12 NORTH CAROLINA JOURNAL OF INTERNATIONAL LAW & COMMERCIAL REGULATION 417 (1987).]

The HTS is based upon the internationally adopted Harmonized Commodity Description and Coding System (known as the Harmonized System or HS) of the Customs Cooperation Council [renamed in 1994 the WCO]. Incorporated into a multilateral convention effective as of January 1, 1988, the HS was derived from the earlier Customs Cooperation Council Nomenclature, which in turn was a new version of the older Brussels Tariff Nomenclature. The HS is a detailed nomenclature structure utilized by contracting parties as the basis for their tariff, statistical, and transport documentation programs.

The United States did not adopt either of the two previous nomenclatures, because it was a party to the Convention creating the Council, and because of the potential benefits from using a modern, widely adopted nomenclature, [and] became involved in the technical work to develop the HS. Section 608(c) of the *Trade Act of 1974* [Public Law Number 93-618, approved 3 January 1975] directed the U.S. International Trade Commission (ITC) to investigate the principles and concepts which should underlie such an international nomenclature and to participate fully in the Council's technical work on the HS. The ITC,

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[55] Documents References:
(1) *Havana (ITO) Charter* Articles 33, 35-37
(2) GATT Article VII
(3) *General Rules of Interpretation for the Harmonized Tariff Schedule (GRI)*
(4) *NAFTA* Chapter 5
(5) Relevant provisions in other FTAs

[56] The U.S. ITC maintains and publishes the HTS. *See, e.g.*, Harmonized Tariff Schedule, Basic Version, https://hts.usitc.gov/view/release?release=2022HTSABasic.

Customs and Border Protection [CBP, the successor to the Customs Service, renamed as such effective 1 March 2003] (which represents the United States at the Council), and other agencies were involved in this work through the mid- and late-1970s; in 1981, the President requested that the ITC prepare a draft conversion of the U.S. tariff into the nomenclature format of the HS, even as the international efforts to complete the nomenclature continued. The Commission's report and converted tariff were issued in June 1983. After considerable review and the receipt of comments from interested parties, Congress introduced legislation to repeal the TSUS and replace it with the HTS. Upon the enactment of the *Omnibus Trade and Competitiveness Act* on August 23, 1988, the United States joined over 75 other trading partners as a party to the HS Convention. As of June 2010, the HS Convention had 137 countries and the European Union as Contracting Parties, in addition to other non-parties applying the HS nomenclature. [As of October 2011, 206 countries or customs territories use the HS.]

Structure of the HTS

Under the HS Convention, the contracting parties are obliged to base their import and export schedules on the HS nomenclature, and the rates of duty are set by each contracting party. The HS is organized into 21 sections and 96 Chapters, with accompanying general interpretive rules [*i.e.*, the General Rules of Interpretation, or GRI] and legal notes. [In studying the HS, consider what status the GRI and legal notes have in a domestic legal setting, *e.g.*, U.S. courts.] Goods in trade are assigned in the system, in general, to categories beginning with crude and natural products and continue in further degrees of complexity through advanced manufactured goods. These product Headings are designated, at the broadest coverage level, with 4-digit numerical codes and are further subdivided into narrower categories assigned 2 additional digits. The contracting parties must employ all 4- and 6-digit provisions and all international rules and notes without deviation; they may also adopt still narrower subcategories and additional notes for national purposes, and they determine all rates of duty. [The 4-digit level is the "Tariff Heading" level, and the 6-digit level is the "Tariff Sub-Heading" level.] Thus, a common product description and numbering system to the 6-digit level of detail exists for all contracting parties, facilitating international trade in goods. Two final Chapters, 98 and 99, are reserved for national use (Chapter 77 is reserved for future international use).

The HTS therefore sets forth all the international nomenclature through the 6-digit level and, where needed, contains added subdivisions assigned 2 more digits, for a total of 8 at the tariff-rate line (legal) level. [Overall, there are roughly 10,700 lines in the HTS. The 8-digit level allows for finer distinctions among product sub-headings. However, many countries, especially developing ones and LDCs, do not use 8-digit categorization, often for reasons of a lack of legal capacity.] Two final (non-legal) digits are assigned as statistical reporting numbers [*e.g.*, for BOP data collection] where further statistical detail is needed (for a total of 10 digits to be listed on entries). Chapter 98 comprises special classification provisions (former TSUS Schedule 8), and Chapter 99 (former Appendix to the TSUS) contains temporary modifications pursuant to legislation or to Presidential action.

Each Section's Chapters contain numerous 4-digit headings (which may, when followed by 4 zeroes, serve as U.S duty rate lines) and 6- and 8-digit subheadings. Additional U.S. notes may appear after HS notes in a Chapter or Section. The General Notes to the HTS, which are provided before Chapter 1, contain definitions and rules on the scope of the pertinent provisions, additional requirements for classification purposes, and non-legal statistical notes. The Most of the General Headnotes of the former TSUS appear as General Notes to the HTS set forth before Chapter 1, along with notes covering more recent trade programs (and the non-legal statistical notes). The General Notes also set out the conditions for special tariff treatment under the various trade programs and free trade agreements. The HTS contains a table of table of contents, an index, footnotes, and other administrative material, which are provided for ease of reference and, along with the statistical reporting provisions, have no legal significance or effect.

Although cited under Title 19, U.S. Code section 1202, the HTS is not published as a part of the statutes and regulations of the United States but is instead subsumed in a document produced and updated regularly by the ITC, entitled "Harmonized Tariff Schedule of the United States: Annotated for Statistical Reporting Purposes." This arrangement is reflective of the diverse textual sources of the HTS, as well as to the need to amend it frequently. As discussed above, key elements of the HTS text are taken directly from the international nomenclature of the HS. Other substantive HTS provisions are legislated directly by Congress. The third source of HTS text is the President, whom Congress authorizes in its trade enactments to implement many HTS elements by proclamation and other appropriate means, subject to Congressional oversight. Such Congressional grant of authority to the President permits timely adjustment of the HTS in response to developments related to the trade measures and commitments of the United States.

The ITC has an important editorial, advisory and custodial role in the preparation of the HTS. Section 1207 of the 1988 *Omnibus Trade and Competitiveness Act* (19 U.S.C. 3007) charges the Commission with the responsibility of compiling, publishing "at appropriate intervals," and keeping up to date the HTS and any related materials. The document and subsequent updates include both the current legal text of the HTS and all statistical provisions adopted under section 484(f) of the *Tariff Act of 1930* (19 U.S.C. 1484(f)). It is presented as a looseleaf publication so that pages issued in supplements that modify the schedule's basic edition for any year edition may be inserted as replacements. Two or more supplements may appear between the publication of each basic edition. The current HTS and archive editions are made available online by the Commission at its website <www.usitc.gov>.

Sections 1205 and 1206 of the 1988 *Omnibus Trade and Competitiveness Act* authorize the President to proclaim technical modifications to the HTS, including changes needed to bring the HTS into conformity with proposed amendments to the HS. Section 1205 directs the Commission to keep the HTS under continuous review and to recommend appropriate modifications to the President as warranted to keep the HTS updated with technological changes and whenever amendments to the HS nomenclature are adopted by the Customs Cooperation Council [CCC, *i.e.*, the WCO]. [As of October 2023, the WCO extended its customary 5-year HTS review cycle to 6 years, with the subsequent round of internationally harmonized revisions implemented on 1 January 2028.[57] The WCO attributed the delay to the effects of the COVID-19 pandemic.] All recommended modifications must be consistent with the HS and with sound nomenclature principles, and must "ensure substantial rate neutrality." Under Section 1206, the President may proclaim the recommended modifications if he determines that they are in conformity with U.S. obligations under the HS Convention and are not counter to the national economic interest of the U.S. The modifications can be proclaimed only after the expiration of a 60-day period beginning when the President submits a report to the Committee on Ways and Means of the House and the Committee on Finance of the Senate enumerating the proposed modifications and the reasons for making them.

Unlike the TSUS, which applied exclusively to imported goods, the HTS can, for almost all goods, be used to document both imports and exports, with a small number of exceptions enumerated before Chapter 1, which require particular exports to be reported under Schedule B provisions. That Schedule, which prior to 1989 served as the means of reporting all exports, has been converted to the HS nomenclature structure. For certain goods that are significant U.S. exports, variations in the desired product description and detail compel the use of Schedule B reporting provisions that cannot be accommodated in the HTS under the international nomenclature structure.

[Under U.S. Customs Law, specifically the *Customs Modernization Act of 1993* (Public Law Number 103-182, 107 Stat. 2057 (8 December 1993), also called the "*Mod Act*", which was Title VI of the *North American Free Trade Implementation Act of 1993*, and which amended portions of the *Tariff Act of 1930*, specifically, 19 U.S.C. Sections 1508-1510), the importer of record (IOR) is liable for payment of tariffs.[58] The IOR is "the person who bears much of the responsibility for ensuring compliance with all applicable state, local, and federal laws when importing goods."[59] That person may be "the owner or purchaser of the products being imported into a destination country," but "can, in fact, be … a customs broker with the proper authorization," such as via Power of Attorney (POA) from the owner or purchaser.[60]]

[That liability concerns the "actual" tariff. There is a critical conceptual, and often practical, distinction between a bound tariff and an applied tariff. Does the HTS contain bound (ceiling) or actual (applied) rates? What document contains the bound rates to which WTO Members have agreed through multilateral trade negotiations? The answer is the HTS of a Member contains actual rates, whereas bound rates are found in the WTO

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[57] *See* World Customs Organization, *Successful Conclusion of the 72nd Session of the Harmonized System Committee* (12 October 2023), www.wcoomd.org/en/media/newsroom/2023/october/successful-conclusion-of-the-72nd-session-of-the-harmonized-system-committee.aspx.

[58] *See U.S. Customs and Border Protection, Recordkeeping Under the Mod Act,* https://web.archive.org/web/20170523234358/, and www.cbp.gov/trade/trade-community/outreach-programs/entry-summary/recordkeeping.

[59] Flash Global, *What is Importer of Record and Why is it Important In Effective Global Supply Chain Management?*, 26 October 2015, https://flashglobal.com/blog/importer-of-record-2/. [Hereinafter, Flash Global.]

[60] Flash Global.

Schedule of Concessions of that Member. Thus, the HTSUS – which is the HTS for the U.S. – contains duties applied by the U.S., whereas the ceiling rates agreed to by the U.S. are in its WTO Schedule.]

II. Reading Tariff Schedules

HOUSE COMMITTEE ON WAYS AND MEANS, 111TH CONGRESS, 2ND SESSION, *OVERVIEW AND COMPILATION OF U.S. TRADE STATUTES*, PART I OF II, 4-9, 12-15 (COMMITTEE PRINT, DECEMBER 2010)

The HTS, like its predecessor the TSUS, is presented in a tabular format containing 7 columns, each with a particular type of information. A sample page of the HTS is set forth [below]…. [As originally reprinted by the Ways and Means Committee, the Table erroneously omitted the columns found in the actual HTS. The Table reproduced here, taken from the HTS, includes the columns found therein.]

The first column, entitled "Heading/Subheading," sets forth the 4-, 6-, or 8-digit number assigned to the class of goods described to its right. It should be recalled that 8-digit-level provisions bear the only numerical codes at the legal level which are determined solely by the United States, because the 4- and 6-digit designators are part of the international convention.

The second column is labeled "Stat. Suffix," meaning statistical suffix. Wherever a tariff rate line is annotated to permit collection of trade data on narrower classes of merchandise, the provisions adopted administratively by an interagency committee under Section 484(f) of the *1930 Act* (19 U.S.C. 1484(f)) are given 2 more digits which must be included on the entry filed with Customs officials. Where no annotations exist, 2 additional zeroes are added to the 8-digit legal code applicable to the goods in question. The goods falling in all 10-digit statistical reporting numbers of a particular 8-digit legal provision receive the same duty treatment.

The third column, "Article Description," contains the detailed description of the goods falling within each tariff provision and statistical reporting number.

The fourth column, "Units of Quantity," sets forth the unit of measure in which the goods in question are to be reported for statistical purposes. These units are administratively determined under Section 484(f) of the *Tariff Act of 1930*. In many instances, the unit of quantity is also the basis for the assessment of the duty. For many categories of products, two or three different figures in different units must be reported (*e.g.*, for some textiles, weight and square meters; for some apparel, the number of garments, value, and weight), with the second unit of quantity frequently being the basis for administering a measure regulating imports, such as a quota. If an "X" appears in this column, only the value of the shipment must be reported.

The remaining columns appear under the common heading "Rates of Duty" and are designated as Column 1 (subdivided into "General" and "Special" Sub-columns) and

Column 2. These Columns contain the various rates of duty that apply to the goods of the pertinent legal provision, depending on the source of the goods and other criteria. Their application to goods originating in particular countries is discussed below under the heading “Applicable duty treatment.”

A rate of duty generally has one of three forms: *ad valorem*, specific, or compound. An *ad valorem* rate of duty is expressed in terms of a percentage to be assessed upon the customs value of the goods in question. A specific rate is expressed in terms of a stated amount payable on some quantity of the imported goods, such as 17 cents per kilogram. Compound duty rates combine both *ad valorem* and specific components (such as 5 percent *ad valorem* plus 17 cents per kilogram).

Chapter 98 comprises special classification provisions permitting, in specified circumstances, duty-free entry or partial duty-free entry of goods which would otherwise be subject to duty. The article descriptions in the provisions of this Chapter enunciate the circumstances in which goods are eligible for this duty treatment. Some of the goods eligible for such duty treatment include: articles re-imported after having been exported from the United States; goods subject to personal exemptions (such as those for returning U.S. residents); government importations; goods for religious, educational, scientific, or other qualifying institutions; samples; and articles admitted under bond.

Chapter 99 contains temporary modifications of the duty treatment of specified articles in the other Chapters. Additional duties and suspensions or reductions of duties enacted by Congress are included, as are temporary modifications (increases or decreases in duty rates) and import restrictions (quotas, import fees, and so forth) proclaimed by the President under trade agreements or pursuant to legislation. Separate Sub-Chapters contain temporary special duty treatment for certain goods of countries that have a free trade agreement with the United States. However, antidumping and countervailing duties imposed under the authority of the *Tariff Act of 1930*, as amended [to eliminate the unfair advantage of under-priced or illegally subsidized imports, respectively] are not included and are instead announced in the *Federal Register*.

Harmonized Tariff Schedule of the United States (2010) (Rev. 2)
Annotated for Statistical Reporting Purposes

Heading/ Subheading	Stat. Suffix	Article Description	Unit of Quantity	Rates of Duty		
				1		2
				General	Special	
		I. PRIMARY MATERIALS; PRODUCTS IN GRANULAR OR POWDER FORM				
7201		Pig iron and spiegeleisen in pigs, blocks or other primary forms:				
7201.10.00	00	Nonalloy pig iron containing by weight 0.5 percent or less of phosphorus…………	t………..	Free		$1.11/t
7201.20.00	00	Nonalloy pig iron containing by weight more than 0.5 percent of phosphorus……….	t………..	Free		$1.11/t
7201.50		Alloy pig iron; spiegeleisen:				
7201.50.30	00	Alloy pig iron…...	t………..	Free		$1.11/t
7201.50.60	00	Spiegeleisen…….	t………..	Free		0.5%
7202		Ferroalloys:				
7202.11		Ferromanganese:				
		Containing by weight more than 2 percent of				

		carbon:				
7202.11.10	00	Containing by weight more than 2 percent but not more than 4 percent of carbon……	kg…….. Mn kg	1.4%	Free (A, AU, BH, CA, CL, D, E, IL, J, JO, MX, OM, P, PE, SG)	6.5%
7202.11.50	00	Containing by weight more than 4 percent of carbon….....	kg…….... Mn kg	1.5%	Free (A+, AU, BH, CA, CL, D, E, IL, J, JO, MX, OM, P, PE, SG) 0.6% (MA)	10.5%
7202.19		Other:				
7202.19.10	00	Containing by weight not more than 1 percent of carbon………	kg…….. Mn kg	2.3%	Free (A, AU, BH, CA, CL, E, IL, J, JO, MA, MX, OM, P, PE, SG)	22%

7202.19.50	00	Containing by weight more than 1 percent but not more than 2 percent of carbon…...	Kg…….. Mn kg	1.4%	Free (A, AU, BH, CA, CL, E, IL, J, JO, MA, MX, OM, P, PE, SG	6.5%

[In April 2020, amidst the COVID-19 pandemic and monstrous decline in economic activity, the U.S. deferred for 90 days collection of applied MFN duties on merchandise entered for consumption, or withdrawn from a warehouse for consumption, between 1 March through 30 April 2020.[61] The deferral was a postponement, not a suspension of liability, for those duties. And, the deferral did not apply to trade remedies, that is, AD duties or CVDs, Section 201, 232, or 301 levies, or retaliation in WTO cases, such as the 2011 Airbus dispute (all discussed in separate Chapters). So, if the applied MFN rate were 10% on a shipment of merchandise, which also was subject to Section 301 Sino-American levy of 25%, for a total tariff bill of 35%, then only the 10% applied MFN rate was deferred. If a shipment contained mixed items but entered under one set of documents, with some merchandise subject to a trade remedy, and some not, then the entire shipment was ineligible for the deferral. Hence, the IOR needed to file two separate entry documents, one for each class of merchandise to defer tariffs on the non-remedy items. some subject to a trade The IOR still had to pay the 25% trade remedy on schedule.]

[The 90 days were measured from the date the IOR otherwise would have had to pay the duties. No interest or penalty was charged for deferring payment for those 90 days.

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61 *See* Department of Homeland Security, U.S. Customs and Border Protection, and Department of the Treasury, 19 CFR Part 24, USCBP-2020-0017, CBP Dec. 20-05, RIN 1515-AE54, *Temporary Postponement of the Time to Deposit Certain Estimated Duties, Taxes, and Fees During the National Emergency Concerning the Novel Coronavirus Disease (COVID-19) Outbreak* (19 April 2020), www.cbp.gov/sites/default/files/assets/documents/2020-Apr/Temporary-Postponement-of-Payment-Period%20for-DTF-20-4-2020-1.pdf [hereinafter, *COVID-19 Temporary Postponement Rule*]; Jenny Leonard & Derek Wallbank, *U.S. Delays Some Tariff Payments, Leaves China Levies in Place*, BLOOMBERG, 19 April 2020, www.bloomberg.com/news/articles/2020-04-20/u-s-temporarily-postpones-certain-tariff-payments-for-90-days-k97u2pd4?sref=7sxw9Sxl. The Treasury Department and CBP acted on jointly on 19 April pursuant to an Executive Order the President issued on 18 April. *See* The White House, *Executive Order on National Emergency Authority to Temporarily Extend Deadlines for Certain Estimated Payments*, 19 April 2020, www.whitehouse.gov/presidential-actions/executive-order-national-emergency-authority-temporarily-extend-deadlines-certain-estimated-payments/; U.S. Department of the Treasury, *Treasury and CBP Announce Deferment of Duties and Fees for Certain Importers During COVID-19 Response*, 19 April 2020, https://home.treasury.gov/news/press-releases/treasury-and-cbp-announce-deferment-of-duties-and-fees-for-certain-importers-during-covid-19-response.

Hypothetically, if the original due date was 1 April 2020, then the new date would be 29 June 2020.]

[The deferment was not automatic. Rather, and IOR had to demonstrate "significant financial hardship," which meant that the operation of the importer "[1] must be fully or partially suspended during March or April 2020 due to orders from a competent governmental authority limiting commerce, travel, or group meetings because of COVID-19, and [2] as a result of such suspension, the gross receipts of such importer for March 13-31, 2020 or April 2020 are less than 60 percent of the gross receipts for the comparable period in 2019."[62] CBP did not require importers to submit proof of their financial hardship. But, CBP expected them to maintain documentation so CBP could police potential abuses, namely, where an importer deferred payment but did not meet these criteria. In the event of a violation, CBP could impose penalties (which include monetary fines equalling the value of the merchandise and/or imprisonment) for making a false statement to the government. Generally, CBP requires IOR to maintain documentation for five years from the date of entry of merchandise in question.]

[Conceptually, the U.S. argued, particularly in the context of the Section 301 tariffs in the Sino-American Trade War (discussed in a separate Chapter) that remedial tariffs did not impose injure the U.S. economy. Yet, the 90-day deferral rule "mark[ed] an acknowledgment by the Trump Administration that import levies are a burden on US importers, which its top officials, including the President, had regularly dismissed."[63]]

Applicable Duty Treatment

Column 1 – General. – The rates of duty appearing in the "General" Sub-column of Column 1 of the HTS are imposed on products of countries that have been extended normal trade relations (NTR), which was previously called most-favored-nation (MFN) or non-discriminatory trade treatment, by the United States, unless such imports are claimed to be eligible for treatment under one of the preferential tariff schemes discussed below. The general duty rates are concessional and have been set through reductions of full statutory rates in negotiations with other countries, generally under the GATT and the WTO. [Though the GATT-WTO rounds have resulted in low actual and bound tariff rates in the HTSUS, with a simple average bound and applied MFN rate of 3.4% (as of 2018),[64] there is some variance, *i.e.*, there are tariff peaks. For example, on T&A items, "[t]he [applied MFN] duties on items such as ski jackets, baby garments, and tennis shoes can range from about 27% to more than 60%."[65]]

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62 *COVID-19 Temporary Postponement Rule*, page 11.

63 James Politi, *Trump Exempts Virus-Hit U.S. Businesses from Import Tariffs*, FINANCIAL TIMES, 19 April 2020, www.ft.com/content/94290e62-b4db-42fa-bf78-a40d7e8a860d?shareType=nongift.

64 *See* World Trade Organization, United States of America, Part A.1, Tariffs and Imports: Summary and Duty Ranges, www.wto.org/english/res_e/statis_e/daily_update_e/tariff_profiles/US_e.pdf.

65 *See* Jenny Leonard, *Trump Set to Announce Deferral for Some Tariff Payments*, BLOOMBERG, 31 March 2020, www.bloomberg.com/news/articles/2020-03-31/trump-set-to-announce-90-day-deferral-for-some-tariff-payments?sref=7sxw9Sxl.

Column 1 – Special. – General Note 3 to the HTS sets forth the special tariff treatment afforded to covered products of designated countries or under specified measures. These programs and the corresponding symbols by which they are indicated in the "Special" Sub-column, along with the appropriate rates of duty, are as follows:

…

Generalized System of Preferences (*GSP*)	……………	A, A*, or A+
United States-Australia Free Trade Agreement [*Australia FTA*]	……………	AU
Automotive Products Trade Act [of 1965, between the U.S. and Canada, Public Law Number 89-283, 19 U.S.C. Sections 2001 *et seq*.]	……………	B
United States-Bahrain Free Trade Agreement Implementation Act [*Bahrain FTA*]	……………	BH
Agreement on Trade in Civil Aircraft	……………	C
North American Free Trade Agreement [*NAFTA*]: Goods of Canada, under the terms of General Note 12 to this Schedule	……………	CA
Goods of Mexico, under the terms of General Note 12 to this Schedule	……………	MX
*United States-Chile Free Trade Agreemen*t [*Chile FTA*]	……………	CL
African Growth and Opportunity Act [*AGOA*]	……………	D
Caribbean Basin Economic Recovery Act [*CBERA*]	……………	E or E*
United States-Israel Free Trade Area [*Israel FTA*]	……………	IL
Andean Trade Preference Act [*ATPA*] or *Andean Trade Promotion and Drug Eradication Act* [*ATPDEA*]	……………	J, J*, or J+
United States-Jordan Free Trade Area Implementation Act [*Jordan FTA*]	……………	JO
Agreement on Trade in Pharmaceutical Products	……………	K

Dominican Republic-Central America-United States Free Trade Agreement Implementation Act [*CAFTA-DR*]	……………	P or P+
Uruguay Round Concessions on Intermediate Chemicals for Dyes	……………	L
United States-Caribbean Basin Trade Partnership Act [*CBI*]	……………	R
United States-Singapore Free Trade Agreement [*Singapore FTA*]	……………	SG
United States-Oman Free Trade Agreement Implementation Act [*Oman FTA*]	……………	OM
United States-Peru Trade Promotion Agreement Implementation Act [*Peru TPA*]	……………	PE

[For the three FTAs that entered into force in 2012, the designations are: "CO" for the *United States – Colombia FTA*, "KR" for *KORUS* pursuant to the *United States – Korea Free Trade Implementation Act*, and "PA" for the *United States – Panama Trade Promotion Agreement Implementation Act*. Also, "MA" refers to the *U.S.-Morocco FTA*.]

The presence of one or more of these symbols – Special Program Indicators (SPIs) – indicates the potential eligibility of the described articles under the respective program. In the case of the *GSP* [when in effect], a symbol followed by an asterisk indicates that, although the described articles are generally eligible for duty-free entry, such tariff treatment does not apply to products of the designated beneficiary countries specified in General Note 4(d). In the case of *CBERA* and the *ATPA*, the asterisk indicates that some of the described articles are ineligible for duty-free entry. [It is the duty of the importer to show eligibility for a conditional exemption from tariff liability based on one of these programs.] …

Column 2. **–** The Column 2 rates of duty apply to products of countries that have been denied NTR status by the United States (see General Note 3(b)) [*e.g.*, North Korea]; these rates are the full statutory rates, generally as originally enacted through the *Tariff Act of 1930* [*i.e.*, the highly restrictive Smoot-Hawley tariffs]. …

[Is Iran a Column 1 or 2 country? President Bill Clinton's *Executive Order* Number 13059 of 19 August 1997 confirmed that virtually all trade and investment with Iran by U.S. was banned. In March 2000, the Clinton Administration eased trade sanctions on Iran to allow imports of carpets and food products, including dried fruits, nuts, and caviar. Actual or prospective importers needed to know whether Iran was a Column 2 country. Sanctions were further eased by the Obama Administration following the November 2013 interim nuclear agreement.

Whether Iranian products get Column 1 or 2 treatment appeared (as of March 2007) to depend on which part of the U.S. government is asked. For CBP, Iran is a Column 1 country. Iran does not appear in General Note 3(b) to the HTS. Moreover, in a ruling on pistachios, CBP informed a California-based importer the applicable rate of duty is a Column 1 rate, namely, 0.9 cents per kilo for in-shell pistachios (HTS 0802.50.20), and 1.9 cents per kilo for shelled pistachios (HTS 0802.50.40).[66]

However, for the International Trade Administration (ITA) of the DOC, Iran is a Column 2 country. In a Sunset Review of an AD order on raw, in-shell pistachios from Iran, the DOC states the 2005 tariff rate for in-shell pistachios from Iran is the Column 2 duty. The DOC observes (in footnote 5 to Table I-4) that Column 2 rates "appl[y] to imports from a small number of countries that do not enjoy normal trade relations duty status, applicable to imports from Iran." The Column 2 rate is 5.5 cents per kilo. *See* United States International Trade Commission, Investigation No. 731-TA-287 (Review) (Publication No. 3824, December 2005.

What about Russia, which unlike Iran, is a WTO Member? Is its merchandise in tariffed under Column 1 or 2? Following its 24 February 2022 invasion of Ukraine, among the sanctions the U.S. imposed on Russia was denial of MFN treatment, effective 27 July 2022 via Presidential *Proclamation* 10420, *Proclamation on Increasing Duties on Certain Articles from the Russian Federation* (27 June 2022).[67] (As with the Iran sanctions, the Russia sanctions are discussed in separate Chapters.) Accordingly, effective 1 April 2023, pursuant to Presidential *Proclamation* 10523, *A Proclamation on Increasing Duties on Certain Articles from the Russian Federation* (24 February 2023),[68] the U.S. implemented 70% Column 2 duties on certain Russian-origin products, such as certain iron ores, chemicals, wire, and containers for compressed or liquefied gas, and wire.]

HTS General Notes and Duty Preferences

The HTS General Notes implement, among other things, the conditions of eligibility for preferential duty treatment for articles identified by one or more Special Program Indicators in Column 1 – Special. For tariff treatment under a Free Trade Agreement, the article generally must qualify as an "originating good" under the rules of origin that appear under the applicable HTS General Note. For tariff treatment pursuant to one of the U.S. unilateral preference programs, an article identified by a Special Program

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[66] *See* Letter from Robert B. Swierupski, Director, National Commodity Specialist Division, United States Customs and Border Protection to Mr. Ahmad Foroutan Zymex Industries, Inc., dated 19 December 2005, Index Number NY L88981, http://rulings.cbp.gov.

[67] www.whitehouse.gov/briefing-room/presidential-actions/2022/06/27/proclamation-on-increasing-duties-on-certain-articles-from-the-russian-federation/.

[68] www.whitehouse.gov/briefing-room/presidential-actions/2023/02/24/a-proclamation-on-increasing-duties-on-certain-articles-from-the-russian-federation/, 88 Federal Register number 41, 13277-13281 (2 March 2023), www.govinfo.gov/content/pkg/FR-2023-03-02/pdf/2023-04471.pdf; U.S. Customs and Border Protection, Cargo Systems Messaging Service, CSMS # 55688476 – UPDATE: Increased Column 2 Duties on Certain Articles from the Russian Federation, CSMS #55688476 (29 March 2023), https://content.govdelivery.com/bulletins/gd/USDHSCBP-351bd1c?wgt_ref=USDHSCBP_WIDGET_2.

Indicator must meet eligibility requirements set forth in the applicable General Note. These requirements may include, among others: production or manufacture such that the article is a "product of" the relevant country or countries; additional value based on costs or values of eligible materials and direct costs of processing; direct shipment of the article to the U.S. and other conditions.

…

HTS Chapter 98 Special Classification Duty Exemptions and Reductions

In principle, special classification and tariff treatment is available for any good, wherever classified in HTS Chapters 1-97, that also meets the terms of a Chapter 98 provision. An importer claims Chapter 98 tariff treatment by declaring classification of the imported merchandise in both a regular HTS provision and in Chapter 98. The various Chapter 98 provisions implement U.S. international obligations or legislative mandates by providing duty-free or reduced-duty treatment. Among the notable Chapter 98 items are:

American goods returned (HTS Subheading 9801.00.10) –

Products of the United States not advanced or improved abroad may be returned to the U.S. free of duty under HTS Sub-Heading 9801.00.10. The Courts have interpreted this provision to allow duty-free entry of American goods which had been exported for sorting, separating (*e.g.*, by grade, color, size, etc.), culling out, and discarding defective items and repackaging in certain containers, so long as the goods themselves were not advanced in value or improved in condition while abroad.

[Note that in a December 2021 decision, the CIT arguably narrowed the scope for returned goods claims under HTSUS 9801. The CIT held parts exported and offered for sale at car racing events in Canada were "professional books, implements, instruments, and tools of trade, occupation, or employment," and were not exported from the U.S. to Canada, for a professional purpose, hence they were not eligible for return to the U.S. under HTSUS 9801.00.8500. See *Porsche Motorsport North America, Inc. v. U.S.*, (Number 16-00182, Slip Opinion Number 21-176 (30 December 2021).[69]]

Goods previously imported, duty-paid (HTS Sub-Heading 9801.00.20) –

Articles previously imported may be returned for the account of the same person free of duty when exported under a lease or similar use agreement and returned to the U.S. without advancement in value or improvement in condition.

American goods repaired or altered abroad (HTS Sub-Heading 9802.00.40) –

HTS Sub-Heading 9802.00.40 provides that goods exported from the United States for repairs or alterations abroad are subject to duty upon their re-importation into the United States (at the duty rate applicable to the imported article) only upon the value of such repairs or alterations. The provision applies to processing such as restoration, renovation, adjustment, cleaning, correction of manufacturing defects, or similar treatment that

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69 *See* www.cit.uscourts.gov/sites/cit/files/21-176.pdf.

changes the condition of the exported article but does not change its essential character. The value of the repairs or processing for purposes of assessing duties is generally determined, in accordance with U.S. Note 3 to Sub-Chapter II of Chapter 98, by –

(1) the cost of the repairs or alterations to the importer; or
(2) if no charge is made, the value of the repairs or alterations, as set out in the customs entry.

However, if the Customs officer finds that the amount shown in the entry document is not reasonable, the value of the repairs or alterations will be determined in accordance with the valuation standards set out in section 402 of the *Tariff Act of 1930*, as amended [19 U.S.C. § 1401a.]

…

[What does "repair or alteration" mean, *i.e.*, when are operations performed overseas too significant to constitute "repair or alteration"? This issue was taken up by the Federal Circuit in *Pleasure-Way Industries, Inc. v. United States*.[70] HTS Sub-Heading 9802.00.50 allows for duty-free entry of merchandise exported from the U.S. to Canada or Mexico, for "repair or alteration" in Canada or Mexico, and then re-imported back to the U.S. Pleasure Way tested the limits of this term, and lost. It purchased "Daimler-Chrysler AG 'Sprinter' cargo vans in the U.S., then exported them to its manufacturing facility in Canada," where it converted them to motor homes.[71] The conversion "installing kitchen and bathroom fixtures, sewage tanks, water heaters, sleeping quarters, counter tops with propane burners, microwave ovens, wall-mounted televisions, refrigerators, porch lights, awnings, running boards, and exterior showers."[72] The Court agreed with CBP that these changes were far beyond "repair or alteration," turning one product (vans that entered Canada) into a different product (motor homes). The Court pointed to the value added in Canada, as Pleasure Way sold the motor homes "at a price significantly higher than – even double or triple – the market price for Sprinter vans," and highlighted that "[i]t marketed the motor homes as upscale leisure vehicles to be used for vacationing and recreation, while the Sprinter vans were marketed primarily as cargo vans, with the potential for other uses if they were modified by purchasers." With such extreme increases in value and changes in names, the Court said the motor homes imported into the U.S. were "commercially different goods from the exported Sprinter vans." So, CBP was right to levy a 2.5% duty. Given the value of the merchandise (over $100,000), that was significant).]

American components assembled abroad (HTS Sub-Heading 9802.00.80) –

Articles assembled abroad from American-made components may be exempt from duty on the value of such components when the assembled article is imported into the United States under HTS Sub-Heading 9802.00.80. This provision enables American manufacturers of relatively labor-intensive products to take advantage of low-cost labor and fiscal incentives in other countries [usually developing countries of LDCs] by

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70 *See* Number 2017-1190 (5 January 2018); Brian Flood*, Maker of Motor Homes Sees Tariff Appeal Crash*, Burn, 35 International Trade Reporter (BNA) 63 (11 January 2018). [Hereinafter, *Motor Homes*.]
71 *Motor Homes*.
72 *Motor Homes*.

exporting American parts for assembly in such countries and returning the assembled products to the United States, with partial exemption from U.S. duties. [*Maquiladora* plants along the U.S.-Mexico border are a prime example.]

Sub-Heading 9802.00.80 applies to articles assembled abroad in whole or in part of fabricated components, the product of the United States, which –

(1) were exported in condition ready for assembly without further fabrication;

(2) have not lost their physical identity in such articles by change in form, shape, or otherwise; and

(3) have not been advanced in value or improved in condition abroad except by being assembled and by operations incidental to the assembly process such as cleaning, lubricating, and painting.

The exported articles used in the imported goods must be fabricated U.S. components, *i.e.*, U.S.-manufactured articles ready for assembly in their exported condition, except for operations incidental to the assembly process. Integrated circuits, compressors, zippers, and pre-cut sections of a garment are examples of fabricated components, but uncut bolts of cloth, lumber, sheet metal, leather, and other materials exported in basic shapes and forms are not considered to be fabricated components for this purpose.

To be considered U.S. components, the exported articles do not necessarily need to be fabricated from articles or materials wholly produced in the United States. If a foreign article or material undergoes a manufacturing process in the United States that results in a "substantial transformation" into a new and different article [*i.e.*, having a distinctive name, character, or use], then the component that emerges may qualify as an exported product of the United States for purposes of Sub-Heading 9802.00.80.

The assembly operations performed abroad can involve any method used to join solid components together, such as welding, soldering, gluing, sewing, or fastening with nuts and bolts. Mixing, blending, or otherwise combining liquids, gases, chemicals, food ingredients, and amorphous solids with each other or with solid components is not regarded as "assembling" for purposes of Sub-Heading 9802.00.80. Special rules apply to certain goods receiving preferential benefits under the *African Growth and Opportunity Act*, the *Caribbean Basin Trade Partnership Act*, and the *Andean Trade Promotion and Drug Eradication Act* ….

The rate of duty that applies to the dutiable portion of an assembled article is the same rate that would apply to the imported article. The assembled article is also treated as being entirely of foreign origin for purposes of any import quota or similar restriction applicable to that class of merchandise, and for purposes of country-of-origin marking requirements. All requirements regarding labeling, radiation standards, flame retarding properties, etc., that apply to imported products apply equally to Subheading 9802.00.80 merchandise.

An article imported under Sub-Heading 9802.00.80 is treated as a foreign article for appraisement purposes. That is, the full appraised value of the article must first be determined under the usual appraisement provisions. The dutiable value, however, is determined by deducting the cost or value of the American-made fabricated components from the appraised value of the assembled merchandise entered under Sub-Heading 9802.00.80.

Personal (tourist) exemption –

Sub-Chapter IV of Chapter 98 of the HTS sets forth various personal exemptions for residents and non-residents that arrive in the United States from abroad. The relevant customs regulations are set forth at 19 CFR 148 *et seq*. In particular, HTS Sub-Heading 9804.00.65 provides that U.S. residents returning from a journey abroad may import up to $800 of articles free of duty, an increase from $400 made in the *Trade Act of 2002* [Public Law Number 107-210]. [A lower threshold applies to non-residents entering the U.S.] The articles must be for personal or household use and may include not more than 1 liter of alcoholic beverages, not more than 200 cigarettes, and not more than 100 cigars.

[The personal exemption presumes articles are carried by the returning U.S. citizen or resident. Goods imported separately go through the usual customs clearance process. The $800 exemption applies on a per person, per day basis. Hence, a family of three traveling together is entitled to a $2,400 exemption. Moreover, the tariff rate on the first $1,000 in excess of the exemption amount is a flat 10%. So, for instance, an individual bringing a rug from Turkey worth $1,100 would pay a tariff $70 (10% times the difference between $1,100 and $400). Finally, as any American who has returned from abroad knows, a declaration of the value of articles bought overseas and carried back is made electronically on a Customs Declaration Form with the cheerful heading "Welcome to the United States." Failure to make a truthful declaration can lead to civil and criminal penalties.

There also is a *de minimis* exception, technically called an "Administrative Exemption," for commercial shipments on a per person, per day basis. Section 321 of the *Tariff Act of 1930*, 19 U.S.C. Section 1321, says small dollar shipments are duty-free. The 2015 *TFTEA* raised the threshold under this Section from $200 to $800 per shipment. "Per shipment" means "one person on one day." Thanks to e-commerce and vendors like Amazon and eBay, the volume of these shipments has grown markedly, raising concerns about how to screen efficiently for *de minimis* packages, while ensuring the packages do not facilitate criminal behavior or undermine national security. One technique is "Unified Cargo Processing" (UCP), a pre-clearance program whereby customs agents from the importing and exporting country perform a single inspection at the port of discharge, such as a U.S. airport from which merchandise is sent to Mexico.

How are shipments treated, such as those fulfilled online by e-commerce businesses like Amazon and eBay, if they have not yet been sold to a final retail consumer whose identity is disclosed to CBP? In July 2020, CBP issued a ruling eligibility for informal duty-free entry by online fulfillment providers.[73] That ruling forbade such providers from invoking Section 321 for duty-free entry if they did not identify to CBP the U.S. owner or purchaser of the merchandise. In those cases, CBP treats the online fulfilment service provider itself as the consignee for the goods. Under the "one person on one day" rule, CBP then aggregates the value of all such shipments to this consignee. That is, the provider is the consignee (the "one person"), and cannot bring in more than $800 in total (on "one day"). Otherwise, Amazon, eBay, or other such providers could abuse the duty-free threshold, bringing in multiple packages each of which is less than $800, but none of which has yet been sold to a consumer, place them in a U.S.-based warehouse, and get duty-free treatment on all of them. Yet the total value of the many packages could be millions of dollars that, because of their structuring into small import bundles, escaped tariffs.

The e-commerce controversy worsened amidst the Sino-American Trade War (discussed in a separate Chapter). To avoid Section 301 tariffs applicable to Chinese-origin merchandise, producer-exporters sent shipments ordered online by U.S. buyers in *de minimis* allotments. In June 2023, Senators Bill Cassidy (Republican-Louisiana), J.D. Vance (Republican-Ohio), and Tammy Baldwin (Democrat-Wisconsin) co-sponsored legislation – *De Minimis Reciprocity Act of 2023* – to strip China and Russia of eligibility for the Section 321 exemption, but allow all other countries to "keep the exemption by adopting the $800 threshold for their own tariff-free imports."[74] Likewise, Senators Sherrod Brown (Democrat-Ohio) and Marco Rubio (Republican-Florida) introduced the *Import Security and Fairness Act* to amend the 1930 *Tariff Act*[75] Their proposal would exclude from Section 321 *de minimis* treatment any products from NMEs (including China), or from countries on the USTR's Section 301 Priority Watch List, plus mandate article description, HTSUS classification, country of origin, valuation, and shipper and importer disclosures on Section 321 entries, and authorize the Treasury Department to deny Section 321 treatment for merchandise imported by sanctioned persons. Would such legislation violate the GATT Article I:1 MFN obligation? If so, then would the Article XXI national security provision be the best defense?]

III. Duty Owed Calculation

[73] *See HQ H290219: Request for Internal Advice; Duty-Free Informal Entry of Shipments for Consignment and Resale, under 19 U.S.C. §1321(a)(2)(C)* (28 July 2020), https://rulings.cbp.gov/ruling/H290219; *CSMS #43534680 – Announcement of Administrative Ruling Related to Domestic Warehouses and Fulfillment Centers, U.S. Customs and Border Protection*, Cargo Systems Messaging Service, (31 July 2020) https://content.govdelivery.com/bulletins/gd/USDHSCBP-2984958?wgt_ref=USDHSCBP_WIDGET_2?utm_source=google&utm_medium=google&utm_term=(not%20provided)&utm_content=undefined&utm_campaign=(not%20set)&gclid=undefined&dclid=undefined&GAID=142787468.1538091034.

[74] Katherine Masters, *China E-Commerce Shipments Would Lose U.S. Tariff Exemption Under Proposed Law*, REUTERS, 14 June 2023, www.reuters.com/business/retail-consumer/china-e-commerce-shipments-would-lose-us-tariff-exemption-under-proposed-law-2023-06-14/. The text of the 12-page bill is S. ___, 118th Congress, 1st Session, https://subscriber.politicopro.com/f/?id=00000188-bc35-d5bd-a9ea-bcb7ee9d0000.

[75] *See* S. 2004, 118th Congress, 1st Session, www.congress.gov/bill/118th-congress/senate-bill/2004/text?s=2&r=1&q=%7B%22search%22%3A%5B%22Import+Security+and+Fairness+Act%22%5D%7D

- **Zero Sum Game**

Consider the following observation:

> In spite of significant progress in recent years and the dazzling success stories of open markets and free trade exemplified by Hong Kong and Singapore, the march toward worldwide free trade has had its stumbling blocks. Old habits die hard; protectionism dates back centuries and of course exists today. Customs administrations in many countries represent the first and last line of defense for those who would sacrifice the economic prosperity brought about by free trade for the apparent short-term gain of protecting uncompetitive industries.[76]

The existence of the HS and GRI restrict the degrees of freedom for Customs officials to behave in a protectionist manner. Of course, they do not address corruption, such as the payment of bribes to customs officials, though other legal regimes like the 1977 *FCPA* and 1998 OECD *Anti-Bribery Convention* do.

Still, Customs officials are charged with an innately protectionist duty: maximize tariff revenue. This duty leads to a two-step zero sum game between those officials and importers. To maximize tariff revenue, first, Customs officials seek to pick a product classification, within the HS bounds and following the GRI, which has associated with it the highest duty.[77] Importers have the exact opposite motivation. Second, Customs seek a valuation for imported merchandise that is as high as possible, because it is to that value that they apply an *ad valorem* duty. (If the tariff is a specific duty, then they would seek the highest possible volume.) Conversely, importers seek the lowest reasonable valuation.

So, as regards the payment of tariffs, there are two essential steps an importer undertakes with respect to imported merchandise: classification and valuation. Classification is the process whereby the article is placed in the correct HTS category. There are approximately 5,000 articles described by Headings (identified by 4 digits) or Sub-headings (identified by 6 digits) in the first 96 of the 98 Chapters of the HTS. A

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[76] MICHAEL H. LANE, CUSTOMS MODERNIZATION AND THE INTERNATIONAL TRADE SUPERHIGHWAY x (1998).

[77] For an entertaining and engaging analysis of the word "edible" in the HTSUS, see Ben Baumgartner, *Chewing It Over: Determining the Meaning of Edible in the Harmonized Tariff Schedule of the United States*, 64 KANSAS LAW REVIEW 293-323 (November 2015). This analysis underscores the importance of technical precision in classification decisions. For example, in *Chemtall, Inc. v. United States*, Number 2016-2380 (21 December 2017), the Federal Circuit disagreed with the importer, Chemtall, that its imports of acrylamido tertiary butyl sulfonic acid (which is used, *inter alia*, in water treatment) were an "amide" subject to 3.7% tariff. Siding with CBP's classification and consequent 6.5% duty, the Court said "amides, when precisely defined, are limited to having only hydrogen, alkyl, or aryl groups bonded to the nitrogen atom." However, AMPS had a sulfonic acid attached to its nitrogen atom. *See also* Brian Flood, *Chemicals Company Loses Bid for Lower Duties at Federal Circuit*, 35 International Trade Reporter (BNA) 17 (4 January 2017) (discussing this case).

particular tariff is associated with each Heading and Sub-Heading. Hence, classification is essential in order to determine the tariff applicable to the article.[78]

- **Formula**

Naturally, classification assumes familiarity with the HTS. That requirement is not as demanding as it seems, despite the size of the HTS. An importer engaged in trading particular merchandise ought to, and typically does, know all of the potentially relevant classifications for the merchandise. Moreover, the importer always has the option of utilizing the services of a customs broker for assistance in clearing shipments.

Valuation is the process of appraising the value of the article. In the case of *ad valorem* duty rates, the tariff is applied to this value. Thus, the process of establishing the duty owed is determined by the following simple arithmetic formula:

Duty Owed = [Tariff Applicable to Article Properly Classified]
x
[Value of Article]

The first term on the right-hand side of the equation is established by properly classifying the article in the HTS. That classification yields an *ad valorem*, specific, or hybrid duty. The second right-hand term is established by an appropriate valuation method, which in most cases, is the transaction value – in effect, the commercial invoice price.

IV. Liquidation of Entries

U.S. CUSTOMS AND BORDER PROTECTION, *IMPORTING INTO THE UNITED STATES, A GUIDE FOR COMMERCIAL EXPORTERS* 83-84 (NOVEMBER 2006)

CBP officers at the port of entry or other officials acting on behalf of the port director review selected classifications and valuations, as well as other required import information, for correctness or as a proper basis for appraisement, as well as for agreement of the submitted data with the merchandise actually imported. The entry summary and documentation may be accepted as submitted without any changes. In this situation, the entry is liquidated as entered. Liquidation is the point at which CBP's ascertainment of the

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78 Under certain circumstances, when CBP believes the initial classification was incorrect, CBP may reclassify goods. Suppose CBP reclassifies entries of merchandise: must the importer of record pay any additional tariff associated with that reclassification before appealing the reclassification? The answer is "no." An importer may not withhold payment, pending its appeal.

In *International Custom Products, Inc. v. United States* (Number 15-00960, *certiorari denied* 6 June 2016), the Supreme Court let stand two lower Court decisions upholding the "pay first, appeal later" CBP rule, *i.e.*, the rule essentially stating "pay the increased in tariff associated with the reclassification first, then challenge the reclassification decision." The importer, International Custom Products, Inc., said CBP wrongly reclassified its entries. The consequence was a 2,400% increase in the tariff owed by the importer. The importer unsuccessfully argued that because it could not afford such a shocking increase, the CBP rule denied its right to due process.

rate and amount of duty becomes final for most purposes. Liquidation is accomplished by posting a notice on a public bulletin board at the customhouse. …

CBP may determine that an entry cannot be liquidated as entered for one reason or another. For example, the tariff classification may not be correct or may not be acceptable because it is not consistent with established and uniform classification practice. If the change required by this determination results in a rate of duty more favorable to an importer, the entry is liquidated accordingly, and a refund is authorized for the applicable amount of the deposited estimated duties. On the other hand, a change may be necessary which imposes a higher rate of duty. For example, a claim for an exemption from duty under a free-rate provision or under a conditional exemption may be found to be insufficient for lack of the required supporting documentation. In this situation, the importer will be given an advance notice of the proposed duty rate increase and an opportunity to validate the claim for a free rate or more favorable rate of duty.

If the importer does not respond to the notice, or if the response is found to be without merit, entry is liquidated in accordance with the entry as corrected, and the importer is billed for the additional duty. …

V. Asking CBP and 2013-2014 *Lafidale* Case

An important practice tip is that "if in doubt, ask." CBP provides a wealth of information on request concerning the classification and valuation process. Moreover, it is possible to obtain an "advance ruling" from CBP, essentially by setting forth the relevant facts and asking how it would treat the matter in question. Taking these precautions is far better than running afoul of the law. Both civil and criminal penalties attach for false classification or valuation declarations.

For example, in the 2013 and 2014 CIT decisions in *United States v. Lafidale, Inc.*, an importer of wallets and handbags was grossly negligent, classifying 46 entries of these items as "wholly or mainly covered with paper."[79] In fact, their covering was plastic, not paper. Thus, as per U.S. Customs Law, "when gross negligence affects the assessment of duties,"[80] the importer was liable for a civil penalty of the lesser of (1) the domestic (as distinct from dutiable) value of the merchandise, or (2) four times the lawful duties that were denied to CBP.[81] In *Lafidale*, the domestic value of the entered merchandise was $753,929, and its misclassification caused CBP to lose $81,171.63 in revenue. The penalty

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[79] *See* Number 12-00397, Slip Opinion 14-3 (10 January 2014), Number 12-00397 (30 October 2013); Brian Flood, *U.S. Must Recalculate Civil Penalty For Misclassified Wallets, Handbags*, 30 International Trade Reporter (BNA) 1727 (7 November 2013).

[80] Brian Flood, *Court Affirms Customs Civil Penalty For Misclassified Wallets, Handbags*, 31 International Trade Reporter (BNA) (16 January 2014).

[81] "Dutiable value" is the price actually paid or payable for merchandise when sold for exportation to the U.S. In most cases, it is Transaction Value (discussed in a separate Chapter). "Domestic value" is the price at which the merchandise, or similar merchandise, is offered for sale at the time and place of appraisement. *See U.S. v. Pan Pacificnext Textile Group, Inc.*, 28 ITRD 1236. In *Lafidale*, the DOC wrongly assigned a penalty on the basis of the domestic value of the entries, $753,929, hence the CIT ordered a recalculation.

the importer had to pay was four times that lost revenue, or $324,687, which was the lesser of the two values. In criminal cases, sanctions include substantial fines and imprisonment.

VI. Protests

U.S. CUSTOMS AND BORDER PROTECTION, *IMPORTING INTO THE UNITED STATES, A GUIDE FOR COMMERCIAL EXPORTERS* 84 (NOVEMBER 2006)

After liquidation, an importer may still pursue, on CBP Form 19 (19 CFR 174), any claims for an adjustment or refund, for entries filed before 12-18-06, by filing a protest within 90 days after liquidation. The protest period has been extended to 180 days for entries filed on or after 12-18-06. In order to apply for a Headquarters ruling, a request for further review must be filed with the protest. The same Form 19 can be used for this purpose. If filed separately, application for further review must still be filed within 90 days of liquidation. However, if a ruling on the question has previously been issued in response to a request for a decision on a prospective transaction or a request for internal advice, further review will ordinarily be denied. If a protest is denied, an importer has the right to litigate the matter by filing a summons with the U.S. Court of International Trade within 180 days after denial of the protest. The rules of the court and other applicable statutes and precedents determine the course of customs litigation.

While CBP's ascertainment of dutiable status is final for most purposes at the time of liquidation, a liquidation is not final until any protest which has been filed against it has been decided. Similarly, the administrative decision issued on a protest is not final until any litigation filed against it has become final.

Entries must be liquidated within one year of the date of entry unless the liquidation needs to be extended for another one-year period not to exceed a total of four years from the date of entry. CBP will suspend liquidation of an entry when required by statute or court order. A suspension will remain in effect until the issue is resolved. Notifications of extensions and suspensions are given to importers, surety companies, and customs brokers who are parties to the transaction.

VII. Inputs, Finished Goods, and 2015 *Best Key* Case

Given that tariff classification involves a zero sum game, would an importer or exporter ever challenge a decision by CBP to classify merchandise in a lower tariff category? This question raises the area of Customs Law known as "protests," whereby an importer protests a decision by CBP. Protests are reasonably common, and almost invariably they are by an importer objecting to a CBP decision to classify merchandise of that importer in a higher, rather than lower, tariff category – resulting, of course, in that importer being liable for a higher, rather than lower, tariff bill.

But, the 2015 CIT case, *Best Key Textiles Co. Ltd. v. United States*, is an unusual instance in which the answer is "yes," *i.e.*, where the protest was not against a CPB decision to classify merchandise in a higher-tariff HTSUS product category, but rather a lower-tariff category.[82] Still, the game in Best Key was zero sum, but the exporter sought a higher tariff classification on articles, because they were inputs into finished merchandise that itself would have to be reclassified into a higher tariff category, resulting in an overall loss to the importer.

In particular, the Best Key Textiles, a Hong Kong exporter, shipped yarn and other goods made from this yarn to the U.S. The yarn contained titanium oxide blends. CBP ruled the yarn was made "of polyesters," with a duty rate of 8%, not "metallized yarn," with a 13.2% tariff. That classification meant Best Key could bring its yarn into America more cheaply, but it also resulted in a change in the classification of merchandise made from the yarn "of polyesters." Finished goods – garments Best Key made overseas – were put into a higher tariff category, thereby raising import duties on those goods, and damaging their sales in the U.S.

The CIT upheld the CBP classification. Best Key lost its appeal to the Federal Circuit, which said it lacked standing to bring the case. The CBP decision on the yarn benefited, rather than harmed, Best Key, and the relevant CIT jurisdictional statute, 28 U.S.C. Section 1581, does not give a company standing to challenge a benefit. An importer of the finished garments made by Best Key overseas would have standing to challenge the classification, because it (the importer) suffered from the higher duties. The Federal Circuit essentially told Best Key that if it had a problem with the CBP classification of finished goods using the yarn, then it should challenge directly the higher duties on those goods.

However, suppose an importer of the finished garments, including possibly Best Key in that position, protests the higher tariffs on those garments. Its remedy would be to recover the difference between the higher duties and the correct ones. CBP would not be compelled to reclassify the yarn.

VIII. Informed Compliance, Newcomers, and Suspects

As intimated, classification and valuation are – at least initially – the responsibility of the importer, not CBP. Indeed, allocating the responsibility in this manner reflects a policy known as "informed compliance." To be sure, there are instances in which CBP may question an importer's declarations in the entry documents filed by the importer. The importer will then be put to the test as to the classification, valuation, and possibly even the country of origin of the merchandise.

First, the importer may be a "newcomer," one unbeknownst to CBP. There is no track record of dealings between the customs officials at the local port of entry and this importer. Hence, there is no basis for trusting the importer's declaration.

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[82] *See Best Key Textiles Co. v. United States*, Federal Circuit Number 2015-1775 (15 August 2016); CIT Number 13-00367 (Slip Opinion 15-63, 18 June 2015); Brian Flood, *Yarn Maker Loses New Bid to Face Higher Duties*, 33 International Trade Reporter (BNA) 1177 (18 August 2016); Brian Flood, *Trade Court Throws Out Yarn Case, Denies Transfer to D.C. District Court*, 32 International Trade Reporter (BNA) 1152 (25 June 2015).

Second, the importer may fit a "profile" developed by CBP, possibly in cooperation with domestic and foreign law enforcement and intelligence agencies, of international traders whose merchandise should be checked. The profile may reflect the ongoing effort to interdict shipments of unlawful goods (namely, narcotics), combat illegal trans-shipments (*e.g.*, of textiles), and fight terrorism. Perhaps a particular importer is a rather suspicious character or company. Or, perhaps the importer may be bringing in goods from a suspicious country.

In either event, CBP is likely to question the importer's declarations. Your *E-Textbook* author ostensibly fit into the second category when he returned from Burma (Myanmar). That country, along with Laos and Thailand, lies in the infamous "Golden Triangle," from which a large percentage of certain drugs (*e.g.*, heroin) come. Carrying several bottles of pills reinforced the profile, even though they were filled with salubrious – and legal – herbs like gingko and ginseng. It took about half an hour to sort matters out (but thanks to a wonderful CBP Officer, who was intrigued by what your author taught and seemed interested in going to law school, all was good).

Chapter 7

CONCEPTUAL CLASSIFICATION CATEGORIES[83]

I. 2018 *Quaker Pet Group* Case, and Other Fun Cases

● Amusing Zero-Sum Games

President Harry S. Truman (1884-1972, President, 1945-1953) once quipped, "If you want a friend in Washington, get a dog." That quip, in turn, rests on the poetry of none other than George Gordon, Lord Byron (1788-1824), a leading Romantic, who in *Epitaph to a Dog* (1808) wrote:

> But the poor Dog, in life the firmest friend
> The first to welcome, foremost to defend....

True enough, and the CIT cited both Mr. Truman and Lord Byron in a 2018 customs classification case, *Quaker Pet Group, LLC v. United States*.[84] CBP hit five types of pet carriers with a 17.6% tariff, based on its classification in HTSUS 4202.92.30 of them as bags for travel and sports, and similar containers:

> Trunks, suitcases, vanity cases, attaché cases, briefcases, school satchels, spectacle cases, binocular cases, camera cases, musical instrument cases, gun cases, holsters and similar containers; traveling bags, insulated food or beverage bags, toiletry bags, knapsacks and backpacks, handbags, shopping bags, wallets, purses, map cases, cigarette cases, tobacco pouches, tool bags, sports bags, bottle cases, jewelry boxes, powder cases, cutlery cases and similar containers, of leather or of composition leather, of sheeting of plastics, of textile materials, of vulcanized fiber or of paperboard, or wholly or mainly covered with such materials or with paper: ...

Such bags are for clothing and personal effects, and CBP said pets are property.

The importer, Quaker Pet Group, countered that a pet is not a "personal effect." So, a pet carrier, which is a cloth and mesh carrying bag used to transport pets, should be classified in HTSUS 6307.90.98. That is a residual category for T&A articles ("Other made up articles, including dress patterns: ... Other: ... Other,"), with a corresponding applied MFN duty rate of 7%.

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83 Documents References:
(1) *Havana (ITO) Charter* Articles 33, 35-37
(2) GATT Article VII
(3) *General Rules of Interpretation for the Harmonized Tariff Schedule (GRI)*
(4) *NAFTA* 1.0 Chapter 5
(5) Relevant provisions in other FTAs

84 *See* Slip Opinion 18-9, Number 13-00393, 12 February 2018; Brian Flood, *Tariffs on Pet Carriers Are Too Husky, Trade Court Rules*, 35 International Trade Reporter (BNA) (15 February 2018).

The CIT disagreed with CBP. The Court explained that "[p]ets are not clothing, and thus whether pet carriers fall within 'travel, sport and similar bags' depends on whether pets are "personal effects." Relying on GRI Rule 1 and three dictionaries, the CIT held a "personal effect" is an inanimate object. Dogs are not inanimate. Said the Court: "Dogs and cats are not normally worn or carried on the person, nor are they similar inanimate objects," like keys and watches. And, relying on a 2005 Federal Circuit precedent, *Avenues In Leather, Inc. v. United States*,[85] which held "the common characteristic or unifying purpose of the goods in Heading 4202 consist[s] of organizing, storing, protecting, and carrying various items," the CIT said the obvious: "Pets are living beings, and thus not things or items." Hence, the 17.6% duty category is inapposite.

The CIT also rejected the CBP argument about inclusive language under Heading 4202. CBP said pet carriers transport not only pets, but also other objects, such as in the side pockets of the carriers. Not so, said the CIT, based the statutory construction principle of *ejusdem generis*, *i.e.*, if a general word is followed by a list of specifics, then that general word must be interpreted to include only items in the same class as the specifically listed ones. Citing *Avenues in Leather*,

> It is well settled that when a list of items is followed by a general word or phrase, the rule of *ejusdem generis* [citation omitted] is used to determine the scope of the general word or phrase. In classification cases, *ejusdem generis* requires that, for any imported merchandise to fall within the scope of the general term or phrase, the merchandise must possess the same essential characteristics or purposes that unite the listed exemplars preceding the general term or phrase. However, a classification under the *ejusdem generis* principle is inappropriate when an imported article has a specific and primary purpose that is inconsistent with that of the listed exemplars in a particular heading.

The CIT reasoned that notwithstanding its side pockets, which may be used to carry inanimate objects, the "primary purpose" of a pet carrier is to transport a pet. It also said it needed more facts to determine whether HTSUS 6307 was the right heading.

Here is the point: customs classification cases not only are zero sum games, with millions of dollars at stake, which pit CBP and its inclination to pick a category yielding the highest possible tariff revenue against the importer and its desire to slot its merchandise in the minimal MFN category. (As another example involving pets, in June 2023, CBP issued a ruling that revoked two of its prior rulings on flea drops. CBP decided topical flea drops are properly classified as insecticides under Heading 3808, with a 6.5% tariff, not as medicaments under Heading 3004, which affords duty-free treatment.[86] Why? Because flea

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85 *See* 423 F.3d 1326, 1332.

86 *See* 19 C.F.R. Part 77, U.S. Customs and Border Protection, *Revocation of Two Ruling Letters and Revocation of Treatment Relating to the Tariff Classification of Flea Drops*, 57 CUSTOMS BULLETIN AND DECISIONS number 22, 5-13 (7 June 2023), www.cbp.gov/sites/default/files/assets/documents/2023-Jun/Vol_57_No_22_complete.pdf.

drops are not a treatment for an affliction and are not principally used as a medicament. Many cats and dogs might beg to differ.) These cases also can be amusing. Of course, to enjoy their facts and reasoning, knowledge of key principles is essential.

- **Dictionaries Matter**

In studying these principles in this and subsequent Chapters, bear in mind that plain reading of HTSUS product classifications is essential. Often, cases turn on reading the words of the classification in a common-sense manner.

For example, in the 2024 *Trijicon, Inc. v. U.S.* case, the CIT held that tritium-powered gun sights are classified as "lamps" (thus properly tariffed at 6% under HTSUS 9405.50.40), not as "apparatus" (thus not qualifying for zero-tariff treatment under HTSUS 9022.29.80).[87] (Tritium is "a radioactive isotope of hydrogen that emits a beta radiation particle as it decays," and each of the 11 models of cylindrical iron sights or rectangular rifle scopes, called "Trigalights," had a "gaseous tritium light source," consisting of a sealed gas capsule, filled with tritium gas, the purpose of which was to aim the weapon more accurately in low-light environments.[88]) So, the competing product classifications were:[89]

> 9405: Lamps and lighting fittings including searchlights and spotlights and parts thereof, not elsewhere specified or included; illuminated signs, illuminated nameplates and the like, having a permanently fixed light source, and parts thereof not elsewhere specified or included:
> 9405.50: Non-electrical lamps and lighting fittings:
> 9405.50.40: Other

versus:

> 9022: Apparatus based on the use of X-Rays or of alpha, beta or gamma radiations, whether or not for medical, surgical, dental or veterinary uses, including radiography or radiotherapy apparatus, X-ray tubes and other X-ray generators, high tension generators, control panels and desks, screens, examination or treatment tables, chairs and the like; parts and accessories there of:
> Apparatus based on the use of alpha, beta or gamma radiations whether or not for medical, surgical, dental or veterinary uses, including radiography or radiotherapy apparatus:
> 9022.29: For other uses:
> 9022.29.80: Other

The Court observed:

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87 *See* Number 22-00040, Slip Opinion 24-18 (16 February 2024), www.cit.uscourts.gov/sites/cit/files/24-18.pdf . [Hereinafter, *Trijicon*.]

88 *Trijicon*, pages 3-4.

89 *See Trijicon*, pages 7-8.

> Based on the plain language of HTSUS 9405, the two tariff classifications are mutually exclusive. HTSUS 9405 covers "[l]amps and light fittings … not elsewhere specified or included …," so that if the subject imports are described by HTSUS 9022, they cannot be classified under HTSUS 9405.[90]

Why did the Court hold for CBP against the importer of subject merchandise?

The gun sights contained a "gaseous tritium light source" that glows for 5-12 years. The CIT reasoned that the "lamps" classification includes various devices for producing any source of light, whereas the "apparatus" classification specifically excludes searchlights and spotlights. Across its 22-page decision, the Court emphasized dictionary definitions and straightforward interpretations:

> … Classifying an imported good involves two steps: (1) determining the meaning of the relevant tariff provisions and (2) determining whether the product at issue falls within a particular tariff provision. *Gerson Co. v. United States*, 898 F.3d 1232, 1235 (Fed. Cir. 2018). The first step is a question of law; the second is a question of fact. … When there is no factual dispute as to the nature of the product [as in this case], the two-step analysis is "entirely … a question of law." *Id.* …
>
> The General Rules of Interpretation ("GRIs") provide the analytical framework for the court's classification of goods under the HTSUS. … The Court applies the GRIs in numerical order. … First and foremost, "for legal purposes, classification shall be determined according to the terms of the Headings and any [relevant] Section or Chapter Notes." GRI 1, HTSUS. "Absent contrary legislative intent, [Courts] construe HTSUS terms according to their common and commercial meanings, which [Courts] presume are the same." *Otter Prods., LLC v. United State*s, 834 F.3d 1369, 1375 (Fed. Cir. 2016). The Court may rely on its own understanding of the relevant terms and may consult dictionaries, encyclopedias, or other reliable authorities. *Kalle USA, Inc. v. United States*, 923 F.3d 991, 995 (Fed. Cir. 2019). …
>
> …
>
> In *Gerson*, the Federal Circuit explained that, in setting out definitions for apparatus, the term "is not free of ambiguity." 898 F.3d at 1236…. Here, while the parties present various definitions of "apparatus," they ultimately coalesce around two: "a set of materials or equipment for a particular use" or "a complex machine or device." … [citing *Apparatus*, *The Merriam-Webster Dictionary*, 11th ed., 2019 and 3rd ed., 1988.]
>
> …
>
> … [I]t is clear to the Court that the subject imports serve a particular or specific use or function. Namely, the subject imports provide illumination, in this case for the aiming points in firearm sights that Trijicon

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[90] *See Trijicon*, pages 7-8.

> manufactures. … While their insertion into various firearm sights occurs after importation, the purpose of the subject imports, as imported, is illumination, whether for firearm sights or for other products. Relatedly, the subject imports also meet the common definition of a device – that is, a thing made for a particular purpose. *Device*, *Merriam-Webster's Collegiate Dictionary* (11th ed. 2018). …
>
> The Court … concludes that the subject imports are not a set of materials for purposes of HTSUS 9022. "[W]ords grouped in a list should be given related meaning," *Third Nat. Bank v. Impac Ltd.*, 432 U.S. 312, 322 (1977), and the Court considers the provided examples when evaluating the definitions of apparatus referencing materials or equipment in this context. In particular, the Court notes that Plaintiff's proffered definition is "a set of materials *or equipment*." … While this is stated in the disjunctive, in the context of an apparatus of HTSUS 9022, it appears incongruous to read "materials" to include anything of matter, rather than referring to equipment or tools or instruments. … Equipment means a "set of articles or physical resources serving to equip" something and is also, circularly for these purposes, known as an "apparatus." *Equipment*, *Merriam-Webster's Collegiate Dictionary* (11th ed. 2018). Nevertheless, each individual component of the subject imports must also serve a particular function. While the subject imports each contain, at least, three components consisting of a glass capillary, phosphor coating, and tritium gas, … none of those constituent parts constitutes equipment, because no part, alone, serves a particular function. … [I]t is only in combination with the other constituent parts that they serve the intended function of providing illumination. Thus, the existence of the constituent parts is insufficient insofar as "apparatus" means "a collection of equipment." *Apparatus*, *Collins English Dictionary* (1st ed. 2016). …
>
> …
>
> It is clear from the definition of lamp and the description of the subject imports that the subject imports are readily classified as lamps. A lamp is "any of various devices for producing light." … [*citing* Lamp, *Webster's New World College Dictionary* (3rd ed. 1988)] It is undisputed that the subject imports produce illumination.[91]

Though this opinion is not written as clearly as it perhaps could have been, the logical flow essentially is this: start with the HTSUS categories in question (*e.g.*, 9022); (2) identify the key terms in those categories (*e.g.*, "apparatus); (3) define those key words using a respected lexicographic source (*e.g.*, *Merriam-Webster*, *Collins*); (4) appreciate the dictionary meaning of key HTSUS terms may need to be defined with reference to words not in the HTSUS, but per the dictionary definition (*e.g.*, equipment to understand "apparatus"); and (5) apply the HTSUS term, as defined lexicographically, to the facts of the subject merchandise.

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91 *See Trijicon*, pages 6, 12-15, 18.

II. Five General Categories

Conceptually, an article may be classified in the HTS in one of five different ways. That is, the HS – and, in turn, the HTS – relies on five kinds of provisions to classify merchandise:

(1) a general description;
(2) an *eo nomine* description (*i.e.*, a description according to the commonly used, or specific, name of the article);
(3) a description according to component material; or
(4) a description by actual or principle use (*i.e.*, a description that includes reference to how the article is used), which also could cover parts and accessories if the part or accessory is principally used as such.
(5) a basket provision (or "other" provision) that encompasses miscellaneous or otherwise unclassified objects (*i.e.*, a last-chance category).

These conceptual categories are implemented through the HS. Note that actual or principal use is country- and time-specific, for example, the use in the U.S. of an article at the time it is imported.

III. *Eo Nomine* Descriptions and 2013 *Wilton Industries* and 2014 *Roche Vitamins* Cases

What if two *eo nomine* descriptions seem correct? In November 2013, the Federal Circuit issued an interesting opinion involving a clash between two plausible *eo nomine* descriptions. The case, *Wilton Industries, Inc. v. United States*, concerned decorative paper punches imported from Taiwan.[92] Those hand-operated punches were used to make designs and shapes in paper.

The Court held in favor of the classification used by CBP under HTSUS Sub-Heading 8203.40.60, which covers "perforating punches and similar hand tools." The corresponding duty rate was 3.3%. The Court agreed with CBP that Heading 8203 had the correct *eo nomine* description.

The importer, Wilton Industries, unsuccessfully argued the correct *eo nomine* description was Sub-Heading 8441.10.00, "cutting machines," and explained Heading 8441 encompasses "cutting machines of all kinds," such as those used to make finished paper into an article like a bag, box, carton, or envelope. That Sub-Heading would yield duty-free treatment. Wilton thought CBP erred because the commercial meaning of a "perforating punch" is for a tool used to make holes in a heavy-duty material like metal, but not paper, so Heading 8203 was inapposite.

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92 *See* Number 2013-1028 (5 November 2013); Rossella Brevetti, *Appeals Court Backs Government In Classification of Paper Punchers*, 30 International Trade Reporter (BNA) 1765 (14 November 2013).

But, the Court said CBP was correct: 8203 gives an *eo nomine* description for all punches, including the ones at issue – hand operated ones that need not be set on a surface. Moreover, the commercial meaning of "punch" allows for paper to be the material in which a hole is made.

Roche Vitamins Inc. v. United States was an interesting dispute involving the fourth and fifth general classification typologies.[93] The CIT was called on to decide whether CBP improperly classified beta carotene in the HTSUS under the basket heading of a "food preparation," which carries a hybrid duty of 8.5% plus 28.8 cents per kilogram. Roche imported and marketed beta carotene, a nutritional supplement, as "BetaTab 20%," and sought categorization for it as a pro-vitamin, which carried duty-free treatment. Along with a high concentration of beta carotene, the product mixed antioxidants, corn starch, gelatin, and sucrose.

CBP classified BetaTab entries using the fifth methodology, arguing the merchandise was "food preparation," because it was suitable for general use. BetaTab could be used not only in vitamin tablets, but also as an additive to foods and beverages. Indeed, the gelatin and sucrose were stabilizers for preservation and transport, not ingredients that limited the use of BetaTab to tablets.

Roche looked to the fourth methodology, and said the duty-free "pro-vitamin" classification was correct. The product was for a specific use – a nutritional supplement in the form of a vitamin tablet or capsule – because it was highly processed.

Siding with Roche, in 2013 the CIT relied on the principal use of the merchandise. The Federal Circuit agreed. A "pro-vitamin" is a substance the body converts to a vitamin, and the body converts beta carotene to Vitamin A. BetaTab has a higher concentration of beta carotene than does merchandise used primarily for food coloring. Moreover, Roche specifically made BetaTab for use in high potency and antioxidant vitamins, and via marketing and channels of distribution, customers used it as a vitamin supplement. Thus, classification based on principal use was proper.

IV. Using Use in *Eo Nomine* Classifications and 2014 *GRK Canada* Case

Is consideration of the use of an article part of an *eo nomine* classification? The answer would seem to be "no," because the nature of an *eo nomine* classification is the specific name of an article, not its use. But, the Federal Circuit said "yes" in a controversial 2014 ruling in *GRK Canada, Ltd. v. United States*.[94]

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93 *See* Federal Circuit Number 2013-1568, 20 November 2014; Brian Flood, *Appeals Panel Affirms Classification, Duty-Free Entry for Provitamin Imports*, 31 International Trade Reporter (BNA) 2068 (27 November 2014), CIT Number 04-00175, Slip Opinion 13-73 (14 June 2013).

94 *See* Number 2013-1255, 4 August 2014; Rossella Brevetti, *Federal Circuit Faults Lower Court In Analysis of Tariff Classification*, 31 International Trade Reporter 1424 (7 August 2014).

Screws imported from Canada were the merchandise at issue, and the CIT decided for the classification preferred by GRK, resulting in a 6.2% duty. The screws could be used in wood, plus many man-made composite materials such as arborite, cement fiberboard, medium-density fiberboard, melamine, polyvinyl chloride board, plastics, and sheet metal. The HTSUS lacks a definition for two pertinent *eo nomine* Sub Headings: "self-tapping screws" (triggering a 6.2% tariff) and "other wood screws" (dutiable at 12.5%). So, GRK said the physical characteristics alone of the screws should be used to differentiate these terms.

CBP argued the materials in which the screws are used, not merely the physical characteristics of the screws, should be considered to interpret the *eo nomine* terms. "Other wood screws" was the best HTSUS product category, said CBP, and the duty rate should be 12.5%. The CIT rejected the CBP argument, saying the CBP conflated the "use" and "*eo nomine*" concepts. The CIT also rejected the precedent CBP cited, saying the earlier cases were of diminished value, because they were decided under the TSUS, the predecessor to the HTSUS.

Siding with the CBP, the Federal Circuit (on a 2-1 vote) vacated the decision and remanded the case to the CIT: when interpreting an *eo nomine* tariff classification, it may be necessary to consider the use to which an article is put. That is because:

> an *eo nomine* classification within [the] HTSUS must capture all forms of a named good, including improvements that do not change the essential character of the articles. [So,] HTSUS provisions must be defined distinctly enough to allow the classification of improved forms of goods – provided that such improvements are not fundamental changes. The use of goods may be an important aspect of the distinction of certain *eo nomine* provisions, in particular, where, as here, the name of the provisions refers directly to the use of subject articles.

Simply put, even for merchandise classified in an *eo nomine* provision of the HTSUS, "classification decisions may still require an analysis of the intended use of the products." The majority holding triggered a dissent saying examination of use when analyzing an *eo nomine* provision "erases the clear distinction" between the two concepts.

GRK asked the Federal Circuit for a review *en banc*, but the Court declined.[95] That rejection triggered three dissents. One of them (Judge Evan J. Wallach, formerly of the CIT) pointed the majority decision is incongruous with prior case law, "confuses what should be a pronounced distinction between *eo nomine* and use headings," and "upends a once-clear analytical framework and [thus] will breed confusion in future cases." Indeed it did. At issue was what role "use" should play (*e.g.*, "motor vehicles for the transport of goods") in a tariff classification that is based on *eo nomine* (*e.g.*, "padlocks and locks"), but which suggests a particular use ("self-tapping screws" and "other wood screws").

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[95] *See GRK Canada, Ltd. v. United States*, Number 2013-1255 (8 December 2014); Brian Flood, *Divided Federal Circuit Court Won't Rehear Case on Customs Classification of Screws*, 31 International Trade Reporter (BNA) 2131 (11 December 2014).

However, in a March 2018 decision, a three-judge panel of the Federal Circuit clarified that the use of a product is just one factor in tariff classification. The Court rejected CBP's argument that use should be the only factor, to the exclusion of the design characteristics of the screws, when classifying this merchandise. The gist of the Court's rational was "GRK's screws were hardened enough that they could be used not just on wood, but also on metals, plastics, and other materials."[96] In a key passage, the Court wrote:

> Despite the Government's recognition that the disputed terms are *eo nomine* provisions, it asks the Court to define the common and commercial meaning of "wood screw" and "self-tapping screw" based on what material the screw is intended to be anchored into. Thus, the Government argues that the use of GRK's screws controls our interpretation of the tariff provisions. In *GRK II* [761 F.3d 1353 (Fed. Cir., 2014), *reh'g denied*, 773 F.3d 1282 (Fed Cir. 2014) *(per curiam*) ("*GRK III*")], we instructed the Court of International Trade [which it did in *GRK IV*] to consider use of the screws in interpreting the HTSUS tariff provisions, but the Government now seeks to elevate use as the sole consideration. *We decline to do so*. Adopting the Government's position would all but abrogate the foundational tenet of tariff classification that *eo nomine provisions are distinct from use provisions and do not depend on either principal or actual use of the imported merchandise*.[97]

V. Tariff Schedule Gender Discrimination and 2010 *Totes* and 2013 *Rack Room* Cases

Regrettably, International Trade Law is not gender neutral. In December 2022, WTO Director General Dr. Ngozi Okonjo-Iweala reported:

> WTO economists find that tariffs are higher on female labor-intensive goods. Female labor-intensive services sectors face greater trade restrictiveness. Trade costs associated with the need for face-to-face interaction tend to be larger in sectors where women are overrepresented….[98]

Indeed, an unfortunate (but little-known) fact is that tariffs on goods in the HTS, garments sometimes are classified by gender or age. In U.S. Tariff Schedules, gender- and age-based classifications began at least as early as the 1951 Torquay Round *Protocol* to GATT (though they may well have existed for over 200 years). When such distinctions are made, frequently female garments carry higher duties than male garments, but the reverse also can occur. In 2009, U.S. customs authorities collected over $50 million more on basketball,

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96 *See GRK Canada, Ltd. v. United States*, Number 2016-2623 (20 March 2018) (hereinafter, *GRK V*); Brian Flood, *Screw Importer Nails Duty Appeal in Classification Case (1)*, International Trade Daily (BNA) (20 March 2018).

97 *GRK V*, 10-11. (Emphasis added.)

98 *Quoted in* World Trade Organization, *Trade and Gender Congress Opens with Call for Inclusive, Research-backed Path to Recovery*, 5 December 2022, www.wto.org/english/news_e/news22_e/women_05dec22_e.htm.

tennis, and other athletic shoes for women than for men. Such distinctions are not universal: by 2013, Canada, for example, had eliminated nearly all gender-based classifications and duty differentials in its Tariff Schedule.

The leading case in the area involved the Totes-Isotoner Corp., in which Totes made a Constitutional argument against a classification-by-gender paradigm as sex-based discrimination.[99] That argument has been unsuccessful.[100] In *Totes-Isotoner v. United States*, the Federal Circuit affirmed a decision by the CIT, rejecting a challenge brought by Totes under the Due Process Clause of the 5th Amendment to the Constitution.[101] The issue: do differential tariff rates based on gender violate the equal protection guarantee in this Clause? The Appeals Court, like the CIT, said Totes had failed to state a claim.

In the case, Totes argued the HTSUS facially discriminates on the basis of gender and age, denying all citizens equal protection under the laws. The HTSUS does so, urged Totes, because the tariff for men's seamed leather gloves is 14% *ad valorem*, but the duty on seamed leather gloves "for other persons," namely, women and children, is 12.6% duty. Totes said it was similarly situated with all persons importing merchandise classified in the HTSUS as seamed leather gloves, but received less favorable treatment because it imports men's seamed leather gloves. Totes sought a refund of customs duties.

The CIT held the HTSUS was not facially discriminatory. Totes had failed to state a claim in that it did not satisfy its burden to plead that the tariff schedule imposed a disproportionate burden on individuals based on their gender or age. Agreeing with that judgment, the Federal Circuit revised the reasoning of the CIT.

The Federal Circuit said disparate impact can be relevant to a finding of a purpose to discriminate. But, on matters of tariffs and taxation, the Appeals Court said, a plaintiff must do more than plead a disparate impact to establish a purpose to discriminate and thereby an equal protection violation:

> Absent a showing that Congress intended to discriminate against men in the tariff schedule, we cannot simply assume the existence of such an unusual purpose from the mere fact of disparate impact.[102]

In other words, disparate impact *ipso facto* is insufficient to establish illegal discrimination. In the area of customs duties, even more so than in the area of taxation, it is hazardous to infer a discriminatory purpose from a disparate impact.

The Federal Circuit ruled the HTSUS is not facially discriminatory. Consequently, to mount a successful equal protection challenge to the HTSUS, a plaintiff must allege facts sufficient to establish a governmental purpose to discriminate between men and women,

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[99] *See Totes-Isotoner Corporation v. United States*, 580 F. Supp. 2d 1371 (CIT 2008).
[100] *See, e.g.*, *Tommy Hilfiger U.S.A. Inc. v. United States*, CIT Number 13-00275 (complaint filed 12 August 2013).
[101] *See* 594 F.3d 1346 (Fed. Cir. 2010).
[102] *Totes-Isotoner Corp. v. United States*, 594 F.3d 1346, 1357 (Fed. Cir. 2010).

or between old and young. Totes viewed this burden as unreasonably high, as a plaintiff challenging a tariff or tax law would have to plead and prove actual government malice, despite manifest and admitted disparate impact.

Notably, both the CIT and Federal Circuit rejected the argument of the U.S. government that the Courts lacked jurisdiction to hear the case on the ground that the issue presented was a non-justiciable political question. Also notably, Circuit Judge Sharon Prost filed a concurring opinion. She explained her disagreement with the view of the majority that international trade law is an exception to equal protection jurisprudence.

Totes filed a writ of *certiorari* with the Supreme Court, urging consideration of whether a revenue statute (*i.e.*, the HTSUS) linking different tariff rates solely and explicitly to gender or age is facially discriminatory and thus violates the equal protection guarantee of the Due Process Clause. The government countered a disparate impact on male versus female imported glove consumers can be explained on grounds other than intent to discriminate. That is, HTSUS categories are not gender-based classifications, but distinctions among merchandise. Absent showing a Congressional intent to discrimination against men, or women, in the tariff schedule, no court should assume it from the mere fact of disparate impact. In July 2010, the Supreme Court denied review.[103]

In a subsequent action alleging Constitutional violations in the HTSUS on apparel and footwear, the plaintiff argued there is no legitimate governmental objective at stake to provide a rational basis for imposing different rates of customs duties based on age or gender, and that even if such an objective exists, differential tariff rates are not rationally related to achieving it.[104] In that case, the CIT again rejected a gender discrimination challenge arising out of America's tariff schedule. Rack Room (along with fellow plaintiff Forever 21 Inc.) alleged that unequal tariff treatment based on gender and age of certain apparel, footwear, and gloves were unconstitutional.

But, the CIT ruled Rack Room failed to show the government was motivated by an invidious intent to discriminate. Following *Totes*, the CIT held that to establish an Equal Protection Clause violation with respect to taxation or tariffs, more than disparate impact must be shown to prove the purpose of the government was to discriminate. Rack Room unsuccessfully argued the government has an infinite number of ways to impose tariffs, yet to select one based on gender or age shows a discriminatory intent. The CIT found that argument a *non sequitur*. It also was unmoved by the 1960 U.S. Tariff Classification Study that Rack Room submitted stating age and gender delineations in a tariff schedule are of "questionable" economic justification. The study was not evidence of discriminatory intent. Rack Room also claimed unsuccessfully the CIT holding conflicted with the 1993 Supreme Court decision in *Bray v. Alexandria Women's Health Clinic*, in which the Court said a "tax on wearing yarmulkes is a tax on Jews."[105]

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[103] *See Totes-Isotoner Corp. v. United States*, U.S. Number 09-1360, 4 October 2010 (denying writ of *certiorari*).

[104] *See Rack Room Shoes v. United States*, CIT, Con. Ct. Number 07-00404, Slip Opinion 12-18 (15 February 2012).

[105] 506 U.S. 263.

In June 2013, the Federal Circuit upheld the CIT ruling in *Rack Room*, thus dismissing claims by Rack Room that the HTSUS violated the Equal Protection provisions of the 5th Amendment Due Process Clause by discriminating on the basis of gender and age.[106] True, certain apparel Sub-Headings have breakdowns based on gender and age, with some classifications imposing higher tariffs on men's apparel, and some imposing higher tariffs on women's apparel. And, true, some footwear Sub-Headings trigger higher tariffs on shoes for youths than for adults. But, as the 2010 *Totes* precedent explains, HTSUS classifications are facially neutral. The words "men," "women," and "children" are merely product classifications identifying the intended gender or age of the users. Simply put, as the *Totes* Court put it, the HTSUS "distinguishes on the basis of products, not natural people."

The Federal Circuit reasoned the HTSUS Sub-Headings are facially neutral, any Equal Protection claim must meet the "disparate impact" test. That means Rack Room needed to show not only that the HTSUS Sub-Headings and consequent tariff levies (1) have a disparate impact for consumers based on age or gender, in that they have to pay more for merchandise of the same type, but also (2) Congress acted with a discriminatory intent in approving the Sub-Headings and duty rates. Rack Room could not prove the second prong. Moreover, the effort of Rack Room to suggest Congress could have used alternative classifications for apparel and shoes – ones based on function, materials, size, and weight, instead of gender and age – fell short. The mere presence of a non-discriminatory alternative is not evidence Congress acted with discriminatory intent. Unsurprisingly, in May 2014, the Supreme Court rejected review.[107]

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[106] *See Rack Room Shoes v. United States*, Federal Circuit Number 2012-1391 (12 June 2013). Rack Room filed a *writ of certiorari*, arguing (*inter alia*), circumstantial evidence should be sufficient in an Equal Protection Clause challenge to prove legislative intent to discriminate intent, as it is in a Commerce Clause challenge. *See Rack Room Shoes Inc. v. United States*, U.S. No. 13-690 (filed 4 December 2013). The Supreme Court denied the petition.

[107] *See Rack Room Shoes Inc. v. United States*, U.S. Number 13-0690, 19 May 2014 (denying writ of *certiorari*).

Chapter 8

GRI 1-2 AND THEIR APPLICATION[108]

I. GRI Overview

More specifically than the five conceptual classifications (discussed in an earlier Chapter), the HTS GRI are used to help place an article in the proper classification. The GRI are applied *in seriatim*. That is, they are used to classify an article of merchandise in succession in order of the Rules, with GRI 1 obviously being at the top of the hierarchy. Recourse to a subsequent Rule is made only if the existing Rule does not yield a classification. The WCO publishes Explanatory Notes that elaborate on the GRI. For example, there are ENs for Rule 3(b) that lay out factors important to determining "essential character." Under U.S. law, the ENs are helpful, even persuasive, guidance. Yet, they are not binding authority on CBP or American courts in making classification decisions.

II. GRI 1: Headings, Chapter Notes, and Section Notes

Rule 1 of the GRI states there are three types of provisions in the HTS that are legally binding, and thus that must be used for tariff classification: the terms of the Headings (*i.e.*, the 4-digit HTS categories), Chapter Notes, and Section Notes. Frequently, Chapter and Section Notes are pivotal to the classification of a good. In contrast, titles of Chapters, Sections, or Sub-Chapters are not legally binding, nor are the Table of Contents or the Alphabetical Index. For instance, Chapter 62 of the HTS is entitled "Articles of Apparel and Clothing Accessories, Not Knitted or Crocheted." This rubric is irrelevant with respect to classifying coats.

Holiday décor presents an interesting example. In 2009, CBP had to classify the Nativity Scene associated with Christmas. HTSUS Sub-Heading 9505.10 covers "Christmas festive articles," and is:

> "Festive, carnival, or other entertainment articles, including magic tricks and practical joke articles; parts and accessories thereof: Articles for Christmas festivities and parts and accessories thereof."

This Sub-Heading provides for duty-free treatment. But, the merchandise at issue was a shipment that included only the Three Magi (Wise Men), not Jesus, Mary, or Joseph.

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[108] Documents References:
- (1) *Havana (ITO) Charter* Articles 33, 35-37
- (2) GATT Article VII
- (3) *General Rules of Interpretation for the Harmonized Tariff Schedule (GRI)*
- (4) *NAFTA* 1.0 Chapter 5, *USMCA* (*NAFTA* 2.0) Chapters 4, 7
- (5) Relevant provisions in other FTAs

Initially, the National Import Specialists in the New York office of CBP decided to classify the Magi figurines as "Other Articles of Ceramic" under Heading 6913.[109]

However, there is a hierarchy among CBP rulings, just as there is among the GRI. A ruling of the Office of Regulations and Rulings of CBP in Washington, D.C., *i.e.*, Headquarters, can overrule a ruling of CBP in New York or other port office. Applying GRI 1, Headquarters decided the article fit within the Sub-Heading 9505.10, *i.e.*, the item was a festive article associated with Christmas. Why?

CBP Headquarters looked at the reference in the New Testament to the Magi, specifically, in Chapter 2, verses 1-12 of the *Gospel According to Matthew*. CBP also engaged in internet research about the Nativity Scene. Based on these two sources – the Bible and the internet – CBP decided the Magi are part of the Nativity Scene. In other words, the Holy Family need not be present to make the article a Nativity Scene – the Three Wise Men are enough.[110]

A different view might be that without Jesus, Mary, and Joseph, the article is not a Nativity Scene, and, therefore, not a Christmas festive article under HTSUS 9505.10. The Magi should be treated as a distinct item, such as a doll or figurine. After all, recall the oft-quoted adages: "without the Christ child there is no Christmas," and "Christ is the reason for the season." Moreover, the Latin root word of "nativity" is "*nativus*," which means to be born." In turn, a "Nativity" Scene" must include a birth. This view would rely on the Doctrine of the Entireties, which is GRI Rule 2(a), or the Essential Character Test, which is GRI Rule 3(b). (Both Rules are discussed below.) But, CBP Headquarters determined that GRI Rule 1 resolved the issue. Hence, there was no need to proceed to another Rule.

Notably, the case was about statistical accuracy, not revenue generation. That is because the classification Heading on which the New York Office of CBP settled (6913) and the Sub-Heading decided upon by Headquarters (9505.10) both provide duty-free treatment. In contrast, some of the highest applied MFN tariffs in the HTSUS are on T&A articles. That is why importers of Christmas merchandise typically try to avoid an apparel category, and argue for a classification as festive articles.[111]

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[109] *See* N.Y. A87160.

[110] *See* 42 CUSTOMS BULLETINS & DECISIONS 42, published as HQ H026515 (9 March 2009).

[111] For a Federal Circuit decision involving "festive articles," see *Rubies Costume Co. v. United States*, Number 2018-1305 (29 April 2019, affirming the CIT decision in *Rubies Costume Co. v. United States*, Number 13-00407, 31 October 2017); Brian Flood, *Santa Suit Importer Faces Tariff Nightmare Before Christmas*, 34 International Trade Reporter (BNA) 1451 (2 November 2017). Rubies Costume imported individual parts of Santa Claus suits, namely, gloves, jacket, pants, and toy sack, and argued the suits qualified for duty free treatment as "festive articles." CBP argued tariffs ranging from 17.6%-32% should be imposed on the components. The CIT essentially agreed with CBP (modestly modifying its classification of Santa's jacket). So, too, did the Federal Circuit, *i.e.*, the correct HTSUS classifications were apparel and apparel-related ones in 4209.92.30 (toy sack, 17.6%), 6103.43.15 (pants, 28.2%), 6110.30.30 (jacket, 32%), and 6116.93.94 (gloves, 10%).

Generally, CBP classifies a costume as a duty-free "festive article" under HTSUS Chapter 95 if it is flimsy and non-durable, because those features indicate the costume is to be used once on a festive occasion. But, if a costume is well-made, like normal clothing, and is comfortable, decent, and protective, then CBP classifies it as apparel, which is not duty-free. Awkwardly, Rubies Costume argued its traditional

III. GRI 1, *Eo Nomine* Provisions, and 2017 *Schlumberger* Case

***SCHLUMBERGER TECHNOLOGY CORPORATION, v. UNITED STATES*, 845 F.3d 1158 (FED. CIR. 2017)**

Wallach, Circuit Judge:

The instant appeal concerns the proper classification of bauxite proppants imported by Appellee Schlumberger Technology Corporation ("Schlumberger") in 2010. U.S. Customs & Border Protection ("Customs") classified the subject merchandise under Subheading 6909.19.50 of the Harmonized Tariff Schedule of the United States ("HTSUS"). Schlumberger appealed Customs's classification to the U.S. Court of International Trade ("CIT"). The CIT rejected Customs's classification and, instead,

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Christmas Santa Suits were not well-made, pointing out they were flammable, the fabric and lining felt like sandpaper and thus could irritate or scratch the skin, and were one-size-fits-all. CBP countered the jacket and pants were durable, and could be worn and cleaned multiple times. So, CBP said they were properly classified as "men's shirts and trousers." Likewise, CBP slotted the gloves as "knitted gloves," and the gift sack Santa carries as "containers such as sporting or shopping bags." CBP also pointed out the Santa Suits cost $100, hardly a low price that would indicate flimsiness or non-durability.

The CIT agreed with CBP's classification, and the Federal Circuit affirmed the CIT decision. In so doing, the Federal Circuit observed (at pages 6-7 of its decision):

> The classification of goods under the HTSUS requires a two-step process. First, the Court "determines the proper meaning of specific terms in the tariff provisions, which is a question of law that we review without deference." *Gerson [Co. v. United States]*, 898 F.3d [1232, 1235 (Fed. Cir. 2018)] at 1235. Second, the Court determines whether the subject merchandise falls within the description of such terms as properly construed, which is a question of fact that we review for clear error. *La Crosse Tech., Ltd. v. United States*, 723 F.3d 1353, 1358 (Fed. Cir. 2013) …
>
> …
>
> GRI [Rule 1] provides that 'classification shall be determined according to the terms of the Headings and any relative Section or Chapter Notes. "We apply GRI 1 as a substantive rule of interpretation, such that when an imported article is described in whole by a single classification Heading or Sub-Heading, then that single classification applies, and the succeeding GRIs are inoperative." *La Crosse Tech.*, 723 F.3d at 1358 (*quoting CamelBak Prods., LLC v. United States*, 649 F.3d 1361, 1364 (Fed. Cir. 2011)).

Applying (at pages 11-14) the *Gerson* and *La Crosse Tech* principles, along with the rule of *ejusdem generis* (with respect to Santa's jacket, which shares the essential characteristics of articles identified in HTSUS 6110], the Federal Circuit affirmed that Santa's suit consists of "articles of normal wearing apparel," and affirmed (at pages 15-16) the CIT's decision with respect to Santa's jacket, pants, and gloves, and also agreed with its classification of his toy sack.

What about Santa's beard, wig, hat, belt, and shoe covers? CBP agreed with Rubies Costumes classification that these accessories were festive articles under HTSUS 9505.90.60, so they entered the U.S. duty free.

entered summary judgment that the subject merchandise should enter under HTSUS 2606.00.00. …

Appellant, the United States ("Government"), appeals. ... We affirm the CIT.

Background

…

I. The Subject Merchandise

Schlumberger, an oil well services provider, … imported the subject bauxite proppants from the People's Republic of China…. Schlumberger used the subject merchandise in hydraulic fracturing services that it provided to customers in the United States. … The subject merchandise, when combined with other materials after importation, increased oil well productivity by preventing fractures in rock formations from closing. …

The subject bauxite proppants consisted of two models: "S580-2040 Ceramic Proppant[s]" ("2040 Proppants") and "S580-4070 Ceramic Proppant[s]" ("4070 Proppants"). … "S580" referred to the designation used by Schlumberger for bauxite proppants produced by a specific third-party supplier, … and "2040" and "4070" referred to the "size of sieves through which the proppants can fit,"…. Each model primarily consisted of "non-metallurgical bauxite," but the precise chemical composition of the merchandise is unknown because neither party retained a sample of the merchandise. … Each model measured less than a millimeter in diameter and possessed specific physical characteristics with associated values for crush resistance (*i.e.*, strength), specific density, roundness, and sphericity. …

The production of the subject merchandise involved the following steps. First, "[t]he raw materials of the subject proppants were milled or ground to a fine powder." … Second, the resulting powder underwent a granulation process in a pan granulator, which resulted in "larger sized particles from the milled particles." … Third, "the particles [were] sorted" to determine whether they met the required size specifications and, if so, the particles were dried. … Fourth, the particles that fell within the required size specifications were kiln fired. … Fifth, after firing, the particles were sorted anew to ensure that ninety percent of them fell within the required size specifications. … Finally, the particles that met the previous steps were packed in bulk in 3,200 pound bags and exported to the United States as the subject bauxite proppants. …

II. Procedural History

Customs classified the subject bauxite proppants under HTSUS 6909.19.50 at a duty rate of four percent *ad valorem*. … The subheading selected by Customs covers "Ceramic wares for laboratory, chemical, or other technical uses; ceramic troughs, tubs and similar receptacles of a kind used in agriculture; ceramic pots, jars and similar articles of a kind used for the conveyance or packing of goods: Other: Other." HTSUS 6909.19.50. Schlumberger contested the classification in separate protests, arguing that the subject merchandise should enter duty free under HTSUS 2606.00.0060 as "Aluminum ores and concentrates: Bauxite, calcined: Other." … Customs denied the protests, and Schlumberger appealed to the CIT. …

… [T]he CIT rejected Customs's classification and entered summary judgment that the subject bauxite proppants should enter under HTSUS 2606.00.00. … [T]he CIT reasoned that the applicable interpretive rules "preclude[d]" classifying the subject merchandise under HTSUS 6909.19.50 "because the proppants are not 'ceramic wares' within the intended meaning of that term as used in [H]eading 6909." … The CIT also found that the Government's "alternate classification" under Subheading 6914.90.80 "is incorrect because [H]eading 6914 . . . is confined to 'ceramic articles' rather than substances such as the proppants at issue." … Having found these provisions inapplicable, the CIT concluded that the subject merchandise should enter under HTSUS 2606.00.00 based on Heading 2606's terms, guidance provided in the notes accompanying HTSUS Chapter 26 and in other sources, and the undisputed material facts. …

Discussion

I. Standard of Review

…

The classification of merchandise involves a two-step inquiry. … We first ascertain the meaning of the terms within the relevant tariff provision and then determine whether the subject merchandise fits within those terms. … The first step presents a question of law that we review *de novo*, whereas the second involves an issue of fact that we review for clear error. … When, as here, no genuine dispute exists as to the nature of the subject merchandise, the two-step inquiry "collapses into a question of law [that] we review *de novo*." *LeMans [Corp. v. United States]*, 660 F.3d [1311] at 1315 [(Fed. Cir. 2011)] …

II. The CIT Properly Classified the Subject Merchandise

The Government contests the CIT's decision to classify the subject bauxite proppants under HTSUS 2606.00.00, arguing that the merchandise instead falls within the terms of HTSUS 6909.19.50 or, alternatively, HTSUS 6914.90.80. … The Government also contends that the subject merchandise does not meet the terms of HTSUS 2606.00.00. … [W]e address these arguments in turn.

A. Legal Framework

The HTSUS governs the classification of merchandise imported into the United States. *See Wilton Indus., Inc. v. United States*, 741 F.3d 1263, 1266 (Fed. Cir. 2013). The HTSUS "shall be considered to be statutory provisions of law for all purposes." 19 U.S.C. § 3004(c)(1). "The HTSUS scheme is organized by Headings, each of which has one or more Subheadings; the Headings set forth general categories of merchandise, and the Subheadings provide a more particularized segregation of the goods within each category." *Wilton Indus.*, 741 F.3d at 1266. "[T]he Headings and Subheadings … are enumerated in Chapters 1 through 99 of the HTSUS (each of which has its own Section and Chapter notes) …." *R.T. Foods, Inc. v. United States*, 757 F.3d 1349, 1353 (Fed. Cir. 2014) (footnote and citation omitted). The HTSUS "also contains the 'General Notes,' the 'General Rules of Interpretation' ('GRI'), the 'Additional [U.S.] Rules of Interpretation' ('ARI'), and various appendices for particular categories of goods." *Id*.

The GRI and the ARI govern the classification of goods within the HTSUS. *See Otter Prods. [LLC v. United States]*, 834 F.3d [1369] at 1375 [(Fed. Cir. 2016)]. The GRI apply in numerical order, meaning that subsequent rules are inapplicable if a preceding rule provides proper classification. … GRI 1 provides … that "classification shall be determined according to the terms of the [HTSUS] *Headings* and any relative Section or Chapter Notes…." … (Emphasis added.) Under GRI 1, "a court first construes the language of the Heading, and any Section or Chapter Notes in question, to determine whether the product at issue is classifiable under the Heading." *Orlando Food Corp. v. United States*, 140 F.3d 1437, 1440 (Fed. Cir. 1998). "[T]he possible headings are to be evaluated without reference to their subheadings, which cannot be used to expand the scope of their respective headings." *R.T. Foods*, 757 F.3d 1353…. "Absent contrary legislative intent, HTSUS terms are to be construed according to their common and commercial meanings, which are presumed to be the same." *Carl Zeiss, Inc. v. United States*, 195 F.3d 1375, 1379 (Fed. Cir. 1999) (citation omitted). "To discern the common meaning of a tariff term, we may consult dictionaries, scientific authorities, and other reliable information sources." *Kahrs Int'l, Inc. v. United States*, 713 F.3d 640, 644 (Fed. Cir. 2013)…

"After consulting the headings and relevant Section or Chapter notes" consistent with GRI 1, we may consider the Explanatory Notes ("EN") attendant to the relevant HTSUS headings. *Fuji Am. Corp. v. United States*, 519 F.3d 1355, 1357 (Fed. Cir. 2008) … The EN provide persuasive guidance and "are generally indicative of the proper interpretation," though they do not constitute binding authority. *Kahrs*, 713 F.3d at 645….

B. The Subject Merchandise Does Not Fall Within the Terms of Heading 6909 or 6914

According to the Government, the subject merchandise constitutes "ceramic wares" under Heading 6909 or, alternatively, "other ceramic articles" under Heading 6914. … The CIT disagreed. … We agree with the CIT.

We first must assess whether the subject Headings constitute *eo nomine* or use provisions because different rules and analysis will apply depending upon the heading type. *Compare Kahrs*, 713 F.3d at 645-46 (*eo nomine* analysis), *with Aromont USA, Inc. v. United States*, 671 F.3d 1310, 1312-16 (Fed. Cir. 2012) (principal use analysis). An *eo nomine* provision "describes an article by a specific name," whereas a use provision describes articles according to their principal or actual use. *Aromont*, 671 F.3d at 1312 … Heading 6909 covers "Ceramic wares for laboratory, chemical, or other technical uses; ceramic troughs, tubs and similar receptacles of a kind used in agriculture; ceramic pots, jars and similar articles of a kind used for the conveyance or packing of goods." Although Heading 6909 recites the use of ceramic products for certain purposes, the operative question here asks whether the subject merchandise constitutes a "ceramic ware" under the Heading's terms. As a result, we treat the Heading as *eo nomine. See Sigma-Tau*, 838 F.3d at 1278 (treating an HTSUS provision as *eo nomine*, despite the provision disclosing certain uses, when the interpretation centered on the terms describing an article by a specific name). Heading 6914, which recites "Other ceramic articles," is unquestionably *eo nomine* because it describes the articles it covers by name. *See Aromont*, 671 F.3d at 1312. Because the subject Headings are *eo nomine*, our analysis starts with their terms. *See R.T. Foods*, 757 F.3d at 1354.

Neither the HTSUS nor the applicable legislative history defines "ceramic wares" under Heading 6909 or "other ceramic articles" under Heading 6914. However, the Notes accompanying HTSUS Chapter 69 inform our construction of the subject Headings. Note 1 to HTSUS Chapter 69 explains that the Chapter's provisions, including Heading 6909 and Heading 6914, "appl[y] only to ceramic products which have been fired after shaping." HTSUS 69, Note 1. The Note does not define "shaping," so we look to the dictionary to understand its common meaning. *See Sigma-Tau*, 838 F.3d at 1279. The infinitive form of the verb "shape" means "to give a *particular* or proper form to by or as if by molding or modeling from an undifferentiated mass" or "to give *definite* or finished shape to …" *Shape*, Webster's (emphases added).

The Government contends that the granulation process provides the requisite shape to the subject merchandise. … The undisputed facts show that it does not. As the CIT observed,

> [w]hen the granules emerge from th[e] granulation process, they range so substantially in size that sieving is necessary to eliminate granules that do not fall within the desired size range. Even after the proppants are sieved so that 90% of the proppants fall within the desired size range, each of the two ranges characterizing the subject merchandise still permits 100% variation in size.

… The Government does not contest the CIT's observations. … Thus, because the subject merchandise's size varied to such a significant degree after the granulation process, the undisputed facts counsel against finding that the merchandise possessed the requisite definite shape following the granulation process. Possessing *some* shape does not equate to the *definite* shape required to enter under HTSUS Chapter 69, and a "desired form" cannot be any form at all since it would be impossible to shape something "as nearly as possible" to an indefinite standard.

The principle of *noscitur a sociis* confirms our conclusion that the subject bauxite proppants do not fall within the terms of either Heading 6909 or Heading 6914. That principle teaches "a word is known by the company it keeps," which "avoid[s] ascribing to one word a meaning so broad that it is inconsistent with its accompanying words." *Yates v. United States*, 135 S. Ct. 1074, 1085 … (2015) (internal quotation marks and citation omitted); *Bilski v. Kappos*, 561 U.S. 593, 604 … (2010) ("[A]n ambiguous term may be given more precise content by the neighboring words with which it is associated." …; *see also Jewelpak Corp. v. United States*, 297 F.3d 1326, 1331, 1337 (Fed. Cir. 2002) (affirming the use of *noscitur a sociis* to interpret an HTSUS provision). Heading 6909 covers "Ceramic wares for laboratory, chemical, or other technical uses; ceramic troughs, tubs and similar receptacles of a kind used in agriculture; ceramic pots, jars and similar articles of a kind used for the conveyance or packing of goods." The EN provide that Heading 6909 "covers a range of very varied articles," such as "crucibles and crucible lids," "mortars and pestles," "beakers," "containers with single or double walls," "[c]ontainers of the kinds used for the commercial transport or packing of goods," and "[t]roughs, tubs and similar containers of the type used in agriculture." EN 69.09. The listed "wares" and "articles" concern individual products with definite forms. *See id.*; *see also* EN 69, General (requiring products imported under HTSUS Chapter 69 to be "shaped as nearly as possible to the desired form"). As explained above, the subject merchandise does not possess a definite form. … Because the subject merchandise does not have a definite form, it cannot fall within that Heading's terms. …

The inclusion of "grinding apparatus and balls, etc., for grinding mills" in the EN accompanying Heading 6909 does not require a different conclusion. … The Government has not provided any evidence demonstrating that the subject bauxite proppants and "grinding apparatus and balls" vary in shape to a similar degree, such that the subject proppants similarly should fall within Heading 6909. …

Finally, an examination of the EN accompanying Heading 6914 yields the conclusion that the subject bauxite proppants do not fall within that Heading's terms. Heading 6914 covers "Other ceramic articles." The EN explain that Heading 6914 covers, *inter alia*, "[s]toves and other heating apparatus," "non-decorative flower pots," "fittings for doors, windows, etc.," "[l]etters, numbers, sign-plates and similar motifs for shop signs and shop windows," ceramic "[s]pring lever stoppers," "jars and containers for laboratories," and "other articles such as knife handles, school inkwells, humidifiers for radiators[,] and bird cage accessories." EN 69.14. The listed examples concern individual products shaped into definite forms. *See id.*; *see also* EN 69, General (requiring products imported under HTSUS Chapter 69 to be "shaped as nearly as possible to the desired form"). Unlike the examples provided in the EN, the subject proppants are bulk substances that lack a definite form. … Because the subject proppants do not possess the requisite definite form like the products listed in Heading 6914, they cannot fall within that Heading's terms. …

C. The Subject Merchandise Falls Within the Terms of Heading 2606

Having found the subject bauxite proppants outside the terms of Heading 6909 and Heading 6914, we next examine Heading 2606. The Government argues that the CIT erred by finding the subject merchandise classifiable under that Heading. … We disagree.

Heading 2606 covers "Aluminum ores and concentrates." The provision is *eo nomine* because it describes the merchandise it covers by name. *See Aromont*, 671 F.3d at 1312. Neither the HTSUS nor the applicable legislative history defines "aluminum ore" under Heading 2606. The notes accompanying HTSUS Chapter 26 inform our construction of the subject Heading, providing two criteria. First, Note 2 to HTSUS Chapter 26 explains that "the term 'ores' means minerals of mineralogical species actually used in the metallurgical industry for the extraction of" certain metals, "even if they are intended for non-metallurgical purposes." HTSUS 26, Note 2. Second, the Note states that HTSUS 2606 does not "include minerals which have been submitted to processes not normal to the metallurgical industry." *Id*.

The subject bauxite proppants meet each criterion. With respect to the first, the subject merchandise contains a mineral of a mineralogical species used in the metallurgical industry for the extraction of a particular metal. EN 26.06 provides that Heading 2606 "covers bauxite (hydrated aluminum oxide containing variable proportions of iron oxide, silica, etc.)." The parties agree that "[t]he subject proppants are produced from non-metallurgical grade bauxite," meaning that the subject proppants contain the requisite mineral of a mineralogical species. … Moreover, the undisputed facts demonstrate that the industry uses bauxite in the extraction of aluminum. …

The Government counters that the subject merchandise cannot meet the first criterion because Schlumberger used the subject merchandise "only for hydraulic fracturing" and not the extraction of a particular metal. … However, the Government overlooks a relevant passage of Note 2 to HTSUS Chapter 26, which explains that the Chapter covers ores "even if they are intended for non-metallurgical purposes," so long as the industry uses the ores for the extraction of metal. HTSUS 26, Note 2. As stated above, it is undisputed that the industry uses bauxite to extract aluminum. …

Because the subject bauxite proppants satisfy the first criterion articulated in Note 2 to HTSUS Chapter 26, we turn to the second to determine whether the subject merchandise underwent processes not normal to the metallurgical industry. Neither the HTSUS nor the applicable Section and Chapter notes provide guidance as to what constitutes a "normal" process in the metallurgical industry. However, the EN to Chapter 26 state that aluminum ore classifiable under Heading 2606 may undergo, *inter alia*, "crushing," "grinding," "screening," "agglomeration of powders … into grains, balls or briquettes," and "drying." EN 26, General. As stated above, the subject bauxite proppants underwent these very steps during the production process. … Thus, the CIT properly concluded that these processes "must be considered normal to the metallurgical industry and not the sort of processing that would cause exclusion from [C]hapter 26 by operation of [N]ote 2 to [C]hapter 26, HTSUS." …

…

Finally, the Government avers that the subject bauxite proppants do not fall within Heading 2606 because they are "finished manufactured products immediately usable upon importation" and "not a 'material' or naturally occurring 'substance.'" … According to the Government, Heading 2606 is limited to "primary materials which will be further processed after importation." …

The terms of Heading 2606 do not support the Government's argument. Under GRI 1, we must look to "the terms of the [HTSUS] Headings and any relative Section or Chapter Notes." As the CIT observed, "[n]othing in the terms of the Heading, the Section or Chapter Notes, or the relevant [EN] supports a conclusion that a product ready for the intended use in the condition as imported is outside the scope of the Heading." … That conclusion comports with the principle that "an *eo nomine* provision" like Heading 2606 "includes all forms of the named article." *Kahrs*, 713 F.3d at 646 (citation omitted). Thus, we decline the Government's invitation to imbue Heading 2606 with a meaning not supported by the Heading's text or the accompanying Section and Chapter Notes.

…

Affirmed

[For an amusing CIT case, which cites *Schlumberger*, see *Mondelez Global LLC v. United States*, Number 12-00076 (25 August 2017), Slip Opinion 17-92 (25 July 2017). Mondelez Global is a subsidiary of an Illinois-based food and beverage MNC, Mondelez International. The parent owned brand name goods like Chips Ahoy!, Halls, Oreo, Ritz, and Triscuit, plus Dentyne and Trident chewing gums. Mondelez Global argued ingredients in the chewing gum should be classified under HTSUS 3824 as "gum base" dutiable at 5%, not "food preparation" under HTSUS 2106 dutiable at 6.4%.

The CIT considered lexicographic sources for the meaning "food preparation," and said if an article has nutritional qualities, then it cannot be classified under a tariff heading that covers chemical products, such as "gum base." The Court also said if a product does not actually provide nutrition, then it has no nutritional value, in which instance it may be classified as a chemical product. Mondelez Global agreed the ingredients namely, calcium carbonate, hydrogenated oil, lecithin, and triacetin have nutritive value within presented to the body in a digestible form, suggesting they are "food preparation." But, Mondelez explained none of them is released into the body when a stick of gum is chewed. In other words, the chewing gum maker admitted its product has no nutritional value, to avoid being stuck with a 6.4% tariff.]

IV. GRI 1, *Eo Nomine* Provisions, and 2017 *Allstar* Case

ALLSTAR MARKETING GROUP, LLC, v. UNITED STATES, UNITED STATES COURT OF INTERNATIONAL TRADE, NUMBER 13-00395 (10 FEBRUARY 2017)

Barnett, Judge:

… Plaintiff Allstar Marketing Group, LLC ("Allstar" or "Plaintiff") contests the denial of protest number 2809-11-100237 challenging U.S. Customs and Border Protection's ("Customs") liquidation of the subject import, a polyester fleece knit article referred to as a "Snuggie®," under Sub-Heading 6114.30.30 of the Harmonized Tariff Schedule of the United States ("HTSUS"), as "Other garments, knitted or crocheted: Of man-made fibers: Other," dutiable at 14.9 percent *ad valorem.* … Plaintiff contends that Customs should have classified the subject imports under Sub-Heading 6301.40.00, HTSUS, as "Blankets," dutiable at 8.5 percent *ad valorem*, or alternatively, under Sub-Heading 6307.90.98, HTSUS, as "Other made up articles," dutiable at 7 percent *ad valorem.* … Defendant, United States, contends that Customs correctly classified the subject imports pursuant to Sub-Heading 6114.30.30. … Defendant agrees that if the Court finds the Snuggie® not classifiable as a garment or blanket, it should be classified under Heading 6307. …

… The sole issue before the Court is whether, as a matter of law, the Snuggie® should be classified under Heading 6114, 6301, or 6307. … The Court finds the subject import is properly classified as a blanket under Sub-Heading 6301.40.00.

Background

…

B. Facts Regarding the Subject Imports

Allstar is the importer of record of the subject merchandise. … "The subject merchandise consists of an adult-sized Snuggie®, designated by Allstar as Item [Numbers] 21065 [(serial number SN011106)] and 21495 [(serial number SN31106)]." [Plaintiff's Statement of Facts, ¶ 6.] …

…

To produce the Snuggie®, the factory cuts polyester fleece knit into rectangles and hems all four sides using a machine over-locked or "blanket" stitch. … Two holes are cut, and "tubes" of the same polyester fleece are sewn onto the holes. … Inspection reports taken for Plaintiff included the following measurements: "length, width, sleeve length, armhole, cuff, across back shoulder, [and] distance from armhole to edge." …

In addition to being the importer of record, Allstar markets and sells the Snuggie®. … Allstar markets the Snuggie® in television commercials, print media, and copy printed on the boxes in which the Snuggie® is sold. … Retail packaging and television advertising describe the Snuggie® as a blanket with sleeves. … The retail packaging states that the Snuggie® enables users to "Keep Hands Free," is made of "Super-Soft Fleece," is "Machine Washable," and is sized "One Size Fits All." … The retail packaging shows users wearing the Snuggie® on their front with their arms through the sleeves while reclining or seated on an airplane, couch, bed, and floor, and engaging in activities such as reading, writing, knitting, holding a remote control, using a laptop, holding a baby, and playing backgammon. … It also shows users wearing the Snuggie® outside, while seated, ostensibly cheering a sports team. …

The television commercial displays text informing viewers that the Snuggie® enables users to use their hands (for example, to read a book), is made of "[u]ltra-soft fleece," has "[o]versized sleeves," is "[o]ne size fits all," and will keep them "[w]arm from head to toe" "[a]nywhere you go," including the outdoors. … The commercial opens with a woman appearing frustrated with her blanket's apparent inability to provide satisfactory coverage, and shows her using a Snuggie® instead. … In addition to showing people wearing the Snuggie® while engaging in the same activities as depicted on the retail packaging, the commercial also shows a woman wearing the Snuggie® while standing and pouring coffee in her kitchen. …

The Snuggie® is sold in the "bedding, housewares, general merchandise, 'impulse buy,' or 'as-seen-on-TV' departments of retail stores," never in the wearing apparel department. …

II. Procedural History

…

Jurisdiction and Standard of Review

…

The Court reviews classification cases *de novo. See* 28 U.S.C. §§ 2640(a), 2643(b). While the Court accords deference to Customs classification rulings relative to their "'power to persuade,'" *United States v. Mead Corp.*, 533 U.S. 218, 235 … (2001) (quoting *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 … (1944)), it has "an independent responsibility to decide the legal issue of the proper meaning and scope of HTSUS terms," *Warner-Lambert Co. v. United States*, 407 F.3d 1207, 1209 (Fed. Cir. 2005) (citing *Rocknel Fastener, Inc. v. United States*, 267 F.3d 1354, 1358 (Fed. Cir. 2001)). It is "the Court's duty to find the correct result, by whatever procedure is best suited to the case at hand." *Jarvis Clark Co. v. United States*, 733 F.2d 873, 878 (Fed. Cir. 1984).

Discussion

The General Rules of Interpretation ("GRIs") provide the analytical framework for the Court's classification of goods. *See N. Am. Processing Co. v. United States*, 236 F.3d 695, 698 (Fed. Cir. 2001). "The HTSUS is designed so that most classification questions can be answered by GRI 1." *Telebrands Corp. v. United States*, … 865 F. Supp. 2d 1277, 1280 (2012), *aff'd* 522 Fed. App'x 915 (Fed. Cir. 2013). GRI 1 states that, "for legal purposes, classification shall be determined according to the terms of the Headings and any [relevant] section or chapter notes." GRI 1, HTSUS. The Court must consider Chapter and Section Notes of the HTSUS in resolving classification disputes because they are statutory law, not interpretive rules. *Arko Foods Intern., Inc. v. United States*, 654 F.3d 1361, 1364 (Fed. Cir. 2011) (citation omitted); *N. Am. Processing Co.*, 236 F.3d at 698.

"Absent contrary legislative intent, HTSUS terms are to be 'construed [according] to their common and popular meaning.'" *Baxter Healthcare Corp. v. United States*, 182 F.3d 1333, 1337 (Fed. Cir. 1999) (quoting *Marubeni Am. Corp. v. United States*, 35 F.3d 530, 533 (Fed. Cir. 1994)). Courts may rely upon their own understanding of terms or consult dictionaries, encyclopedias, scientific authorities, and other reliable information. *Brookside Veneers, Ltd. v. United States*, 847 F.2d 786, 789 (Fed. Cir. 1988); *BASF Corp. v. United States*, … 798 F. Supp. 2d 1353, 1357 (2011). For additional guidance on the scope and meaning of tariff Headings and Chapter and Section Notes, the Court also may consider the Explanatory Notes ("EN") to the Harmonized Commodity Description and Coding System, developed by the World Customs Organization. *See Deckers Outdoor Corp. v. United States*, 714 F.3d 1363, 1367 n. 1 (Fed. Cir. 2013). Although Explanatory Notes do not bind the Court's analysis, they are "indicative of proper interpretation" of the tariff schedule. *Lynteq, Inc. v. United States*, 976 F.2d 693, 699 (Fed. Cir. 1992) (quoting H.R. Rep. No. 100-576, at 549 (1988) (Conf. Rep.), *reprinted in* 1988 U.S.C.C.A.N. 1547, 1582)….

I. Tariff Headings at Issue

Customs liquidated the subject imports as garments pursuant to Sub-Heading 6114.30.30. The United States contends Customs correctly classified the subject imports. …This Sub-Heading covers:

6114 Other garments, knitted or crocheted:

6114.30	Of man-made fibers:
6114.30.30	Other:..14.9%

Allstar contends that the subject imports are not garments, but are blankets classifiable under Sub-Heading 6301.40.00. … This Sub-Heading covers:

6301 Blankets and traveling rugs:

6301.40:	Blankets (other than electric blankets) and traveling rugs, of synthetic fibers:
6301.40.00:	Other:..8.5%

If the Court finds that the Snuggie® is not a garment or a blanket, Parties agree that the Snuggie® is classifiable as an "other made up article." … The relevant basket provision covers:

6307 Other made up articles, including dress patterns:

6307.90:	Other:
6307.90.98	Other:...7.5%

II. Relationship Between the Competing Classifications

All of the asserted classifications fall within Section XI of the HTSUS, which covers "textiles and textile articles," and includes Chapters 50 to 63 of the HTSUS. Chapter 61 (which covers "articles of apparel and clothing accessories, knitted or crocheted") and Chapter 63 (which covers, *inter alia*, "other made up textile articles") apply only to "made up" articles. Note 1 to Chapter 61; Note 1 to Chapter 63. Note 7(e) to Section XI defines "made up" as, *inter alia*, an item "[a]ssembled by sewing, gumming or otherwise." Parties do not dispute that the Snuggie® is assembled by sewing. … Thus, the Snuggie® is a made up article.

Note 2(a) to Chapter 63 states that subchapter 1 to Chapter 63, which includes Headings 6301 to 6307, does not cover "[g]oods of chapters 56-62." Parties agree that if the Snuggie® is properly classified as a garment pursuant to Heading 6114, it is not classifiable as a blanket or other textile pursuant to Headings 6301 and 6307. …

Accordingly, the Court first addresses whether the Snuggie® is classifiable as a garment under Sub-Heading 6114.30.30.

III. The Snuggie® is Not Classifiable under Sub-Heading 6114.30.30

The GRIs govern the proper classification of merchandise and are applied in numerical order. *N. Am. Processing Co.*, 236 F.3d at 698. "Under GRI 1, the Court must determine the appropriate classification 'according to the terms of the Headings and any relative Section or Chapter notes' … [with] terms of the HTSUS . . . construed according to their common commercial meaning." *Millenium Lumber Dist. Ltd. v. United States*, 558 F.3d 1326 ,1328-29 (Fed. Cir. 2009)….

Sub-Heading 6114.30.30 is an *eo nomine* provision covering "Other garments, knitted or crocheted: Of man-made fibers: Other:" *See GRK Canada, Ltd. v. United States*, 761 F.3d 1354, 1361 (Fed. Cir. 2014) (Reyna, J., dissenting) (noting that the HTSUS has distinctive use and *eo nomine* provisions; defining *eo nomine* as that which "describes an article by a specific name") … Parties agree that the Snuggie® consists of polyester knit fleece. … The issue is whether the Snuggie® is classifiable as a garment. "Garment" is not defined in the relevant section or chapter notes or in the legislative history. Accordingly, the Court considers its common commercial meaning.

To that end, Parties disagree whether the Court should consider the meaning of "apparel" or "wearing apparel" to inform its interpretation of the term "garment." Plaintiff contends that "apparel" is interchangeable with "garment" and "clothing," and relies on the Court of Appeals for the Federal Circuit's ("Federal Circuit") interpretation of "wearing apparel" in *Rubie's Costume Co. v. United States*, 337 F.3d 1350 (Fed. Cir. 2003). … Defendant argues that Allstar's reliance on the definition of "wearing apparel" is misplaced because the phrase does not appear in the Headings, Section Notes, or Chapter Notes for Chapter 61. … Defendant further contends that *Rubie's Costume* is inapposite because it interpreted Note 1(e) to Chapter 95, not Heading 6114. … Defendant asserts that "garment" is defined as "'an article of outer clothing (as a coat or dress) usu. exclusive of accessories,'" and "[c]lothing is defined as 'covering for the human body or garments in general: all the garments and accessories worn by a person at any one time.'" [Defendant's Cross-Motion for Summary Judgement] … (quoting *H.I.M./Fathom*, … 981 F. Supp. at 615 (1997) (quoting *Webster's Third New Int'l Dictionary of the English Language Unabridged* (1993) at 428, 936).

"Fundamentally, Courts interpret statutory language to carry out legislative intent." *Rubie's Costume*, 337 F.3d at 1357 (citing *Nippon Kogaku (USA), Inc. v. United States*, … 673 F.2d 380, 383 (1982))…. …Chapter 61 covers "articles of apparel and clothing accessories, knitted or crocheted." Note 14 to Section XI states, *inter alia*, that the phrase "textile garments" means garments covered by Headings 6101 to 6114. A review of the headings of Chapter 61 indicates a delineation whereby Headings 6101 to 6114 cover garments, and Headings 6115 to 6117 cover clothing accessories. Reading the Chapter title in concert with the Chapter Headings and Note 14 to Section XI suggests the drafters intended the phrase "articles of apparel" in the Chapter title to encompass the garment provisions (Headings 6101 to 6114), and the phrase "clothing accessories" to encompass the accessory provisions (Headings 6115 to 6117). The notion that the terms "apparel" and "garments" are interchangeable is further supported by The *American Heritage Dictionary of the English Language's* definition of "garment" as "An article of clothing," and "clothes" as "Articles of dress; *wearing apparel; garments*." … (Emphasis added.) Accordingly, the Court considers the meaning of "apparel" and the case law discussing that meaning to inform its interpretation of "garment."

Further, contrary to Defendant's assertion, *Rubie's Costume* considered whether the Halloween costumes at issue were "fancy dress, of textiles, of chapter 61 or 62," such that they were not classifiable pursuant to Chapter 95. *Rubie's Costume*, 337 F.3d at 1357…. If the Halloween costumes were properly classified as garments pursuant to Sub-Heading 6114.30.30, as the government had contended, then they were not classifiable as "festive articles" under Sub-Heading 9505.90.60, as the trial Court had found. *Rubie's Costume*, 337 F.3d at 1351-52. According to the Federal Circuit, deciding whether the Halloween costumes were classifiable under Chapter 61 or 62 (covering "Articles of apparel and clothing accessories, not knitted or crocheted") required interpreting the phrase "wearing apparel." *Id*. at 1357.

The Federal Circuit began its analysis with the U.S. Supreme Court's definition of "wearing apparel" as "all articles which are *ordinarily* worn – dress in general." *Id*. at 1357 (quoting *Arnold v. United States*, 147 U.S. 494, 496 … (1893)). (Emphasis added in *Rubie's Costume*.) It further noted that the Customs Court had defined "wearing apparel" as "clothes or covering[] for the human body worn for decency or comfort," and stated that "common knowledge indicates that adornment is also an element of many articles of wearing apparel." *Rubie's Costume*, 337 F.3d at 1357 (quoting *Antonio Pompeo v. United States* ("*Pompeo*"), 40 Cust. Ct. 362, 364 (1958))….

Parties disagree whether the *Pompeo* decency/comfort/adornment definition is disjunctive, whereby an article fulfilling one characteristic constitutes wearing apparel. Plaintiff argues the *Pompeo* definition is not strictly disjunctive because *Rubie's Costume* found that although the Halloween costumes at issue afforded some decency or comfort, those features were incidental to the costumes' festive purpose. Plaintiff concedes the Snuggie® offers comfort; however, Plaintiff contends the Snuggie® is not worn for decency or adornment and asserts that "all items that impart comfort are not necessar[ily] wearing apparel." … Defendant contends the *Pompeo* definition is disjunctive, and the Snuggie® is, thus, "wearing apparel" because "it is a covering for the human body that is worn for comfort." … Plaintiff responds that Defendant has misinterpreted *Rubie's Costume*. …

A review of the Federal Circuit's reasoning in *Rubie's Costume* shows that the Court synthesized the *Arnold* and *Pompeo* definitions. The Court explained:

> While the [Halloween costumes] may simulate the structural features of wearing apparel, and have some incidents of "clothes or coverings for the human body worn for decency or comfort," *Antonio*, 40 Cust. Ct. at 364,

> they are not practical "articles which are ordinarily worn," *Arnold*, 147 U.S. at 496 ….

Rubie's Costume, 337 F.3d at 1358. Although the Court considered the Halloween costumes' tendency to impart decency or comfort relevant to the inquiry, the case ultimately turned on whether the costumes were "ordinarily worn." *Id*. at 1358…. Finding that the costumes were not ordinarily worn, the Court reasoned that although the costumes may impart decency or comfort, "such benefits are incidental and the imports are primarily created for Halloween fun, strongly promoting festive value rather than *cognitive association as wearing apparel*. Such costumes are generally recognized as not being *normal articles of apparel*." *Rubie's Costume*, 337 F.3d at 1358. (Emphasis added.)

The dictionary definition of garment proposed by Defendant complements the Federal Circuit's understanding of "wearing apparel." *Webster's* defines "garment" as "an article of outer clothing (as a coat or dress) usu. exclusive of accessories," and clothing is defined as "covering for the human body or garments in general: all the garments and accessories worn by a person at any one time." *Webster's* at 428, 936….

Defendant emphasizes the clothing portion of the definition, asserting that the Snuggie® is "worn as an outer covering for the human body at a particular time, such as when seated, standing, or reclining." … Plaintiff urges the Court to focus on the recognized exemplars, asserting that "a garment is something that can be identified as an article of outer clothing[,] such as 'a coat or dress.'"

The exemplars contained in the garment definition are supported by the *Arnold* interpretation of "apparel" as that which is "ordinarily worn," "ordinarily" being defined as "in the ordinary course of events: usually," or, "in a commonplace … way." *Webster's* at 1589. Reference to the exemplars is also supported by *Rubie's Costume*, which considered the primary purpose of the costumes as "promoting festive value rather than [having] cognitive association as wearing apparel." *Rubie's Costume*, 337 F.3d at 1358….

A review of the specialized articles included in the … EN to Heading 6114 also supports interpreting "garment" as identifiable clothing items, and disfavors classifying the Snuggie® as a garment. Pursuant to EN 61.14, Heading 6114 covers:

> (1) Aprons, boiler suits (coveralls), smocks and other protective clothing of a kind worn by mechanics, factory workers, surgeons, etc.
> (2) Clerical or ecclesiastical garments and vestments (*e.g.*, monks' habits, cassocks, copes, soutanes, surplices).
> (3) Professional or scholastic gowns and robes.
> (4) Specialized clothing for airmen, etc. . . .
> (5) Special articles of apparel . . . used for certain sports or for dancing or gymnastics (*e.g.*, fencing clothing, jockeys' silks, ballet skirts, leotards)….

When the nature of the article is unclear, EN 61.14 describes the article by reference to an identifiable clothing type (*e.g.*, coveralls, habits, skirts, leotards). Defendant contends the Snuggie® is akin to "clerical or ecclesiastical garments and vestments" and "professional or scholastic gowns and robes" because those garments "have wide-armed sleeves and flow loosely around the body." … As Plaintiff contends, however, clerical and ecclesiastical garments have closures. … It is unclear what constitutes a professional or scholastic "gown," distinct from a "robe," but for Defendant's analogy to hold, at a minimum, one must wear the Snuggie® backwards. Accordingly, the Court is not persuaded by Defendant's argument.

Finally, the manner in which the Snuggie® is used also disfavors classification as a garment. Preliminarily, Parties disagree whether use is an appropriate consideration when determining whether a good is properly classified in an *eo nomine* provision. … However, a careful review of the relevant Federal Circuit case law confirms the relevance of use in the context of an *eo nomine* provision.

In *GRK Canada*, the Federal Circuit explained that use may be considered in classifying an article pursuant to an *eo nomine* provision when (1) the use of the subject article is an important aspect of its identity, and consequently the article's classification; or, as relevant here, when (2) "determining whether [the subject article] fits within the classification's scope." *GRK Canada*, 761 F.3d at 1358-59 (internal citations omitted) (considering use to determine under which *eo nomine* tariff provision to classify certain screws)…. Factors guiding this Court's determination whether the Snuggie® is classifiable as a garment include (1) its "physical characteristics" and "features," (2) "how it was designed and for what objectives," (*i.e.*, its intended use), and (3) "how it is marketed." *GRK Canada*, 761 F.3d at 1358.

First, as to its physical characteristics and features, the Snuggie® consists of a 71-by-54 inch rectangular piece of polyester fleece knit fabric, with 28.5 inch sleeves attached to the front. … There is no closure, and it is open in the back. … *In camera* inspection of the physical sample reveals a soft, long, loose-fitting article, measuring almost six feet by 4.5 feet, worn on the front, with long, loose sleeves. *See Trans-Atlantic Co. v. United States*, … 471 F.2d 1397, 1398 (1973) (viewing a sample of the subject import before concluding that it is covered by an *eo nomine* provision for hinges) ("the sample of the imported merchandise … is itself a potent witness"). Defendant contends the "one size fits all" nature of the Snuggie® supports classifying it as a garment because "fit" is "characteristic of a specification for garments." … However, "fit" in the context of "one size fits all" is a misnomer, and merely conveys single size availability. Notwithstanding the presence of the loose-fitting sleeves, there is nothing "fitted" about the Snuggie®. The Snuggie®'s physical characteristics and features, such as its dimensions and lack of rear closure, do not resemble a "normal article of apparel," or an article "ordinarily worn" in any "commonplace … way."

Second, relevant to design and intended use, the Snuggie® was inspired by the "Slanket®" and the "Freedom Blanket," two products that are marketed as blankets. … [I]nspection of the physical sample shows that the Snuggie® was designed (and, thus, intended) to be loosely worn as an outer layer roughly covering the front of the user to provide warmth. … The Snuggie® was not designed and was not intended to be used as a "normal article of apparel" classifiable as a garment.

Finally, as to sales and marketing, Allstar referred to the Snuggie® as a blanket, not apparel, in discussions with the foreign vendor of the Snuggie®, and in purchase orders, specifications, and commercial and retail invoices. … Additionally, Allstar obtained trademark protection [from the U.S. Patent and Trademark Office] to use the mark "Snuggie®" on fleece blankets and throws. … The Snuggie® is sold in the "bedding, housewares, general merchandise, 'impulse buy,' or 'as-seen-on-TV' departments of retail stores," not in the apparel department. … Defendant contends that Allstar's emphasis on the sleeves in marketing materials supports garment classification. … However, retail packaging and television advertising consistently describe the Snuggie®, *inter alia*, as *a blanket with sleeves*. The marketing materials depict people using the Snuggie® as a warm cover, as one might use a blanket, albeit one held in place and permitting greater use of hands with the addition of the sleeves. …

In sum, after considering the terms of the Headings, relevant Section or Chapter Notes, Explanatory Notes, and the common commercial meaning of garment as stated in lexicographic sources and case law, the Court finds the Snuggie® is not classifiable under Sub-Heading 6114.30.30. The Court turns to whether the Snuggie® is classifiable under Sub-Heading 6301.40.00.

IV. The Snuggie® is Classifiable as a Blanket under Sub-Heading 6301.40.00

… [T]he Court begins with GRI 1 to determine the appropriate classification according to the terms of the Heading and relevant Section or Chapter Notes, construing terms in accordance with their common commercial meaning. *N. Am. Processing*, 236 F.3d at 698; *Millenium Lumber Dist.*, 558 F.3d at 1328-29. Subheading 6301.40.00 is an *eo nomine* provision covering "Blankets (other than electric blankets) and traveling rugs, of synthetic fibers."

Plaintiff contends the Snuggie® is classifiable under Heading 6301 as an "'enhanced or 'improved' blanket with 'sleeves.'" … Plaintiff further contends that the ENs to Heading 6301, the dictionary definition of "blanket," commercial references to the Snuggie® as a "blanket," and its use as a blanket collectively support its classification under Heading 6301. … Defendant contends that Plaintiff's dictionary definition does not support classifying the Snuggie® as a blanket, and "calling an article a blanket [in commerce] does not necessarily make it a 'blanket' for classification purposes." …

"Blanket" is not defined in the statute or legislative history; thus, the Court considers its common commercial meaning. *Baxter Healthcare Corp.*, 182 F.3d at 1337. Plaintiff proposes the following dictionary definition, defining "blanket" as "a warm woolen (or nylon etc.) covering used esp. on a bed: any extended covering." … [Plaontiff's Motion for Summary Judgment] (quoting *New Webster's Dictionary and Thesaurus of the*

English Language…). Defendant proposes two additional definitions: *Merriam Webster*, defining "blanket" as "a large usually oblong piece of woven fabric used as a bed covering; a similar piece of covering used as a body covering (as for an animal)," and *Oxford Dictionaries*, defining "blanket" as "a large piece of woolen or similar material used as a bed covering or other covering for warmth." Likewise, The *American Heritage Dictionary* defines "blanket" as "[a] large piece of woven material used as a covering for warmth, especially on a bed." …

… Two points emerge from the dictionary definitions: first, that a blanket is a large (possibly oblong) piece of fabric, and second, that a blanket is used as a covering for warmth, often, but not always, as common knowledge dictates, on a bed. *See Brookside Veneers, Ltd.*, 847 F.2d at 789; *BASF Corp.*, … 798 F. Supp. 2d at 1357 (Courts may rely on their own understanding to construe HTSUS terms)….

Retail packaging refers to the Snuggie®'s ability to "Keep[] You Warm And Your Hands Free!"…. The key inquiry, however, is whether the addition of sleeves transforms what may have been a blanket, into something that is not a blanket. ... "Absent limitation or contrary legislative intent, an *eo nomine* provision includes all forms of the named article, even improved forms." *CamelBak Prods.*, 649 F.3d at 1364-65…. An article that "has been improved or amplified but whose essential characteristic is preserved or only incidentally altered is not excluded from an unlimited *eo nomine* statutory designation." *Casio, Inc. v. United States*, 73 F.3d 1095, 1098 (Fed. Cir. 1996). However, when the subject import "is in character or function something other than as described by a specific statutory provision-either more limited or more diversified-and the difference is significant," it is not classifiable within that provision. *Casio*, 73 F.3d at 1097…. In other words, Courts must assess whether the article has "features *substantially in excess* of those within the common meaning of the term." *Casio*, 73 F.3d at 1098 (affirming trial Court's classification of a synthesizer as a musical instrument because the "additional features are designed primarily to make it easier for a musician to create music or embellish the sound he or she would normally be able to produce")…. Relevant factors include the subject import's design, use, or function, how the article is regarded in commerce and described in sales and marketing literature, and whether the addition "is a substantial or incidental part of the whole product." *CamelBak Prods.*, 649 F.3d at 1368 (citations omitted).

… Parties do not dispute that specifications, purchase orders, and invoices describe the Snuggie® as a blanket, and Allstar has trademarked "Snuggie®" to use on blankets and throws. … The Snuggie® is marketed as a blanket, albeit one with sleeves. … Retail packaging depicts people wearing the Snuggie® in the types of situations one might use a blanket; for example, while seated or reclining on a couch or bed, or outside cheering a sports team. … The television commercial additionally shows a woman wearing a Snuggie® in place of a blanket that failed to sufficiently cover her. … All of the above indicates that the Snuggie® is designed, used, and functions as a blanket, and is regarded in commerce and described in sales and marketing literature as a blanket. …

The Court further finds that the sleeves are incidental to the Snuggie®'s use as a blanket; the sleeves are not so substantial as to transform the Snuggie® into something other than a blanket. … The undisputed facts show that the Snuggie® "preserve[s]" the "essential characteristic[s]" of a blanket – a large piece of fabric providing a warm covering. *See Casio*, 73 F.3d at 1098. The sleeves support, rather than detract from, the Snuggie®'s "primary design and use" as a blanket because they ostensibly enable the Snuggie® to remain in place and keep the user warm while allowing the user to engage in certain activities requiring the use of their hands. … The Court thus concludes that the Snuggie® is correctly classified as a "blanket" under Sub-Heading 6301.40.00.

V. GRI 1, *Eo Nomine* versus Use Provisions, Section 232 National Security Tariffs, and 2023 *ME Global* Case

In the *ME Global* case, the CIT ruled that heat-forged steel rods are properly classified as "other bars and rods" under HTSUS Heading 7228, not as "other articles of iron or steel" under Heading 7326. Both Headings are *eo nomine* tariff provisions. The actual use of the merchandise is as grinding rods, which is provided for at the 8-digit HTSUS Sub-Heading level under Heading 7326. In perusing the opinion, note the carefully laid-out, step-by-step reasoning process, including as to the difference between *eo nomine*, principal use, and actual use HTSUS classifications, the relevance of terms in Headings versus Sub-Headings, and the application of GRIs 1 and 6. Note, also, the context of this case – the Section 232 Steel and Aluminum national security action (discussed in a separate Chapter).

***ME GLOBAL, INC. V. UNITED STATES*, UNITED STATES COURT OF INTERNATIONAL TRADE, NUMBER 19-00179, SLIP OPINION 23-68 92 MAY 2023)**[112]

Eaton, Judge:

Before the Court are the cross-motions for summary judgment of plaintiff ME Global, Inc. [which is the U.S. subsidiary of Compania Electro Metalurgica S.A., a publicly traded company in Chile] ("Plaintiff") and defendant the United States, on behalf of the U.S. Customs and Border Protection ("Customs"). … At issue is the proper classification of heat-treated forged steel rods from the People's Republic of China ("China"), entered by Plaintiff on August 4, 2018. …

… Customs' cross-motion for summary judgment is granted, Plaintiff's motion for summary judgment is denied, and the Court finds that Plaintiff's heat-treated forged steel rods are properly classified under the Harmonized Tariff Schedule of the United States ("HTSUS") (2018) Sub-Heading 7228.40.00 as "[o]ther bars and rods, not further worked than forged."

Background

…

112 Footnotes omitted.

At issue are heat-treated forged steel rods, which are used to crush ore in mining and mineral extraction operations. … When in use, the subject rods lie in parallel alignment in a large rotating cylinder or "mill." … Ore is fed into the mill and, as it rotates, the ore is crushed between the rods. … This pulverizes the ore into a finer composition, allowing for the recovery of metals such as gold, copper, silver, and iron. …

The rods are produced in China by Plaintiff's joint venture called ME Global Long Teng Grinding Media (Changshu) Co. Ltd. ("ME Long Teng"). … To manufacture the imported rods, steel blooms are first heated, hot-rolled into bars, and then cooled. … The steel bars are then sent to ME Long Teng's plant where they are cut to the customer's desired length, heated in a series of Inductoforge devices, and then processed by a series of forging dies and passed through a water quenching system. …

The result of this process is a steel rod comprised of a hard outer surface of martensite and a softer inner core of pearlite. … The hardness of the outer martensite layer makes the rods suitable for breaking down ore and mineral structures, while the softness of the inner pearlite core provides ductility, which prevents the bars from breaking while being used in the mill. …

The subject rods, as imported, have a chromium content between 0.3% and 0.39% by weight. …

Plaintiff ME Global, Inc., the importer of record of the rods, entered them as a single entry at the Port of Minneapolis, Minnesota on August 4, 2018, Entry No. 791-1880870-3. … Customs classified the rods under HTSUS Sub-Heading 7228.30.80 ("Other bars and rods, not further worked than hot-rolled, hot-drawn or extruded . . . Other"). …

When Plaintiff entered the rods, goods classified under HTSUS Sub-Heading 7228.30.80 were subject to a national security tariff of 25% *ad valorem* imposed under HTSUS Sub-Heading 9903.80.01 (establishing 25% *ad valorem* duties for, *inter alia*, Chinese products of iron or steel classified under HTSUS Heading 7228), pursuant to Section 232 of the *Trade Expansion Act of 1962*. See 19 U.S.C. § 1862 (2018); see also Sub-Heading 9903.80.01, HTSUS (referencing HTSUS Sub-Heading 7228.30.80).

[Crucially, in terms of the diametrically opposite incentives of ME Global versus CBP created by the Section 232 national security tariff, as the CIT noted in Footnote 5:

> Section 232 of the *Trade Expansion Act of 1962*, codified as amended at 19 U.S.C. § 1862, empowers the President to adjust the imports of articles that may threaten to impair national security. … On March 8, 2018, the President, pursuant to Section 232, issued *Proclamation 9705*, which imposed a 25% *ad valorem tariff* on steel articles imported from all countries except Canada and Mexico. … The President implemented the tariffs by modifying Subchapter III of Chapter 99 of the HTSUS to add a new Note 16 and a new tariff provision under the Sub-Heading 9903.80.01. … Note 16 provided, in relevant part, that "[t]he rates of duty set forth in

> [Sub-]Heading 9903.80.01 … apply to all imported products of iron or steel classifiable in the provisions enumerated in this subdivision: . . . bars and rods provided for in Heading[] … 7228." Ch. 99, Subchapter III, Note 16(b)(ii), HTSUS.
>
> Accordingly, *merchandise imported into the United States from China classified under HTSUS Sub-Heading 7228.30.80 (i.e., the Sub-Heading Customs classified Plaintiff's rods under) became subject to the additional 25% ad valorem Section 232 tariffs on March 23, 2018, and remain subject thereto.* Plaintiff's rods were dutiable at 25% *ad valorem* because they were (1) imported from China; (2) entered on August 4, 2018, after the Section 232 tariffs went into effect; and (3) classified under an HTSUS Sub-Heading (*i.e.*, 7228.30.80) to which Section 232 tariffs applied (*i.e.*, through application of HTSUS Sub-Heading 9903.80.01). *Had the steel rods been classified under Plaintiff's preferred Sub-Heading, HTSUS 7326.11.00 ("Grinding balls and similar articles for mills"), they would not be subject to the 25% tariffs.* [(Emphasis added.)]

Manifestly, ME Global is seeking an HTSUS classification that will exempt its merchandise from the 25% Section 232 duty.]

…

Jurisdiction and Standard of Review

The Court has subject matter jurisdiction under 28 U.S.C. § 1581(a) and reviews Customs' classification determination de novo. See 28 U.S.C. § 1581(a) (2018)….

…

Legal Framework

The objective in a classification case is to determine the correct tariff provision for the subject merchandise. See *Jarvis Clark Co. v. United States*, 733 F.2d 873, 878 (Fed. Cir. 1984). While the Court affords deference to Customs' classification rulings relative to their "power to persuade," it has "an independent responsibility to decide the legal issue of the proper meaning and scope of the HTSUS terms." See *United States v. Mead Corp.,* 533 U.S. 218, 235 (2001) (quoting Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944)); see also *Warner-Lambert Co. v. United States*, 407 F.3d 1207, 1209 (Fed. Cir. 2005). As such, it is "the Court's duty to find the *correct* result, by whatever procedure is best suited to the case at hand." *Jarvis Clark*, 733 F.2d at 878. (Emphasis in original.)

The Court's review of a classification determination involves two steps. See *Bausch & Lomb, Inc. v. United States*, 148 F.3d 1363, 1365 (Fed. Cir. 1998)…. First, it must construe the relevant classification headings – a question of law. … Second, it must determine which of the properly construed tariff provisions the merchandise at issue falls under – a question of fact. … When the nature of the merchandise is undisputed, as is the case here, the issue collapses entirely into a question of law ripe for summary judgment.

…

The General Rules of Interpretation ("GRI") "govern classifications of imported goods under [the] HTSUS and [are] appl[ied] in numerical order." *CamelBak Prods., LLC v. United States*, 649 F.3d 1361, 1364 (Fed. Cir. 2011) (citing *BASF Corp. v. United States*, 482 F.3d 1324, 1325-26 (Fed. Cir. 2007)). Most classification disputes are resolved by the application of GRI 1. … If a good is not classifiable under GRI 1, and if the Headings and Notes do not require otherwise, then the other GRIs will be considered in numerical order. See *Schlumberger Tech. Corp. v. United States*, 845 F.3d 1158, 1163 (Fed. Cir. 2017) (citation omitted) ("The GRI apply in numerical order, meaning that subsequent rules are inapplicable if a preceding rule provides proper classification."). Under GRI 1, the Court determines the appropriate classification of merchandise "according to the terms of the headings and any relative Section or Chapter Notes." GRI 1, HTSUS. The HTSUS Section and Chapter Notes "are not optional interpretive rules," but instead have the force of statutory law. *Aves. in Leather, Inc. v. United States*, 423 F.3d 1326, 1333 (Fed. Cir. 2005) (quoting *Park B. Smith, Ltd. v. United States*, 347 F.3d 922, 926 (Fed. Cir. 2003)).

[As the CIT quoted in Footnote 6, the pertinent GRIs are:

> GRI 1, HTSUS:
> The table of contents, alphabetical index, and titles of Sections, Chapters and Sub-Chapters are provided for ease of reference only; for legal purposes, classification shall be determined according to the terms of the Headings and any relative Section or Chapter Notes and, provided such headings or notes do not otherwise require, according to the [subsequent GRIs].
>
> GRI 6, HTSUS:
> For legal purposes, the classification of goods in the Sub-Headings of a Heading shall be determined according to the terms of those Sub-Headings and any related Sub-Heading Notes and, *mutatis mutandis*, to the above rules, on the understanding that only Sub-Headings at the same level are comparable. For the purposes of this rule, the relative Section, Chapter, and Sub-Chapter notes also apply, unless the context otherwise requires.]

"Only after determining that a product is classifiable under [a specific] Heading should the Court look to the Sub-Headings…." *Orlando Food Corp. v. United States*, 140 F.3d 1437, 1440 (Fed. Cir. 1998). Moreover, "the possible [tariff] headings are to be evaluated without reference to their Sub-Headings, which cannot be used to expand the scope of their respective headings." *R.T. Foods, Inc. v. United States*, 757 F.3d 1349, 1353 (Fed. Cir. 2014) (citing *Orlando Food Corp.,* 140 F.3d at 1440).

"[T]he Court also may consider the Explanatory Notes to the Harmonized Commodity Description and Coding System [(the "Explanatory Notes")], developed by the World Customs Organization." *See Rubies Costume Co. v. United States*, … 279 F. Supp. 3d 1145, 1154 (2017)…. The Explanatory Notes (unlike the Section and Chapter Notes) are not legally binding or dispositive, but "may be consulted for guidance and are generally indicative of the proper interpretation of the various HTSUS provisions." *Aves. in Leather,* *Inc.*, 423 F.3d at 1334…. A Court may rely on its own understanding of any terms undefined in the HTSUS or consult other reliable information sources to ascertain the common meaning of such terms. *See Baxter Healthcare Corp. v. United States*, 182 F.3d 1333, 1337-38 (Fed. Cir. 1999).

Discussion

While Customs classified, at entry, the subject rods under HTSUS Sub-Heading 7228.30.80 ("Other bars and rods, not further worked than hot-rolled, hot-drawn or extruded . . . Other"), it now argues that the rods should be classified under HTSUS Chapter 72, Heading 7228, Sub-Heading 7228.40.00, as "[o]ther bars and rods, not further worked than forged." … Customs maintains that under GRI 1 the imported rods are *prima facie* classifiable under HTSUS Sub-Heading 7228.40.00 because they are "[o]ther bars and rods" of "[o]ther alloy steel" and are not further worked than forged as defined in the Chapter Notes to Chapter 72. See Ch. 72, Notes 1(f) ("Other alloy steel") & (m) ("Other bars and rods"), HTSUS. For Customs, the rods are classifiable *eo nomine* under HTSUS Sub-Heading 7228.40.00 because this Sub-Heading describes the rods by name – and with greater specificity than HTSUS Sub-Heading 7228.30.80. …

[As the CIT explained in Footnote 9, HTSUS Chapter 72 covers "iron and steel." The relevant 4- and 6-digit portions are:

> **7228** Other bars and rods of other alloy steel; angles, shapes, and sections, of other alloy steel; hollow drill bars and rods, of alloy or non-alloy steel:
>
> …
>
> **7228.40.00** Other bars and rods, not further worked than forged

Further, as the CIT explained in Footnote 10:

> An *eo nomine* tariff provision is one that "describes an article by a specific name." *R.T. Foods, Inc.*, 757 F.3d at 1354 (quoting *CamelBak Prods.,* 649 F.3d at 1364). "[This] includes all forms of the named article, including improved forms." … For example, in *Carl Zeiss, Inc. v. United States*, the Federal Circuit determined that HTSUS Heading 9011 – which covers "compound optical microscopes" – is an *eo nomine* classification provision because it is a provision that describes an article or good by a specific name, not by its use. See 195 F.3d 1375, 1379 (Fed. Cir. 1999).

As to the reason for the greater relative specificity of one Sub-Heading over another, the CIT said in Footnote 11:

> … HTSUS Sub-Heading 7228.40.00 ("Other bars and rods, not further worked than forged") is more specific than HTSUS Sub-Heading 7228.30.80 ("Other bars and rods, not further worked than hot-rolled, hot-

> drawn or extruded . . . Other") *because it describes the subject rods in their final form*. [(Emphasis added.)]

Plaintiff, on the other hand, argues that the subject rods do not fall within the scope of HTSUS Heading 7228 because they have assumed the character of goods classified under HTSUS Chapter 73, Heading 7326, Sub-Heading 7326.11.00, covering "[o]ther articles of iron or steel: [f]orged or stamped, but not further worked: … [g]rinding balls and similar articles for mills." …

[HTSUS Chapter 73 encompasses "articles of iron or steel." The relevant 4- and 6-digit portions thereof are:

> **7326** Other articles of iron or steel:
> Forged or stamped, but not further worked:
> …
> **7326.11.00** Grinding balls and similar articles for mills]

In making this claim, Plaintiff relies on Explanatory Note 72.28(A) (*i.e.*, the Explanatory Note to Customs' preferred heading), which states that "[t]he provisions of the Explanatory Notes to headings [7214] to [7216] apply, *mutatis mutandis*, to the products of this heading [*i.e.*, HTSUS heading 7228]." See Explanatory Note 72.28(A). Explanatory Note 72.28(A) thus incorporates, by reference, Explanatory Note 72.15(2).

Explanatory Note 72.15(2) provides:

> The bars and rods of this Heading may: … have been subjected to working (such as drilling or sizing, or to further surface treatments than are allowed for products of Heading [7214], such as plating, coating, or cladding (see Part (IV) (C) of the General Explanatory Note to this Chapter), provided that they do not thereby *assume the character of articles or of products falling within other Headings*.

… (Emphasis added.)

For Plaintiff, these two Explanatory Notes (Explanatory Note 72.28(A) and Explanatory Note 72.15(2)), taken together, stand for the proposition that merchandise otherwise classified under HTSUS Heading 7228 will not be classified thereunder if subjected to "working" that causes it to "*assume the character of articles or products falling in* [*sic*] *another* [*sic*] *Heading* [*sic*]." …

Relying on the language in Explanatory Note 72.15(2) – made applicable to HTSUS heading 7228 by reference – Plaintiff asserts that the heat treatments and other processing that occurred at ME Long Teng's manufacturing plant, although not considered further "working,"15 nevertheless caused the rods to be "processed out" of the scope of HTSUS heading 7228 ("Other bars and rods of other alloy steel") because they assumed the character of articles under HTSUS Sub-Heading 7326.11.00 ("Grinding balls and similar articles for mills"). …

According to Plaintiff, "[t]he processing by ME Long Teng causes [the rods] to be processed into a new and different article more properly classified in Sub-Heading 7326.11, HTSUS [because t]he resulting article is 'similar to' 'grinding balls' and which are also designed – exclusively – for use in mills." … Importantly, Plaintiff claims that the rods' actual use as grinding rods dictates their classification under HTSUS Sub-Heading 7326.11.00. See Pl[aintiff]'s Br[ief]. at 18 ("[T]he use of the grinding rods is determinative of their classification.").

There are two problems with Plaintiff's argument. First, the subject rods' use is not an essential or even a material consideration in their classification because neither HTSUS Heading 7228 nor 7326 is a use provision – either principal or actual – nor does either Heading inherently suggest that products classified within its scope are for a particular use. See, e.g., *Apple Inc. v. United States*, 964 F.3d 1087, 1093 (Fed. Cir. 2020) ("A use provision describes an article by its principal or actual use." … Second, Plaintiff's argument violates the principal that, under GRI 1, "the possible headings are to be evaluated without reference to their subheadings, which cannot be used to expand the scope of their respective headings." *R.T. Foods, Inc.,* 757 F.3d at 1353 (citing *Orlando Food Corp.*, 140 F.3d at 1440 ("[W]hen determining which Heading is … more appropriate for classification, a Court should compare only the language of the Headings and not the language of the Sub-Headings.")). And so, even though HTSUS Sub-Heading 7326.11.00 describes "[g]rinding balls and similar articles for mills," this Sub-Heading is not relevant when evaluating tariff provisions at the Heading level.

I. The Court Will Not Consider the Use of the Subject Rods or the Terms of Sub-Headings in Evaluating the Parties' Competing Tariff Provisions Under GRI 1

A. The Subject Rods' Actual Use as Grinding Rods is Not a Material Consideration in Their Classification

Plaintiff contends that the subject rods' actual use as grinding rods is an essential consideration in determining their classification. … But Plaintiff's argument that use should be elevated as a factor in resolving the present classification dispute is without merit.

Here, it is important to keep in mind that the discussion concerns Headings – not Sub-Headings. Neither HTSUS Heading 722817 nor 732618 are use provisions because they do not describe an article by its principal or actual use. See *Schlumberger Tech. Corp.*, 845 F.3d at 1164 ("[A] use provision describes articles according to their principal or actual use." … A principal use provision classifies a particular article according to its ordinary commercial use, even though that article may, at times, be put to some atypical use. See *Primal Lite, Inc. v. United States*, 182 F.3d 1362, 1364 (Fed. Cir. 1999). While the HTSUS contains plenty of principal use provisions, HTSUS Headings 7228 and 7326 are not among them. …

On the other hand, "[a]ctual use provisions, which are rare in the HTSUS, are those in which classification is dependent upon the merchandise's actual use." *GRK Canada, Ltd. v. United States*, … 180 F. Supp. 3d 1260, 1266 n.7 (2016). Neither HTSUS Heading 7228 nor 7326, however, is one of the few actual use provisions found in the HTSUS. … Rather, they are *eo nomine* tariff provisions.

An *eo nomine* tariff provision "is one which describes a commodity by a specific name, rather than by use, and absent limitation or contrary legislative intent … includes all forms of the named article, even improved forms." *Well Luck Co. v. United States*, 887 F.3d 1106, 1111 n.4 (Fed. Cir. 2018)…. HTSUS Heading 7228 ("Other bars and rods of other alloy steel") is an *eo nomine* provision because it describes articles by specific names (*i.e.*, "bars" and "rods" of "alloy steel"). *See, e.g.*, *Orlando Food Corp.*, 140 F.3d at 1441 ("HTSUS 2002, 'Tomatoes prepared or preserved,' is clearly *an eo nomine* provision, *i.e.*, 'it describes a commodity by a specific name, usually one common in commerce.'" (quoting *Nidec Corp. v. United States*, 68 F.3d 1333, 1336 (Fed. Cir. 1995))).

Likewise, HTSUS Heading 7326 ("Other articles of iron or steel") is an *eo nomine* provision of the basket type because it describes, by name, iron or steel articles that are not more specifically provided for elsewhere in the HTSUS. …

Plaintiff maintains, however, that the subject rods' use is determinative of their classification regardless of HTSUS Headings 7228's and 7326's status as *eo nomine* tariff provisions. … In making its argument, Plaintiff attempts to fit the facts of this case into the framework of the Federal Circuit's decisions in *GRK Canada, Ltd. v. United States*, and *Ford Motor Co. v. United States*. … These cases are inapposite.

GRK Canada, Ltd. v. United States considered whether a use limitation could be read into an *eo nomine* provision covering "other wood screws." See 761 F.3d 1354, 1359 (Fed. Cir. 2014). There, noting that "it [wa]s evident that the material with which the screw is intended to be used is inherent within the name of the *eo nomine* tariff classification 'other wood screw,'" – *i.e.*, the wood screws were not made of wood but rather metal screws used to fasten wood – the Court determined that "[t]he use of goods may be an important aspect of the distinction of certain eo nomine provisions … where … the name of the provisions refers directly to the use of subject articles." *Id*. at 1359, 1361.

Similarly, *Ford Motor Co. v. United States* looked at whether a use limitation could be read into an *eo nomine* tariff provision covering "[m]otor cars and other motor vehicles principally designed for the transport of persons." See 926 F.3d 741, 750 (Fed. Cir. 2019). There, the Court concluded that the "appeal present[ed] one of the very limited circumstances where the relevant Heading … is an *eo nomine* provision for which consideration of use is appropriate because [the] [H]eading … inherently suggest[ed] looking to intended use." *Id*. at 753. That is, "the 'principally designed for' portion [of the heading] inherently suggest[ed] a type of use, *i.e.*, 'the transport of persons.'" *Id*. at 750.

Here, Plaintiff claims that use is essential to the Court's classification determination because – like the tariff provisions for "other wood screws" in *GRK Canada* and "[m]otor cars and other motor vehicles principally designed for the transport of persons" in *Ford Motor Co*. – the "text of Sub-Heading 7326.11, HTSUS, inherently suggests that the products classified under its scope are for a particular type of use as a grinding ball or similar object." … Plaintiff's argument fails for two reasons. First, the language of HTSUS Sub-Heading 7326.11.00 is irrelevant under GRI 1 because the Court is only concerned with a comparison of the competing Headings (*i.e.*, HTSUS heading 7228 and 7326). Plaintiff attempts to expand the scope of HTSUS Heading 7326 to include the terms of its Sub-Heading 7326.11.00 and, for the reasons discussed in the next subsection, this is not allowed.

Second, unlike the *eo nomine* provisions at issue in *GRK Canada* and *Ford Motor Co.*, neither HTSUS heading 7228 ("Other bars and rods of other alloy steel") nor 7326 ("Other articles of iron or steel") inherently suggests a type of use. In fact, HTSUS Headings 7228 and 7326 are unlike any provisions for which Courts have previously considered use – principal or actual. …

Although the scope of each heading at issue here necessarily encompasses articles designed for various uses, nothing about the language of these Headings explicitly or implicitly suggests that an article's principal or actual use is necessary to or determinative of its classification under either Heading. Therefore, the Court will not read a use limitation into either of the competing *eo nomine* tariff headings as part of its GRI 1 analysis. See *Carl Zeiss, Inc. v. United States*, 195 F.3d 1375, 1379 (Fed. Cir. 1999) ("[A] use limitation should not be read into an *eo nomine* provision unless the name itself inherently suggests a type of use."…

B. Headings Are to Be Evaluated Without Reference to Their Sub-Headings

In a similar vein, Plaintiff argues that the subject steel rods are not classifiable under HTSUS Heading 7228 because, as a result of the processing that occurred at ME Long Teng's manufacturing plant, the rods have assumed the character of articles in – and should therefore be classified under – HTSUS Sub-Heading 7326.11.00 ("Grinding balls and similar articles for mills"). By making this argument, Plaintiff attempts to bypass the initial step in a classification analysis (*i.e.*, a comparison of Headings) by expanding the scope of HTSUS Heading 7326, for classification purposes, to include the terms of its Sub-Heading (*i.e.*, HTSUS Sub-Heading 7326.11.00).

Plaintiff insists the subject rods have assumed the character of articles under HTSUS Sub-Heading 7326.11.00, by citing HTSUS General Note 3(h)(vi)20 for the proposition that a reference to HTSUS Heading 7326 ("Other articles of iron or steel") necessarily encompasses the terms of HTSUS Sub-Heading 7326.11.00 ("Grinding balls and similar articles for mills"). …

HTSUS General Note 3(h)(vi) provides:

(h) Definitions. For the purposes of the Tariff Schedule, unless the context otherwise requires –

…

(vi) the term "Headings" refers to the article descriptions and tariff provisions appearing in the Schedule at the first hierarchical level; the term "Sub-Heading" refers to any article description or tariff provision indented thereunder; a reference to "Headings" encompasses subheadings indented thereunder.

…

Plaintiff, in this way, misreads not only the intent, but also the express meaning, of General Note 3(h)(vi). Neither General Note 3(h)(vi) nor anything else in the HTSUS does what Plaintiff argues. That is, create a rule that a term of a Sub-Heading should be used to interpret the scope of a term of a Heading, or the scope of a Heading as determined according to its terms, when read in accordance with the relevant Section and Chapter notes. Rather, General Note 3(h)(vi) is merely a definitional provision describing what headings and Sub-Headings are, not how they are to be applied for purposes of classification.

Instead, "[t]he classification of merchandise is governed by the GRIs … which are applied in numerical order." See *R.T. Foods, Inc.*, 757 F.3d at 1353…. Thus, classification analysis begins with GRI 1, which provides that "classification shall be determined according to the terms of the *Headings* and any relative Section or Chapter Notes." *Id.* (Emphasis in original.) (first quoting GRI 1, HTSUS; and then citing *Orlando Food Corp.*, 140 F.3d at 1440 ("[A] Court first construes the language of the Heading, and any Section or Chapter notes in question, to determine whether the product at issue is classifiable under the Heading.")).

As mentioned above, the Federal Circuit has cautioned that, "[p]ursuant to GRI 1, the possible Headings are to be evaluated without reference to their Sub-Headings, which cannot be used to expand the scope of their respective headings." *Id.* …

Thus, Plaintiff's attempt to expand the scope of its preferred HTSUS Heading 7326 ("Other articles of iron or steel") to include the terms of its Sub-Heading 7326.11.00 ("Grinding balls and similar articles for mills") is impermissible under the GRIs. Therefore, the Court will first evaluate the parties' competing tariff provisions at the heading level, without reference to their Sub-Headings, as is provided for in GRI 1.

II. Classification of the Subject Rods Pursuant to GRI 1

Keeping in mind that the scope of HTSUS Headings 7228 and 7326 cannot be expanded by reference to their respective Sub-Headings, and that the subject rods' "use" as grinding rods is irrelevant to their classification, the Court turns next to a comparison of the competing headings pursuant to GRI 1. … [T]he Court concludes that an evaluation of the parties' competing tariff Headings under GRI 1 demonstrates that the subject rods are properly classified under HTSUS Heading 7228, and not HTSUS Heading 7326.

A. The Subject Rods Are Properly Classified Under HTSUS Heading 7228 Pursuant to GRI 1

HTSUS Heading 7228 covers "[o]ther bars and rods of other *alloy steel*; angles, shapes and sections, of other alloy steel; hollow drill bars and rods, of alloy or non-alloy steel." Heading 7228, HTSUS. (Emphasis added.) HTSUS Chapter 72 note 1(m) defines "other bars and rods" as

> Products which do not conform to any of the definitions at (ij), (k), or (l) above or to the definition of wire, which have a uniform solid cross-section along their whole length in the shape of circles, segments of circles, ovals, rectangles (including squares), triangles or other convex polygons (including "flattened circles" and "modified rectangles," of which two opposite sides are convex arcs, the other two sides being straight, of equal length and parallel).
>
> …

It is undisputed that the subject rods do not conform to any of the Chapter 72 definitions in Notes (ij), (k), or (l), or the Chapter 72 definition of wire. There appears to be some disagreement, however, as to whether the "uniform solid cross-section" runs along the "whole" length of the subject steel rods.

Plaintiff maintains that the subject steel rods "have a uniform cross section along *most* of their length, except at the ends, where they are notched to fit into a particular rod mill." … (Emphasis added.) … Customs "[d]enies that '[t]he ends of the grinding rods [are] notched' [and a]vers that photographs of the rods do not show the rods to have notched ends."…

Whether the ends of the subject steel rods are "notched," however, is immaterial because HTSUS Chapter 72 note 1(m) provides that "products may … have indentations, ribs, grooves or other deformations produced during the rolling process (reinforcing bars and rods) [or] be twisted after rolling," and still be considered "[o]ther bars and rods" for classification purposes. Ch. 72, Note 1(m), HTSUS.

The term "notch" is not defined in the HTSUS. A tariff term undefined by the HTSUS is construed in accordance with its common and commercial meaning. See *Baxter Healthcare Corp.*, 182 F.3d at 1337. The Court, in ascertaining the common meaning of a tariff term undefined by the HTSUS, "may rely upon its own understanding of the terms used, and it may consult lexicographic and scientific authorities, dictionaries, and other reliable information." Id. at 1338…. The *Oxford English Dictionary* defines a notch as "[a] groove, incision, or indentation (typically V-shaped in cross-section) in an edge, or across or through a surface." …

Thus, it follows that a "notch," as a type of "groove" or "indentation," is provided for under the relevant HTSUS chapter note. Therefore, that a steel bar or rod may contain notches, ribs, grooves, or indentations does not render it without a uniform solid cross-section along its whole length for purposes of classification under HTSUS Heading 7228. Consequently, the subject rods satisfy the definition of "[o]ther bars and rods" under HTSUS heading 7228 regardless of whether they have notched ends or not.

"Other bars and rods" of HTSUS Heading 7228 must also be of "other alloy steel" to be classifiable under this heading. The relevant portions of Note 1(f) to HTSUS Chapter 72 define "other alloy steel" as "[s]teels not complying with the definition of stainless steel and containing by weight one or more of the following elements in the proportion shown … 0.3 percent or more of chromium." …

The metallurgical testing performed by Plaintiff shows that the percentage of chromium contained in the subject steel rods, for the period in question, fluctuated between 0.3% to 0.39%, by weight. … Therefore, because the subject steel rods do not comply with the definition of stainless steel (*i.e.*, "containing, by weight 1.2 percent or less of carbon and 10.5 percent or more of chromium"), and their chromium content never dipped below the 0.3% threshold requirement, they satisfy the Chapter 72 definition of "[o]ther alloy steel."

As Customs notes, HTSUS Heading 7228 is an *eo nomine* provision covering "[o]ther bars and rods of other alloy steel." … … [T]he subject rods satisfy the controlling HTSUS Chapter 72 notes that define "[o]ther bars and rods of other alloy steel." Thus, pursuant to a GRI 1 analysis, the rods are classifiable under HTSUS Heading 7228 because they are specifically described by the terms of HTSUS heading 7228 as "[o]ther bars and rods of other alloy steel." Heading 7228, HTSUS.

B. The Subject Steel Rods Are Not Properly Classified Under HTSUS Heading 7326 Pursuant to GRI 1

Plaintiff's proposed heading is HTSUS 7326 – a "basket provision" covering "[o]ther articles of iron or steel."29 Heading 7326, HTSUS. "A basket provision is not a specific provision." *R.T. Foods, Inc.,* 757 F.3d at 1354 (quoting *Int'l Bus. Machs. Corp. v. United States*, 152 F.3d 1332, 1338 (Fed. Cir. 1998)). "Therefore, '[c]lassification of imported merchandise in a basket provision is only appropriate if there is no tariff category that covers the merchandise more specifically.'" *Id*. (quoting *Rollerblade, Inc. v. United States*, …, 116 F. Supp. 2d 1247, 1251 (2000), aff'd, 282 F.3d 1349 (Fed. Cir. 2002)).

In other words, because Plaintiff's proposed HTSUS Heading 7326 is a basket provision, the subject rods can only be classified under that Heading if they are not more specifically covered elsewhere in the tariff schedule. Since the Court has determined that the rods are specifically covered by HTSUS Heading 7228 ("Other bars and rods of other alloy steel"), it follows that they cannot also be classified under HTSUS Heading 7326 – a basket provision covering "[o]ther articles of iron or steel." Put another way, "rods of other alloy steel" is more specific than "other articles of steel," and thus GRI 1 directs that the subject rods be classified under HTSUS Heading 7228.

III. The Subject Rods Are Properly Classified Under HTSUS Sub-Heading 7228.40.00 Pursuant to GRI 6

Having determined the subject rods are properly classified under HTSUS Heading 7228, the Court turns next to an analysis of the competing Sub-Headings. While Customs originally classified the rods under HTSUS Sub-Heading 7228.30.80 ("Other bars and rods, not further worked than hot-rolled, hot-drawn or extruded … Other"), it now maintains that HTSUS Sub-Heading 7228.40.00 ("Other bars and rods, not further worked than forged") describes the rods with more specificity. That is, for Customs, although both HTSUS Sub-Headings 7228.30.80 and 7228.40.00 appear to describe the subject rods insofar as they are the product of hot-rolling and forging, HTSUS Sub-Heading 7228.40.00 ("Other bars and rods, not further worked than forged") is more specific than HTSUS subheading 7228.30.80 ("Other bars and rods, not further worked than hot- rolled, hot-drawn or extruded … Other") because it describes the rods in their final form.

The Court looks to GRI 6 [quoted above] to determine whether HTSUS Sub-Heading 7228.30.80 or 7228.40.00 is the correct tariff designation for the subject rods. … …

Here, the subject rods are first hot-rolled and then forged. …Therefore, because the rods are forged after being hot-rolled, HTSUS Sub-Heading 7228.30.80, which covers "[o]ther bars and rods, not further worked than hot-rolled, hot-drawn or extruded … [o]ther," only describes the subject steel rods at an intermediate stage of their production. On the other hand, HTSUS Sub-Heading 7228.40.00, which covers "[o]ther bars and rods, not further worked than forged," more specifically describes the subject steel rods as a finished product.

The term "further worked" is defined in Additional U.S. Note 2 to Chapter 72, which provides:

> For the purposes of this Chapter, unless the context provides otherwise, the term "further worked" refers to products subjected to any of the following surface treatments: polishing and burnishing; artificial oxidation; chemical surface treatments such as phosphatizing, oxalating and borating; coating with metal; coating with nonmetallic substances (*e.g.*, enameling, varnishing, lacquering, painting, coating with plastics materials); or cladding.

…

While "forging" is not explicitly referenced in Additional U.S. Note 2, the definition of "further worked" is not limited to the Note's listed surface treatments. Additional U.S. Note 2 expressly states that the term "further worked" constitutes the listed surface treatments "unless the context provides otherwise." … Here, the context provides otherwise.

In this case, the subject rods were hot-rolled, then forged, and were not subject to any of the surface treatments listed under Additional U.S. Note 2 after being hot-rolled and forged. Thus, if the Court were to read "further worked" as limited to surface treatments, it would render unnecessary the qualifying language (*i.e.*, "than hot-rolled, hot-drawn or extruded" in HTSUS Sub-Heading 7228.30.80 and "than forged" in HTSUS Sub-Heading 7228.40.00) that distinguishes the two competing tariff provisions.

As with any statute, "[w]hen interpreting HTSUS provisions, [courts] must strive to give effect to every word in the statutory text." *Deckers Outdoor Corp. v. United States*, 714 F.3d 1363, 1371 (Fed. Cir. 2013)…. An interpretation of a tariff provision will be disfavored if it renders the terms of another HTSUS provision superfluous. … Thus, Courts should construe the provisions of the tariff code in a way that avoids rendering terms redundant, meaningless, or inoperative. Therefore, in this context, the term "further worked" is more appropriately defined by its common meaning, *i.e.*, "to form, fashion, or shape an existing product to a greater extent." *Cummins Inc*. [*v. United States*], 454 F.3d [1361] at 1365 [(Fed Cir. 2006)].

"Forging" is defined under Chapter 72 as "the hot deformation of the metal in the mass by means of drop hammers or on forging presses, to obtain pieces of any shape." Ch. 72, General Explanatory Note (IV)(2)(A)(2), HTSUS. The act of "forging" clearly falls within the common meaning of "further worked" as it is the process of shaping an existing product – in this case, the steel bars – to a greater extent.

Thus, applying GRI 6, the subject rods cannot be classified as "[o]ther bars and rods, not further worked than hot-rolled, hot-drawn or extruded … [o]ther" under HTSUS Sub-Heading 7228.30.80 because forging is a type of further working, and the rods were forged after being hot-rolled. Accordingly, the Court concludes that the subject rods are properly classified under HTSUS Sub-Heading 7228.40.00 as "[o]ther bars and rods, not further worked than forged."

Conclusion

… [T]he Court holds that the subject steel rods are classifiable under HTSUS Sub-Heading 7228.40.00 ("Other bars and rods, not further worked than forged"). …

VI. GRI 2(a): Doctrine of the Entireties (Substantial Completeness), or Incomplete, Unassembled, and Unfinished Articles

The traditional label for Rule 2(a) of the GRI is the "Doctrine of the Entireties." Under this Doctrine, reference to an article in an HTS heading (or sub-heading) includes three forms of that article, namely, the:

(1) complete, finished and assembled form of the article;
(2) complete, finished form of the article that is unassembled or disassembled; and

(3) incomplete, unfinished form of the article where this form has the "essential character" of the complete, finished article.

Thus, the Doctrine addresses the issue of substantial completeness: when is it appropriate to deem an article of merchandise as complete, even though technically it is not, and when is it more accurate to treat that article as separate items of merchandise? If the merchandise is deemed complete, because it is substantially so, then the applicable tariff is the rate for the merchandise as a single article. If the merchandise is treated as distinct parts, then separate tariffs are imposed on each part based on the classification of those parts as distinct articles.

This issue amounts to a zero-sum game. Customs authorities favor a determination that maximizes revenue, and importers. Producer-exporters seek the tariff-minimizing result. To referee this game, over the years American courts have developed rules for substantial completeness. Perhaps the most notable one is the five-factor *Daisy-Heddon* Test from the 1979 case bearing that name. This Test is stated and applied in the 1989 *Simod* case (discussed in a separate Chapter).

Consider, for example, Heading 6201 is "men's or boy's overcoats, carcoats, capes, cloaks, anoraks (including ski-jackets), windbreakers and similar articles (including padded, sleeveless jackets), other than those of heading 6203 [which covers suits and blazers]." This Heading covers vests, *i.e.*, sleeveless jackets. The applied MRN rate in the HTSUS for this Heading is high – 14.9%. Suppose L.L. Bean imports men's parkas from Canada. The parkas are down-filled and have four pockets.

Plainly, Heading 6201 covers the imported parkas if they arrive in complete, finished and assembled form. The Heading also covers the parkas if each parka is imported in three pieces – namely, 2 arms and a body – and the pieces subsequently are assembled at an L.L. Bean factory in Freeport, Maine. Finally, this Heading should cover the parkas even if they are imported into the U.S. without the down filling or pockets and the filling is injected, and pockets attached, later in the factory. Arguably, the incomplete, unfinished items have the essential character of a parka. After all, there is no other conceivable use for the items. Note that anoraks, including ski-jackets of man-made fibers "[c]ontaining 15 percent or more by weight of down and waterfowl plumage and of which down comprises 35 percent or more by weight" is HTS item 6201.93.10. This article carries a bound rate of duty of 4.4%. The pre-Uruguay Round rate was 4.7%.

Rule 2(a) is important because it prevents an importer from structuring the way in which it imports articles to avoid a tariff that should logically apply. Structuring could take the form of importing components of the article and assembling them in the U.S. to take advantage of lower tariffs on the components than the assembled article. It could also take the form of deliberately omitting a component (or a few components) from the article in order to remove the article from a higher-tariff category and place it in a lower tariff category. In both cases, the complete, finished, and assembled form of the article is apparent from the items that are imported. Neither the lack of assembly nor a missing component should defeat an otherwise appropriate tariff classification.

However, what is the current status of the Doctrine of the Entireties in the U.S. On the one hand, the Doctrine is incorporated into GRI 2(a) in the context of incomplete and unfinished goods. Moreover, the *Daisy-Heddon* Test still is good law. Many cases refer to it in other contexts. For example, in the 1972 case of *Border Brokerage Co. Inv. v. United States*, the U.S. Customs Court applied the Doctrine in the context of "American Goods Returned."[113]

On the other hand, the *Daisy-Heddon* Test arose under the former TSUS, which the HTSUS replaced on 1 January 1989. Likewise, the *Simod* case is based on the TSUS. To be sure, remnants of the TSUS linger. And, pre-1989 rulings of the Customs Service and case law occasionally are cited. But, relying on such administrative or judicial decisions from the TSUS era for classification purposes is dicey. That is because the HTSUS numbering scheme is different from that of the TSUS, and the GRI – which were introduced along with the HTS – changed many criteria for classification. When pre-1989 rulings or cases are used, the reasons typically are either that the issue is one of settled law, or there is no more recent decision on point.

Further, in the 2005 case of *Zomax Optical Media, Inc. v. U.S.*, the CIT observed that CBP acknowledged the Doctrine was defunct, at least for purposes of that case.[114] That narrow interpretation is based on the facts of the case, which involve split shipments. It also is based on the legal reality that the way in which CBP handled classification of merchandise no longer is covered by the Doctrine, but rather by a statute on split shipments, namely, 19 U.S.C. Section 1484(j).

Query whether CBP has a habit of interpreting the law in a way that favors its interests, albeit obliquely. For example, in the context of rules of origin and the *Anheuser-Busch* substantial transformation test, does CBP alter the test for conferral of origin based on a substantial transformation from a change in (1) "name, character, or use," which the Supreme Court intended, to (2) "name, character, and use"? Might CBP use the fact that the Doctrine of the Entireties has been subsumed into GRI 2(a) as a basis for extending "defunctness" to broader applications?

From the uncertainty about the status of the *Daisy-Heddon* Test, it may be inferred that GRI Rule 2(a) is more accurately called "Incomplete, Unassembled, and Unfinished Articles." Indeed, in 1999 – a decade after the HTSUS and GRI became law – the Customs Service acknowledged Rule 2(a) is based on the Essential Character Test, which is formally Rule 3(b) (discussed below). In particular, the Customs Service said the way to decide whether an article is complete, if it is imported in its unassembled, incomplete, or unfinished form, is to ascertain whether that article has the "essential character" of the finished or assembled good.[115]

VII. GRI 2(b):

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113 *See* 349 F. Supp. 1011.
114 *See* Slip. Op. No. 05-44, 12.
115 *See* HQ 96238 (26 August 1999).

Pure and Mixed Forms

Rule 2(b) of the GRI indicates that a reference in the HTS to an article of a given material or substance includes reference to an article that consists wholly or partly of such material or substance. Thus, both a "pure" and "mixed" (*i.e.*, "composite") article is covered by the heading. Consider HTS item 6201.93, which is anoraks including ski jackets, of man-made fibers. This item covers anoraks that are wholly or partly of man-made fibers. Here, the Rule serves to prevent structuring the composition of an article to avoid an otherwise appropriate classification.

Chapter 9

GRI 3-6, THEIR APPLICATION, AND ARI[116]

I. GRI 3(a): Rule of Relative Specificity

What if an article can be placed in two or more HTS classifications? GRI Rules 3 and 4 of the GRI address this issue. It is of immense practical importance when different tariffs are specified for the various relevant classifications. Rules 3 and 4 contain four tools for choosing the correct classification. Again, these tools are to be used *in seriatim*. The first tool, Rule 3(a), is traditionally known as the "Rule of Relative Specificity." It establishes a preference for the heading that provides the most specific description of the article. A description by use is more specific than an *eo nomine* description or a general description. An *eo nomine* description is more specific than a general description.

For instance, take iron and steel springs. The description by use classification "[l]eaf springs and leaves therefor: [s]uitable for motor-vehicle suspension: [t]o be used in motor vehicles having a G.V.W. not exceeding 4 metric tons" is HTS item 7320.10.30. (It carries a post-Uruguay Round tariff of 3.2%, reduced from 4%.) This classification is more specific than the alternative general description classification "other [leaf springs and leaves therefor]" (HTS item 7320.10.60, which carries the same pre- and post-Uruguay Round tariff rates).

As another example, consider apricot products. The *eo nomine* classification "apricot pulp" (HTS item 2008.50.20, which carries a post-Uruguay Round tariff of 10%, reduced from 12.5%) is more specific than the general description "apricots" (HTS item 0809.10.00, which carries a post-Uruguay Round tariff of 0.2 cents per kilogram, reduced from 0.4 cents per kilogram).

Sometimes, the issue of specificity can arise with respect to parts of completed merchandise. In the 2017 case of *The Container Store v. United States*, the CIT was presented with finished elfa®-brand modular storage and organization units.[117] The question was how to classify so-called "top tracks" for The Container Store's elfa® modular home storage and organization systems. The tracks (and related hangers) are the parts of the system that allow the overall structure to be affixed to a wall or door, and enable the structure to hold baskets, drawers, and shelves to be attached to the system. The

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116 Documents References:
(1) *Havana (ITO) Charter* Articles 33, 35-37
(2) GATT Article VII
(3) *General Rules of Interpretation for the Harmonized Tariff Schedule (GRI)*
(4) *NAFTA* Chapter 5
(5) Relevant provisions in other FTAs

117 *See* Number 09-00327 (Slip Opinion 16-6, 21 January 2016); Brian Flood, *Court Upholds Container Tariffs*, 33 International Trade Reporter 130 (BNA) (28 January 2016).

importer, The Container Store, sought duty free treatment by classifying the tracks as "parts of furniture" under HTSUS Sub-Heading 9403.90.80, which covers:

9403	Other furniture and parts thereof:
9403.90	Parts:
9403.90.80	Other.

CBP said the better category was the 3.9% tariff classification for "base metal," HTSUS Subheading 8302.42.30, which covers:

8302	Base metal mountings, fittings and similar articles suitable for furniture, doors, staircases, windows, blinds, coachwork, saddlery, trunks, chests, caskets or the like; base metal hat racks, hat-pegs, brackets and similar fixtures; castors with mountings of base metal; automatic door closers of base metal; and base metal parts there-of:
8302.42	Other, suitable for furniture:
8302.42.30	Of iron or steel, of aluminum or of zinc.

CBP said elfa® systems are unit furniture, with top tracks and hanging standards comprised of epoxy-bonded steel. CBP argued the tracks and hangers are "parts of general use." As such are excluded from the scope of Heading 9403, and thus they must be classified under Heading 8302.

The CIT agreed with CBP: its classification was more specific than that advocated by the importer. However, in 2017, the Federal Circuit reversed the CIT decision, thus rejecting the CBP view that top tracks are metal furniture mountings dutiable at 3.9%.[118] The Federal Circuit faulted the CIT for not paying due regard to the WCO EN 83.02, which:

> draws a sharp distinction between "general purpose … accessory fittings and mountings," which fall within the scope of Heading 8302, and "goods forming an essential part of the structure of [an] article," which do not. The top tracks and hanging standards provide the indispensable structural framework for the elfa® modular storage unit, and without them the system could not hang from a vertical surface.

In other words, the elfa® system is unit furniture, because it is designed to be hung on a wall, is fitted with other pieces to constitute a larger system, and a consumer can assemble the system in various ways to hold objects. Top tracks are designed exclusively for the elfa® system, so they are properly classified as parts of that unit furniture under HTSUS 9403.90.80.

Rule 3(a) also states if two or more headings each describe only part of the materials or substances used in a mixed or composite article, then such headings are deemed to be

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[118] *See The Container Store v. United States*, Federal Circuit Number No. 2016-1666 (18 July 2017); Brian Flood, *Container Store Wins Customs Appeal Over Import Duties*, 34 International Trade Reporter (BNA) 1055 (27 July 2017).

equally specific. Similarly, if two or more headings each describe only some of the items in an article comprised of a set of items, then such headings are deemed equally specific. In these cases, Rule 3(a) does not yield a classification, and the 2nd tool must be used.

For example, suppose Mediterranean Market in Lawrence, Kansas imports packages of dried fruits. Each package contains prunes, figs, papayas and cherries. They are sold as a single article, namely, a gift pack. (Because they are suitable for immediate consumption, HTS heading 0812, which concerns dried fruit not suitable for immediate consumption, is inapplicable). According to HTS item 0813.50.00, which covers mixtures of nuts and dried fruits, the applicable post-Uruguay Round bound tariff rate is 14% (reduced from a previous rate of 17.5%). But, suppose each gift pack also contains brazil nuts, pecans, and almonds. HTS item 2008.19.85 concerns mixtures of fruits and nuts and specifies a post-Uruguay Round bound tariff rate of 22.4% (reduced from a previous rate of 28%). Both HTS items, 0813.50.00 and 2008.19.85, describe only some of the items in the gift packs. Thus, both are deemed equally specific under Rule 3(a).

II. GRI 3(a), *Eo Nomine* versus Use Classification, and 2021 *SC Johnson* Case

S.C. JOHNSON & SON V. UNITED STATES, UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT, NUMBER 2020-1476 (2 JUNE 2021)[119]

Dyk, Circuit Judge:

Background

On May 15, 2013, S.C. Johnson imported 1,512 cases of Ziploc® brand re-closable sandwich bags from Thailand. The bags have a single zipper closure and measure six and one-half inches by five and seven-eighths inches. They are manufactured from polyethylene resin pellets and are tested to ensure compatibility with food contact.

Upon entry, Customs classified the sandwich bags under HTSUS Sub-Heading 3923.21.00, covering "[a]rticles for the conveyance or packing of goods, of plastics; stoppers, lids, caps and other closures, or plastics: Sacks and bags (including cones): Of polymers of ethylene." On June 26, 2014, S.C. Johnson filed a protest, which was deemed denied.

S.C. Johnson then initiated this action before the Trade Court, contending that the sandwich bags should have been classified under HTSUS Sub-Heading 3924.90.56, covering "[t]ableware, kitchenware, other household articles and hygienic or toilet articles, of plastics: Other. Other." S.C. Johnson additionally argued that, because the merchandise should have been classified under Sub-Heading 3924.90.56 and was imported from Thailand, the bags were eligible for duty-free treatment under the Generalized System of Preferences. [The *GSP* is discussed in a separate Chapter.]

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[119] Emphasis original.

The parties filed cross-motions for summary judgment before the Trade Court. The Trade Court determined "HTSUS Heading 3923 is a principal use provision and encompasses goods of plastic used to carry or transport other goods of any kind." … The Trade Court also concluded that "HTSUS Heading 3924 is an *eo nomine* provision that encompasses plastic goods of or relating to the house or household." … The Trade Court declined to determine on summary judgment whether the sandwich bags were *prima facie* classifiable under either Heading.

After a bench trial on the papers, the Trade Court conducted a principal use analysis using the *Carborundum* factors to determine whether the sandwich bags were *prima facie* classifiable under HTSUS Heading 3923. [In Footnote 1 of the Federal Circuit's decision, it summarized the *Carborundum* factors as follows: "The *Carborundum* factors are used to determine whether merchandise is commercially fungible with the particular class or kind of merchandise that falls under a principal use provision. *See Aromont USA, Inc. v. United States*, 671 F.3d 1310, 1312-13 (Fed. Cir. 2012) (*citing United States v. Carborundum*, 536 F.2d 373, 377 (CCPA 1976)). Under *Carborundum*, courts look to (1) use in the same manner as merchandise which defines the class; (2)the general physical characteristics of the merchandise; (3) the economic practicality of so using the import; (4) the expectation of the ultimate purchasers; (5) the channels of trade in which the merchandise moves; (6) the environment of the sale, such as accompanying accessories and the manner in which the merchandise is advertised and dis-played; and (7) the recognition in the trade of this use. *Id.*at 1313."] The Court concluded that "the majority of the *Carborundum* factors support[ed] classification under HTSUS Heading 3923" and that "the subject merchandise [we]re *prima facie* classifiable under that Heading.

The Trade Court also determined that the sandwich bags were *prima facie* classifiable under HTSUS Heading 3924, noting that "[t]he sandwich bags are designed in a manner consistent with household food storage" and that "S.C. Johnson's internal study indicate[d] that the sandwich bags can be found in a household."

Because the sandwich bags were *prima facie* classifiable under both headings at issue, the Court applied General Rule of Interpretation ("GRI") 3, which dictates that goods should be classified under the Heading that provides the most specific description. [In Footnote 2 of its opinion, the Federal Circuit observed: "The GRIs, along with the Additional U.S. Rules of Interpretation ("ARIs"), "govern the proper classification of all merchandise and are applied in numerical order." *Carl Zeiss, Inc. v. United States*, 195 F.3d 1375, 1379 (Fed. Cir. 1999). GRI 3 provides in relevant part that:

> When … goods are, *prima facie*, classifiable under two or more Headings … the Heading which pro-vides the most specific description shall be preferred to Headings providing a more general description.

GRI 3(a)."] The Court concluded that the sandwich bags were properly classified under HTSUS Heading 3923 because that Heading "has requirements that are more difficult to satisfy and describe the article with a greater degree of accuracy and certainty." Be-cause the products were classified under HTSUS Heading 3923, the Trade Court did not reach whether the sandwich bags were eligible for duty-free treatment under the Generalized System of Preferences.

S.C. Johnson appealed. …

Discussion

The classification of merchandise "involves two underlying steps: (1) determining the proper meaning of the tariff provisions, which is a question of law; and (2) determining which Heading the particular merchandise falls within, which is a question of fact." *Deckers Corp. v. United States*, 532 F.3d 1312, 1314-1315 (Fed. Cir. 2008). "We review questions of law *de novo*, including the interpretation of the terms of the HTSUS, whereas factual findings of the Court of International Trade are reviewed for clear error." *Id*. at 1315. The issues here are legal issues – the interpretation of HTSUS Headings.

I.

First, we address S.C. Johnson's argument that the Trade Court erred in determining that the sandwich bags are classifiable under HTSUS Heading 3923. That Heading provides for classification of:

> [a]rticles for the conveyance or packing of goods, of plastics; stoppers, lids, caps and other closures, of plastics.

HTSUS Heading 3923.

The Trade Court concluded that HTSUS Heading 3923 "encompasses goods of plastic used to carry or to transport other goods of any kind." S.C. Johnson argues that HTSUS Heading 3923 should instead apply only to "articles used for commercial purposes," … that is, the transportation of goods between sellers and their sup-pliers rather than the transportation of goods by customers. We disagree.

In support of its interpretation, S.C. Johnson urges that HTSUS Heading 3923 should be construed to have the same scope as a predecessor tariff provision, Tariff Schedules of the United States ("TSUS") item 772.20, which encompassed:

> [c]ontainers, of rubber or plastics, with or without their closures, chiefly used for the packing, transporting, or marketing of merchandise.

TSUS 772.20.

Because of the reference to "merchandise," TSUS item 772.20 was construed as limited to the packing, transport, or marketing of goods in the stream of commerce. *See Imperial Packaging Corp. v. United States*, 535 F. Supp. 688, 689-90 (Ct. Int'l Trade, 1981) (concluding that plastic shopping bags used by customers to carry merchandise did not fall under TSUS 772.20 because the Heading was "not intended to encompass merchandise bags which retail stores furnish to their customers for carrying purchases home").

None of the cases on which S.C. Johnson relies was decided by this Court or its predecessor. In any event, cases limiting TSUS item 772.20 to the packing or transportation of commercial goods do not apply to the "differing language of the more recently enacted HTSUS." *Mitsubishi Int'l Corp. v. United States*, 182 F.3d 884, 886 (Fed. Cir. 1999); *see also Bausch & Lomb, Inc. v. United States*, 148 F.3d 1363, 1367 (Fed. Cir. 1998) (addressing the differences be- tween an HTSUS Sub-Heading and TSUS item and stating that "[w]e can safely assume that Congress changed the language for a reason"). The language of HTSUS Heading 3923 differs from TSUS item 772.20 item in two material respects. First, HTSUS Heading 3923 changed "merchandise" to "goods." As the government correctly points out, the term "goods" is broader than "merchandise" and includes "both personal property as well as items of trade." …; *see also Good*, *Webster's II New College Dictionary* 480 (1999) (defining "goods" as "a. Commodities: wares … b. Portable personal property").

Second, the provision was changed to apply to items for "conveyance or packing," HTSUS Heading 3923, rather than "packing, transporting, or marketing," TSUS item 772.20. Thus, HTSUS 3923 applies more broadly to articles for the "conveyance or packing of goods," and is not limited to transportation between sellers and their suppliers.

The materiality of this difference in language is con- firmed by a comparison of the Summary of Trade and Tariff Information for TSUS item 772.20 and the current Explanatory Notes for HTSUS Heading 3923. The Summary of Trade and Tariff Information states that:

> [b]ags and similar nonrigid articles which are not covered here under TSUS item 772.20 include disposable household bags such as garbage and garden bags, sandwich bags, and food bags.

Summary of Trade and Tariff Information, TSUS item 772.20, 772.85, and 772.86 (April 1981), U.S. International Trade Commission. By contrast, the Explanatory Notes for HTSUS Heading 3923 state that the Heading covers:

> [c]ontainers such as boxes, cases, crates, **sacks and bags (including cones and refuse sacks)**, casks, cans, carboys, bottles, and flasks.

… [EN 39.23(a), (c) (2012) (Emphasis added by Court.)]. Thus, while TSUS item 772.20 did not cover disposable household bags, the modified language of HTSUS Heading 3923 does.

Next, S.C. Johnson contends that the Trade Court's determination as to the scope of HTSUS Heading 3923 is in- consistent with Customs rulings finding that Heading 3923 should be limited to "articles used to package or convey bulk or commercial merchandise." …; *see also* HQ H026225 (June 4, 2009) (stating that HTSUS Heading 3923 "provides for cases and containers used for shipping purposes" and therefore the heading "provides for cases and containers of bulk goods and commercial goods, not personal items"). These Customs rulings are not entitled to *Chevron* deference and are not persuasive. *See United States v. Mead Corp.*, 533 U.S. 218, 221 (2001) (holding that a Customs classification ruling "has no claim to judicial deference under *Chevron*" but can "claim respect according to its persuasiveness"). Nor are they consistent. As the government correctly points out, Customs previously classified Dow Chemical's "polyethylene food bags with mini-grip closures" under HTSUS subheading 3923.21.00, the same provision at issue in this case. HQ 086579 (March 7, 1990).

Finally, S.C. Johnson contends that our prior decision in *SGI, Inc. v. United States*, 122 F.3d 1468 (Fed. Cir. 1997), "reject[ed] classification of household food storage articles as 'articles for the conveyance or packing of goods' within HTSUS Heading 3923." … In *SGI*, this Court summarily ruled that soft-sided vinyl insulated coolers for transporting food or beverages did not fall within the scope of HTSUS heading 3923 because Heading 3923 does not specifically mention "foodstuffs." *SGI*, 122 F.3d at 1473 n.1. S.C. Johnson appears to interpret this statement as a determination that HTSUS 3923 does not apply to personal food transportation or storage. However, there is nothing in HTSUS heading 3923 that excludes containers for transporting foodstuffs. As the explanatory notes to HTSUS heading 3923 illustrate, the heading includes "boxes, cases, crates, sacks and bags (including cones and refuse sacks), casks, cans, carboys, bottles and flasks" and "[c]ups without handles having the character of containers used for the packing or conveyance of certain foodstuffs." EN 39.23. Thus, HTSUS heading 3923 encompasses containers for the packing or transport of foodstuffs. Whatever the meaning of *SGI*, it does not help S.C. Johnson here.

S.C. Johnson does not appear to otherwise challenge that the sandwich bags are used for the packing or conveyance of goods. Nor could it. The record overwhelmingly shows that the sandwich bags are used for the transportation of food that is consumed away from home. As S.C. Johnson's witness, Amy Bigna, explained, the bags are "predominantly used for packing lunches, whether it be for someone to take it to work or to send it to school with your child." …

II.

Next, we address S.C. Johnson's challenge to the Trade Court's determination that HTSUS heading 3924 is an *eo nomine* provision rather than a use provision. If HTSUS Heading 3924 is a use provision, then both HTSUS Headings at issue would be use provisions, and under ARI 1(a), the "principal use" would govern classification of the sandwich bags. S.C. Johnson contends that the principal use of the bags is household food storage. We agree with the Trade Court that HTSUS Heading 3924 is an *eo nomine* provision. As the Trade Court determined, the key inquiry under the terms of the Heading is where the articles at is- sue are located, rather than how they are used. This Heading provides in pertinent part for the classification of:

> [t]ableware, kitchenware, other household articles and hygienic or toilet articles, of plastics.

HTSUS Heading 3924.
There are two types of HTSUS headings, *eo nomine* and use provisions. "An *eo nomine* provision 'describes an article by a specific name,' whereas a use provision describes articles according to their principal or actual use." *Schlumberger Tech. Corp. v. United States*, 845 F.3d 1158, 1164 (Fed. Cir. 2017) (*quoting Aromont*, 671 F.3d at 1312). On its face Heading 3924 does not define its coverage by reference to the "use" of the goods in question. While a use provision need not expressly use the words "used for," *see StoreWALL, LLC v. United States*, 644 F.3d 1358, 1365 (Fed. Cir. 2011) (Dyk, J., concurring), "a use limitation should not be read into an *eo nomine* provision unless the name itself inherently suggests a type of use," *Carl Zeiss, Inc. v. United States*, 195 F.3d 1375, 1379 (Fed. Cir. 1999).

In determining whether a provision inherently suggests a type of use, we have previously looked to dictionary definitions of heading terms. In *Minnetonka Brands, Inc. v. United States*, the Trade Court concluded that HTSUS Heading 9503, covering "Other toys," was a principal use provision because dictionary definitions suggested that toys are "designed and used for amusement, diversion or play, rather than practicality." 110 F. Supp. 2d 1020, 1026 (Ct. Int'l Trade 2000). The Trade Court's reasoning in *Minnetonka* was adopted by this Court in *Processed Plastics Co. v. United States*, 473 F.3d 1164, 1170 (Fed. Cir. 2006) ("We agree with the standard adopted in *Minnetonka* to determine whether merchandise should be classified as a toy.").

Other cases have determined that generic terms pre- ceded by an adjective suggesting a manner of use can constitute principal use provisions. *See, e.g.*, *Stewart-Warner Corp. v. United States*, 748 F.2d 663, 667 (Fed. Cir. 1984) (explaining that the TSUS term encompassing "bicycle speedometers" was "a term 'controlled by use' … because the noun 'bicycle' acts as an adjective modifying 'speedometer' in a way that implies use of the speedometer on a bicycle").

Here, the Trade Court noted that "'[h]ousehold' is defined as 'the maintaining of a house,' 'household goods and chattels,' 'a domestic establishment,' or 'of or relating to a household.'" … (*quoting Webster's Third New International Dictionary* 1096 (1993))…. The Court also determined that "'[a]rticle' is defined as an 'individual thing or element of a class; a particular object or item.'" *Id.* at 36 (*quoting The American Heritage Dictionary of the English Language* 101 (4th ed. 2000))…. As the Trade Court concluded, these definitions do not suggest a specific type of use. Further, none of the terms in HTSUS Heading 3924 acts as an adjective that suggests a type of use rather than a location where the objects can be found.

S.C. Johnson argues that "an unbroken line of cases" establishes that "household article" constitutes a use provision. … In support, S.C. Johnson relies on several cases in which this court or its predecessor determined that the different tariff term "household utensils" used in Paragraph 339 of the *Tariff Act of 1930* constituted a use provision. *See*

M. Pressner & Co. v. United States, 42 CCPA 48, 49 (1954); *Frank P. Dow Co. v. United States*, 21 CCPA 282, 287 (1933); *see also Stewart-Warner Corp. v. United States*, 748 F.2d 663, 667 (Fed. Cir. 1984) (noting that the Trade Court had previously determined that "household utensils" was a use classification).

Even if "household utensils" were a use provision, that does not change the outcome of this case. As the government points out, the term "utensil" is defined as "an implement, instrument, or vessel used in a household and especially a kitchen." … (*quoting Utensil*, *Merriam-Webster*, www.merriam-webster.com/dictionary/utensil (last visited May 10, 2021)). Thus, the term "utensil," like the term "toy," suggests a specific use and could be construed as a use provision. *Processed Plastics*, 473 F.3d at 1170 (discussing the tariff term "Other toys"). As we have noted, in contrast, the term "Article" does not suggest a type of use and should not be construed as creating a use provision.

In *SGI*, this Court determined that the items at issue (soft-sided coolers) fell under HTSUS Heading 3924.10.50, explaining that "the coolers may be considered 'household articles' because '[t]he coolers may be used in a number of locations where food or beverages might be consumed.'" *SGI*, 122 F.3d at 1473 (*quoting SGI, Inc. v. United States*, 917 F. Supp. 822, 825 (Ct. Int'l Trade 1996), *rev'd*, 122 F.3d 1468) (alteration in original). Whether HTSUS Heading 3924 constitutes a use provision or an *eo nomine* provision did not affect the result of that case. The coolers would have been classifiable under HTSUS Heading 3924 even if the heading were an *eo nomine* provision because they were located in the household. We do not view *SGI* as determining that HTSUS Heading 3924 was a use provision. [In Footnote 4 of its opinion, the Federal Circuit stated: "We additionally note that *SGI* was superseded by statute when HTSUS Heading 4202 was amended by *Presidential Proclamation* to include "insulated food or beverage bags." *Proclamation* 7515, 66 Fed. Reg. 66,549, 66,619 (Dec. 18, 2001), *as corrected by* Technical Corrections to the Harmonized Tariff Schedule of the United States, 67 Fed. Reg. 2008 (Jan. 15, 2002). *SGI*'s conclusion that insulated cooler bags are not classifiable under HTSUS heading 4202 because the provision "[did] not include containers that organize, store, protect, or carry food or beverages," 122 F.3d at 1472, is therefore no longer good law."]

S.C. Johnson also points to Customs' website, which states that "other household articles … [i]ncludes any article principally used in or around the home." Appellant's Reply Br. 15 (*quoting U.S. Dep't of Homeland Security*, *The Importation of Tableware, Kitchenware, Other Household Articles and Toilet Articles of Plastics* 9, www.cbp.gov/sites/default/files/assets/documents/2020-Feb/icp031_3.pdf). However, S.C. Johnson agrees that this court need not afford deference to Customs' website.

We conclude that HTSUS Heading 3924 encompasses goods of plastic commonly found in the home and affirm the Trade Court's determination that the heading is an *eo nomine* provision. ARI 1(a) therefore does not apply. We also agree that the sandwich bags are *prima facie* classifiable under HTSUS Heading 3924.

III.

Because the Trade Court concluded that the sandwich bags were *prima facie* classifiable under both HTSUS Headings, it applied GRI 3 to determine which Heading provided the more specific description of the products. The Trade Court believed that HTSUS Heading 3923 describes the bags more specifically than HTSUS Heading 3924. Neither party challenges the Trade Court's determination that HTSUS Heading 3923 "has requirements that are more difficult to satisfy and describe the article with a greater degree of accuracy and certainty." …

We therefore affirm the Trade Court's determination that the sandwich bags are properly classified under HTSUS Heading 3923.

III. GRI 3(b): Sets, Mixtures, Retail Sales, Essential Character Test, and 2013 *Sony* Case

The second tool, Rule 3(b), is the "Essential Character" Test. It is used if application of Rule 3(a) fails to achieve a classification for a mixed article or a set. Classification is based on the materials in the mixed article, or items in the set, that give the article its essential character. Recall, as per the discussion under Rule 2(a), CBP also uses the Essential Character Test for incomplete, unassembled, and unfinished articles.

The analysis for a mixed article or set (like that of an incomplete, unassembled, or unfinished article) sometimes requires creative argument. Consider a desk set sold as a single article. It is comprised of a pencil, eraser, paper and ruler. What item gives the set its essential character? Arguably, the paper imparts the essential character because the other items operate on the paper: the pencil is used to write on the paper, the eraser is used to eliminate marks from the paper, and the ruler is used to draw lines on the paper. Accordingly, the correct classification for the article under Rule 3(b) could be paper. But, the application of Rule 3(b) may not yield a classification. Consider again the Mediterranean Market gift packs. What item gives the pack its essential character?

As the hypothetical examples intimate, the principal context in which the Essential Character Test is used is the classification of a set of articles. However, this Test also may be used in a second context, namely, the classification of incomplete or unfinished goods as finished goods. That is, the Test may be applied in the context of GRI 2, where the issue is whether an article of merchandise is substantially complete. The deciding factor could be whether that article has its essential character, and thus can be deemed substantially complete.

Suppose an article of merchandise is multi-functional, and can be classified appropriately in a particular HTS category. Is it still necessary to apply the Essential Character Test in classifying that article, given it can be used for multiple purposes? Or, does the availability of a suitable category make application of that Test unnecessary? The CIT faced this issue in the 2013 case of *Sony Electronics, Inc. v. United States*.[120] The CIT held there was no need to apply the Test.

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[120] *See* Number 13-153, 23 December 2013; Rossella Brevetti, *CIT Backs Claim on Duty-Free Entry Of Sony Electronics Digital Camera*, 31 International Trade Reporter (BNA) 28 (2 January 2014).

The merchandise at issue in *Sony Electronics* was a digital camera that could take both still and moving images, the NSC-GC1 Net-Sharing Cam. Sony argued the Cam fit within HTSUS Sub-Heading 8525.80.40, a duty-free category for a "still image video camera." (Congress first put this description in the HTSUS in 1996, and added the term "digital" to it in 1997.) So, there was no need to analyze under Note 3 to HTSUS Section XVI whether the principal function of the item was for still or moving images.

CBP countered unsuccessfully the better categorization was HTSUS 8525.80.50, "Television cameras, digital cameras and video camera recorders: Other," which carried a 2.1% tariff. CBP said the Sub-Heading sought by Sony applied to a single-function article that could take only still pictures and record them electronically. Further, the word "Cam" on the merchandise indicated its principal function was as a camcorder, that is, its essential character was to take moving images.

The case turned on the meaning of the word "video" in HTSUS 8525.80.40. Based on dictionary definitions, Explanatory Notes, expert testimony, and the history and structure of the HTSUS, the CIT said "video" means "moving images." Therefore, the multifunctional digital camera fit within "still image video cameras" under HTSUS 8525.80.40. The CIT pointed out if CBP prevailed, then two different meanings of "video" would exist in the Tariff Schedule: still electronic image capture under 8525.80.40, and moving images under 8525.80.50. Yet, a consistent meaning must be given to similar language in the same section of a statute. In turn, because one category fully covered the multifunctional merchandise, there was no need to consider its essential character, that is, to apply a "Principal Function" analysis under HTSUS Note 3.

The CIT observed that – ironically – in years prior to the *Sony* case, CBP had put multifunctional cameras into HTSUS 8525.40 under its own ruling letters. Of course, those letters are not precedential.

IV. GRI 3(b), Question of "Set," and 2015 *Marck* Case

Another instance involving a set of items in which the Essential Character Test is not deployed is when those items do not follow the same pattern. In the 2015 case of *G.G. Marck & Associates v. United States*, the CIT ruled imported cups and mugs should not all be classified as ceramic tableware available in sets at the same 4.5% duty rate, even though the importer (G.G. Marck) put them under a single trademarked "Cancun" line of merchandise.[121]

Instead, the CIT said the 91 cups and mugs needed to classified into three categories: (1) 5 in the 4.5% category; (2) 58 as steins or mugs at 10%; and (3) 28 as ceramic tableware at 9.8%. The reason was the 91 items were not all "in the same pattern," *i.e.*, they did not all have the same color, design characteristics, or purpose for use together.

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[121] *See* Number 08-00306, Slip Opinion 15-62 (17 June 2015); Brian Flood, *Trade Court Sorts Cups, Mugs Into Three Import Tariff Categories*, 32 International Trade Reporter (BNA) 1154 (25 June 2015).

Simply put, the 91 items were not a "set," so it was inappropriate to inquire into their Essential Character as a set.

V. Essential Character of Bulbs and 2016 *Tyco Fire Product*s Case

TYCO FIRE PRODUCTS, LIMITED PARTNERSHIP, v. UNITED STATES (UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT, NUMBER 2015-1968 2015-1969, 18 NOVEMBER 2016)[122]

Background

The issue … is the proper classification of certain liquid-filled glass bulbs according to the HTSUS. Each bulb consists of a sealed, hollow glass tube that is filled with colored liquid and an air bubble. A bulb of this type is commonly used as a temperature-dependent trigger component of fire sprinkler heads. Used in this context, the bulb is installed into a sprinkler head, which acts as a valve, such that the bulb is positioned to hold the valve closed and prevent water from being released. When the sprinkler head is exposed to fire, the bulb is heated and the liquid inside the bulb expands until the bulb ultimately shatters. When the bulb breaks, the valve of the sprinkler system opens and releases a shower of water intended to extinguish the fire.

Tyco's bulbs can also be used in water heaters. As used in that context, the bulb is positioned to hold open a door to a water heater combustion chamber, which allows air to flow into the chamber. When the temperature rises to a particular threshold, the bulb shatters, forcing the door shut and thereby cutting off the air supply to the combustion chamber, extinguishing the flame. Tyco purchased the bulbs from two German manufacturers, Job GmbH ("Job") and Geissler Glasinstrumente GmbH ("Geissler"). Between 2004 and 2006, Tyco imported 42 different models of bulbs into the United States. Of these models, Tyco used 39 in fire sprinkler systems. Tyco used the other 3 models as thermal release devices in water heaters.

The temperature threshold, or activation temperature, at which the bulb breaks corresponds to the temperature rating for that model of bulb. Different models of bulbs are designed to break at different temperatures, and the temperature rating of each bulb is indicated by a colored dye in the liquid. The liquid inside the Geissler bulbs is triethylene glycol. The composition of the liquid inside the Job bulbs is proprietary to Job. Other relevant qualities of the bulb models include their response time index, which relates to the amount of time required for the bulb to reach its activation temperature; structural strength; and compatibility with environmental conditions.

U.S. Customs and Border Protection ("Customs") classified the bulbs as "other articles of glass" under HTSUS subheading 7020.00.60 ("Heading 7020"), which has a 5% rate of duty. Tyco protested Customs' ruling and requested further review, asserting that the bulbs are more properly classified under subheading 8424.90.90, which includes

[122] Emphasis original.

"Other" "Parts" of goods classified under heading 8424 and is duty-free. Customs denied Tyco's protest, and Tyco appealed to the CIT.

On summary judgment, the CIT agreed with Customs and held that the bulbs are properly classified as articles of glass under Heading 7020. The Court recognized that Chapter Note 1(c) to Chapter 84 excludes from that Chapter "other articles for technical uses or parts thereof, of glass (Heading 7019 or 7020)." Consulting the Explanatory Notes ("EN") to Chapter 84 of the Harmonized Commodity Description and Coding System ("HS"), of which the HTSUS is an embodiment, *see Pima W., Inc. v. United States*, 915 F. Supp. 399, 402 (Ct. Int'l Trade 1996), the Court determined that the bulbs are "of glass" within the meaning of the exclusion and, therefore, they are not classifiable under that Chapter.

The Court rejected Tyco's assertion that the bulbs fall within exceptions to the exclusion as set forth in the EN to Chapter 84. Specifically, the EN provides:

> [T]he following are, as a rule, to be taken to have lost the character … of glass:
>
> (i) Combinations of … glass components with a high proportion of components of other materials (*e.g.*, of metal); also articles consisting of a high proportion of … glass components incorporated or permanently mounted in frames, cases or the like, of other materials.
> (ii) Combinations of static components of … glass with mechanical components such as motors, pumps, etc., of other materials (*e.g.*, of metal).

EN Ch. 84 at 1393 (EN/AS 5, Feb. 2004). The Court determined that the bulbs do not contain a "high proportion" of non-glass material and that the bulbs do not comprise both a static and a mechanical component. The Court also consulted the ENs to Chapter 70 and Heading 7020 and determined that the bulbs have the essential character of glass, and therefore they are properly classified under Heading 7020. Tyco appeals.

Discussion

…

Having concluded that the bulbs are not classifiable under Chapter 84 [*i.e.*, Tyco argued the bulbs should be classified under Chapter 84, and thus get duty-free treatment, but the Federal Circuit upheld the CIT decision that Note 1(c) to Chapter 84 excludes the bulbs from Chapter 84], we now determine whether Customs properly classified the bulbs under Heading 7020. The EN to Heading 7020 explains, "[t]his heading covers glass articles (including glass parts of articles) **not covered** by other headings of this Chapter or of other Chapters of the Nomenclature. These articles remain here even if combined with materials other than glass, **provided** they retain the *essential character* of glass articles." EN Heading 7020 at 1178 (2002) (italicization added [, bold original]). Because the bulbs each have a glass component that is combined with a liquid component, we must determine whether the glass component or the liquid component imparts the bulbs' essential character. We agree with the CIT that the bulbs have the essential character of glass.

The parties agree that the essential character test set forth in the EN to Heading 7020 is analogous to the essential character test typically performed pursuant to GRI 3(b). Although "essential character" is not defined in the GRIs, the EN to GRI 3(b) provides, "[t]he factor which determines essential character will vary as between different kinds of goods. It may, for example, be determined by the nature of the material or component, its bulk, quantity, weight or value, or by the role of a constituent material in relation to the use of the goods." EN GRI at 4 (2002); *see also Home Depot, U.S.A., Inc. v. United States*, 427 F. Supp. 2d 1278, 1293 … (Ct. Int'l Trade 2006) (identifying "other possible considerations" such as "ordinary common sense" and the article's recognized names, invoice and catalogue descriptions, size, primary function, and uses), *aff'd*, 491 F.3d 1334 (Fed. Cir. 2007). One component can impart the article's essential character even if two components are both indispensable to the use of the article. *See Alcan* [*Food Packaging (Shelbyville) v. United States*], 771 F.3d [1364] at 1367 [(Fed. Cir. 2014)].

While we recognize Tyco's engineer's testimony that the liquid component is "the brains behind the operation" of the triggers, … we agree with the CIT's determination that both the glass and the liquid components "play critical roles in the proper functioning of the filled bulb," in view of "primary considerations … includ[ing]) the response time required, 2) the load the filled bulb will have to bear, 3) the environmental conditions the bulb will be placed into, and 4) the temperature rating." … Turning to other factors for determining essential character, the evidence shows that for each bulb model the glass weighs more than the liquid. Tyco concedes that the relative weight factor favors the government. The glass is also the more expensive component in all of the imported bulbs except the smallest models and the water heater models. Furthermore, as Tyco admits, the bulbs are sometimes referred to as "glass bulbs," and much of the packaging and marketing materials in the record use similar terminology. *See La Crosse Tech., Ltd. v. United States*, 723 F.3d 1353, 1361 (Fed. Cir. 2013) (considering the name of the devices in determining their essential character); *United China & Glass Co. v. United States*, 293 F. Supp. 734, 737 … (Cust. Ct. 1968) ("[I]t is not uncommon that an article is called by the name denoted by its essential character…"). Finally, as the CIT noted, Congress amended the HTSUS in 2006 to create a temporary duty-free Sub-Heading specifically encompassing the types of bulbs at issue. *See Tax Relief and Health Care Act of 2006*, Pub. L. No. 109-432, § 1331, 120 Stat. 2922, 3124. The temporary Sub-Heading also referred to the items as "[l]iquid-filled glass bulbs." *See id.* ("9902.24.26: Liquid-filled glass bulbs designed for sprinkler systems and other release devices (provided for in Sub-Heading 7020.00.60)").

… [W]e see no error in the CIT's conclusion that the bulbs have the essential character of glass and are properly classified under Heading 7020.

Conclusion

… [W]e conclude that the bulbs are excluded from Chapter 84 and are properly classifiable under Heading 7020 of the HTSUS.

Affirmed

VI. GRI 3(c): Last Listed

If both Rules 3(a) and 3(b) fail to yield a classification, then the third tool, found in Rule 3(c), must be employed. It simply states the article should be classified according to the heading that occurs last in numerical order among the headings of the HTS that equally merit consideration. Applying Rule 3(c) to the Mediterranean Market gift packs, HTS item 2008.19.85 would be the correct classification. It appears in Chapter 20 of the HTS, which clearly comes after HTS item 0813.50.00, which appears in Chapter 8.

VII. GRI 4: Kinship

Finally, if none of the aforementioned tools works, then Rule 4 of the GRI instructs that the problematical article must be classified in the heading for the goods to which the article is most akin.

There is an important overlay on the GRI: a large body of common law – both case law and administrative precedents – applying the GRI from the CIT and Federal Circuit. That law can help guide importers on classification questions.

VIII. GRI 5: Containers

This Rule is used for international traffic and packing materials. It consists of two Rules. Rule 5(a) concerns containers that are shaped to fit and protect the article they contain, suitable for long-term use, and presented with the article they contain. Examples are camera, drawing instrument, gun, musical instrument, and necklace cases. Such containers are classified together with the article they contain, as long as the container does not give the article its "essential character." If the container accounts for the essential character, then the article is classified according to the container. Rule 5(b) covers all other types of containers, such as packing materials like bubble wrap or styrofoam chips. As long as they are normally used for packing the article in question, and not appropriate for repetitive use, they are classified along with that article.

IX. GRI 6: Sub-Headings

According to Rule 6, Sub-Headings (*i.e.*, the 6 digit HTS categories) may be used to classify an article of merchandise. But, they can be used only after the article is properly classified in a Heading (*i.e.*, at the 4 digit level). That is, once an article of merchandise has been categorized into a Heading, through the application of the aforementioned GRI, then classification into a Sub-Heading occurs. Classification at the Sub-Heading is done by repeating the GRI, *in seriatim*, as above.

X. GRI 3(a) and 6, and 2018 *Well Luck* Case

WELL LUCK COMPANY, INC. V. UNITED STATES, UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT, NUMBER 2017-1816 (11 APRIL 2018)

Wallach, Circuit Judge:

This appeal concerns the proper classification of certain in-shell sunflower seeds for snacking imported by Appellant Well Luck Company, Inc. ("Well Luck"). U.S. Customs and Border Protection ("Customs") classified the subject merchandise under Harmonized Tariff Schedule of the United States ("HTSUS") Sub-Heading 2008.19.90.1 Before the ... CIT, Well Luck and Appellee United States ("the Government") filed cross-motions for summary judgment, with Well Luck challenging Customs' classification and arguing that Customs should have classified the subject merchandise under HTSUS Sub-Heading 1206.00.00. The CIT denied Well Luck's Cross-Motion and, instead, granted the United States' Cross-Motion, determining that Customs properly classified the subject merchandise under HTSUS Sub-Heading 2008.19.90. *See Well Luck Co. v. United States*, 208 F. Supp. 3d 1364, 1367 (Ct. Int'l Trade 2017)....

Well Luck appeals. ... We affirm.

Background

The subject merchandise "consists of three varieties of wet-cooked and/or roasted, salted, flavored, and/or unflavored sunflower seeds in unbroken shells: All Natural Flavor, Spiced Flavor, and Coconut Flavor." *Well Luck*, 208 F. Supp. 3d at 1367.... The sunflower seeds in each flavor "are of the common sunflower, *Helianthus annuus*, and the seeds used by [Well Luck] are used, as is, for human consumption and not for the extraction of edible or industrial oils or fats." *Id.* at 1368.... After initial processing and selection "for quality, size, and purity," the sunflower seeds "are then further processed by being heated in an oven to 302 degrees Fahrenheit ... for approximately [sixty-five] minutes," and "[s]alt is added to the seeds during this heating process." *Id.* (citations omitted). Finally, the sunflower seeds "are then cooled, and those in unbroken shells are packaged into finished product bags sold for consumption and [then] imported." *Id.* (citations omitted). The subject merchandise "is not fungible or interchangeable with" any of the following: (1) "raw sunflower seeds"; (2) sunflower seeds that "only undergo heat treatment" to preserve them, "to inactivate antinutritional factors," or "to facilitate their use"; or (3) sunflower seeds that "are not roasted, salted[,] and flavored." *Id.* ...

Customs classified the subject merchandise under HTSUS Sub-Heading 2008.19.90 at a duty rate of 17.9% *ad valorem*. ... HTSUS Sub-Heading 2008.19.90 covers "[f]ruit, nuts and other edible parts of plants, otherwise prepared or preserved, whether or not containing added sugar or other sweetening matter or spirit, not elsewhere specified or included: [n]uts, peanuts (ground- nuts) and other seeds, whether or not mixed together: [o]ther, including mixtures: [o]ther." Well Luck contested the classification by filing a protest, arguing that the subject merchandise should enter at a duty-free rate under HTSUS Sub-Heading 1206.00.00, which covers "[s]unflower seeds, whether or not broken." ... Customs denied Well Luck's protest, and the CIT upheld Customs' classification. ...

The CIT determined that HTSUS Sub-Heading 1206.00.00 covers "seeds of the common sunflower plant, *Helianthus annuus*, that are not processed in a way that renders them unsuitable for extraction of edible or industrial oils and fats, sowing, and other purposes," *Well Luck*, 208 F. Supp. 3d at 1372, whereas HTSUS Sub-Heading 2008.19.90 "covers parts of plants made ready or suitable in advance for eating, such as by dry-roasting or fat roasting, whether or not containing or coated with vegetable oil, salt, flavors, spices or other additives, and made fit for future use in a manner to prevent spoilage," *id.* at 1375. Applying these interpretations to the subject merchandise, the CIT held that Well Luck's "sunflower seeds are not classified in [HTSUS S]ub-Heading 1206.00.00 ... because it is undisputed that they are not suitable for general use," *id.*, but rather "are prepared or preserved not elsewhere specified or included within the meaning of [HTSUS S]ub-Heading 2008.19.90," *id.* at 1377.

Discussion

I. Standard of Review

We review *de novo* the CIT's decision to grant summary judgment, applying the same standard used by the CIT to assess Customs' classification. *See Otter Prods., LLC v. United States*, 834 F.3d 1369, 1374–75 (Fed. Cir. 2016). "Although we review the decision of the CIT *de novo*, we give great weight to the informed opinion of the CIT and it is nearly always the starting point of our analysis." *Schlumberger Tech. Corp. v. United States*, 845 F.3d 1158, 1162 (Fed. Cir. 2017)....

The classification of merchandise involves a two-step inquiry. *See LeMans*, 660 F.3d at 1315. First, we ascer tain the meaning of the terms within the relevant tariff provision and, second, we determine whether the subject merchandise fits within those terms. *See Sigma-Tau HealthSci., Inc. v. United States*, 838 F.3d 1272, 1276 (Fed. Cir. 2016). The first step presents a question of law that we review de novo, whereas the second involves a question of fact that we review for clear error. *Id.* When, as here, no genuine dispute exists as to the nature of the subject merchandise, the two-step inquiry "collapses into a question of law [that] we review *de novo*." *LeMans [Corp. v. United States]*, 660 F.3d [1311] at 1315 [Fed. Cir. 2011]....

II. The CIT Properly Granted Summary Judgment for the Government

A. The Legal Framework

The HTSUS governs the classification of merchandise imported into the United States. *See Wilton Indus., Inc. v. United States*, 741 F.3d 1263, 1266 (Fed. Cir. 2013). The

HTSUS "shall be considered ... statutory provisions of law for all purposes." 19 U.S.C. § 3004(c)(1) (2012). [As the Court explained in a footnote, the tenth digit is not statutory. See *Chemtall, Inc. v. United States*, 878 F.3d 1012, 1026 (Fed. Cir. 2017).] "The HTSUS scheme is organized by Headings, each of which has one or more Sub-Headings; the Headings set forth general categories of merchandise, and the Sub-Headings provide a more particularized segregation of the goods within each category." *Wilton Indus.*, 741 F.3d at 1266. "The first four digits of an HTSUS provision constitute the Heading, whereas the remaining digits reflect Sub-Headings." *Schlumberger*, 845 F.3d at 1163 n.4. "[T]he Headings and Sub-Headings ... are enumerated in Chapters 1 through 99 of the HTSUS (each of which has its own Section and Chapter notes)...." *R.T. Foods, Inc. v. United States*, 757 F.3d 1349, 1353 (Fed. Cir. 2014). The HTSUS "also contains the 'General Notes,' the 'General Rules of Interpretation' ('GRI'), the 'Additional [U.S.] Rules of Interpretation' ('ARI'), and various appendices for particular categories of goods." *Id.* ...

The GRI and the ARI govern the classification of goods within the HTSUS. *See Otter Prods.*, 834 F.3d at 1375. "The GRI apply in numerical order, meaning that subsequent rules are inapplicable if a preceding rule provides proper classification." *Schlumberger*, 845 F.3d at 1163. GRI 1 provides, in relevant part, that "classification shall be determined according to the terms of the *Headings* and any relative section or chapter notes." GRI 1. (Emphasis added.) "Under GRI 1, a court first construes the language of the Heading, and any Section or Chapter notes in question, to determine whether the product at issue is classifiable under the heading." *Schlumberger*, 845 F.3d at 1163 (internal quotation marks and citation omitted). "[T]he possible headings are to be evaluated without reference to their Sub-Headings, which cannot be used to expand the scope of their respective headings." *R.T. Foods*, 757 F.3d at 1353.... "Absent contrary legislative intent, HTSUS terms are to be construed according to their common and commercial meanings, which are presumed to be the same." *Carl Zeiss, Inc. v. United States*, 195 F.3d 1375, 1379 (Fed. Cir. 1999). "To discern the common meaning of a tariff term, we may consult dictionaries, scientific authorities, and other reliable information sources." *Kahrs Int'l, Inc. v. United States*, 713 F.3d 640, 644 (Fed. Cir. 2013)....

"After consulting the Headings and relevant Section or Chapter notes" consistent with GRI 1, we may consider the relevant Explanatory Notes ("EN"). *Fuji Am. Corp. v. United States*, 519 F.3d 1355, 1357 (Fed. Cir. 2008). "The [ENs] provide persuasive guidance and are generally indicative of the proper interpretation, though they do not constitute binding authority." *Chemtall*, 878 F.3d at 1019.... When, as here, "merchandise is *prima facie* classifiable under two or more Headings or Sub-Headings of the HTSUS" and GRI 2 does not apply, "we apply GRI 3 to resolve the classification." *LeMans*, 660 F.3d at 1316...; *see* GRI 2(a) (applying to "article[s] incomplete or unfinished" and "article[s] complete or finished..., presented unassembled or disassembled"); GRI 2(b) (applying to "mixtures or combinations of . . . material[s] or substance[s]" and providing that "[t]he classification of goods consisting of more than one material or substance shall be according to the principles of [GRI 3]"); GRI 3 (providing for classification "[w]hen, by application of [GRI] 2(b) or *for any other reason*, goods are, *prima facie*, classifiable under two or more Headings." (Emphasis added, italics omitted.)). GRI 3(a) provides that "[t]he heading which provides the most specific description shall be preferred to Headings providing a more general description." GRI 3(a).

Once the court determines the appropriate heading, the court applies GRI 6 to determine the appropriate subheading. *See* GRI 6; *see also Orlando Food Corp. v. United States*, 140 F.3d 1437, 1442 (Fed. Cir. 1998) (relying on GRI 6 when turning to the subheadings). GRI 6 provides that "the classification of goods in the *Sub-Headings* of a heading shall be determined according to the terms of those subheadings and any related Sub-Heading notes and, *mutatis mutandis*, to the above [GRIs], on the understanding that only Sub-Headings at the same level are comparable." GRI 6. (First emphasis added.)

B. The Subject Merchandise Falls Within the Terms of HTSUS Headings 1206 and 2008

1. HTSUS Heading 1206

According to Well Luck, the subject merchandise "are *prima facie* classifiable as 'sunflower seeds'" under HTSUS Heading 1206 because it "contains an unambiguous and unlimited *eo nomine* tariff provision" and "lexicographic authorities and published industry sources support a broad common and commercial meaning of 'sunflower seeds' that includes snacking seeds." ... The Government responds that, *inter alia*, "Well Luck has failed to establish that the common and commercial meaning of the tariff term 'sunflower seeds' includes" the subject merchandise. ... We conclude that the subject merchandise is *prima facie* classifiable under HTSUS Heading 1206.

"We first must assess whether the subject [h]eading[] constitute[s an] *eo nomine* or use provision[] because different rules and analysis will apply depending upon the heading type." *Schlumberger*, 845 F.3d at 1164 (first citing *Kahrs*, 713 F.3d at 645-46 (*eo nomine* analysis); then citing *Aromont USA, Inc. v. United States*, 671 F.3d 1310, 1312–16 (Fed. Cir. 2012) (principal use analysis)). HTSUS Heading 1206, which recites "[s]unflower seeds, whether or not broken," "is unquestionably *eo nomine* because it describes the articles it covers by name," and, thus, "our analysis starts with [its] terms." *Schlumberger*, 845 F.3d at 1164.

Neither the HTSUS, nor legislative history, nor Chapter Notes inform our construction of "sunflower seeds" as used in HTSUS Heading 1206. Therefore, "we look to the dictionary to understand its common meaning." *Id.* The common meaning of "sunflower seed" is "the hard-shelled edible seed of a plant of the daisy family, yielding an oil used in cooking and margarine." *Sunflower Seed*, New Oxford American Dictionary (3d ed. 2010); *see Sunflower Seed*, Oxford English Dictionary (3d ed. 2018) (defining "sunflower seed" as "any of the edible, oil-rich grey seeds of a sunflower; the fruit (an achene with a thin, hard shell) containing such a seed; (as a mass noun) such seeds or fruits collectively").... ... The common meaning of "sunflower seeds" as used in HTSUS Heading 1206 thus is unambiguously "edible, oil-rich seeds of a sunflower," and there is no reasonable dispute that this broad definition covers the subject merchandise. *See Well Luck*, 208 F. Supp. 3d at 1368 (stating as an uncontroverted fact that "[t]he sunflower seeds in all varieties of [Well Luck]'s imported merchandise are of the common sunflower, *Helianthus annuus*, and the seeds used by [Well Luck] are used, as is, for human consumption"....

Having considered the Heading, legislative history, and Chapter Notes consistent with GRI 1, we may turn to the relevant ENs. *Fuji*, 519 F.3d at 1357. As the CIT explained, ... the General EN to Chapter 12 provides a narrowed definition for seeds, stating that Headings 1201-07 cover: (1) "seeds ... used for the extraction ... of edible or industrial oils and fats" but not seeds "primarily used for other purposes"; and (2) seeds that "have undergone heat treatment" but "only if [the heat treatment] does not alter the character of the seeds ... as natural products" and "does not make them suitable for a specific use rather than for general use." EN 12, General. However, by relying on the "narrower interpretation" provided by the EN to determine that HTSUS Heading 1206 does not cover the subject merchandise, *Well Luck*, 208 F. Supp. 3d at 1373; *see id.* (stating that "[n]othing in the language of the HTSUS heading itself clarifies whether this broad definition or a narrower definition applies" and adopting the "narrower interpretation" provided by the EN), the CIT ran afoul of our instruction that a court "shall not employ [the ENs'] limiting characteristics, to the extent there are any, to narrow the language of the classification heading itself." *Sigma-Tau*, 838 F.3d at 1281 (quoting *Rubie's Costume Co. v. United States*, 337 F.3d 1350, 1359 (Fed. Cir. 2003)); *cf. Archer Daniels Midland Co. v. United States*, 561 F.3d 1308, 1315 (Fed. Cir. 2009) (declining to afford ENs "any weight" when inconsistent with a tariff provision's plain meaning .... We decline to repeat the CIT's error here. Therefore, we conclude that the subject merchandise is *prima facie* classifiable under HTSUS Heading 1206.

2. HTSUS Heading 2008

Well Luck contends that, because the subject merchandise is *prima facie* classifiable under HTSUS Heading 1206, our inquiry ends. ... However, imports may be *prima facie* classifiable under multiple HTSUS Headings. *See* GRI 3 (governing situations where "goods are, *prima facie*, classifiable under two or more Headings" .... We hold that the subject merchandise also is *prima facie* classifiable under HTSUS Heading 2008.

HTSUS Heading 2008 covers "[f]ruit, nuts and other edible parts of plants, otherwise prepared or preserved, whether or not containing added sugar or other sweetening matter or spirit, not elsewhere specified or included: [n]uts, peanuts (ground-nuts) and other seeds, whether or not mixed together." It is "*eo nomine* because it describes the articles it covers by name," and, thus, "our analysis starts with [its] terms." *Schlumberger*, 845 F.3d at 1164.

Neither the HTSUS, nor legislative history, nor Chapter Notes inform our construction of HTSUS Heading 2008. Therefore, "we look to the dictionary to understand its common meaning." *Id.* Because there is no dispute that the subject merchandise is "seeds" under HTSUS Heading 2008, ... we must determine the common meaning of "edible" and "prepared or preserved." First, "edible" means "fit to be eaten." *Edible*, Webster's New World College Dictionary (4th ed. 2009); *see Edible*, The American

Heritage Dictionary of the English Language (5th ed. 2011) (defining "edible" as "[f]it to be eaten, especially by humans"); *Edible*, New Oxford American Dictionary (3d ed. 2010) (defining "edible" as "fit to be eaten (often used to contrast with unpalatable or poisonous examples)"). Second, the definition of "prepared" includes "to be made ready." *See Prepare*, The American Heritage Dictionary (5th ed. 2011) (defining "prepare" to mean, *inter alia*, "[t]o make ready beforehand for a specific purpose" and "[t]o put together or make by combining various elements or ingredients"); *Prepare*, New Oxford American Dictionary (3d ed. 2010) (defining "prepare" to mean, inter alia, "make (something) ready for use" and "make (food or a meal) ready for cooking or eating"); *Prepare*, Webster's New World College Dictionary (4th ed. 2009) (defining "prepare" to mean, *inter alia*, "to make ready, usually for a specific purpose" and "to put together or make out of ingredients, parts, etc., or according to a plan or formula"). And the definition of "preserve" includes "treat[ing] or refrigerat[ing] (food) to prevent its decomposition or fermentation." *Preserve*, The New Oxford American Dictionary (3d ed. 2010); *see Preserve*, The American Heritage Dictionary (5th ed. 2011) (defining "preserve" to mean "prepare (food) for storage or future use, as by canning or salting"); *Preserve*, Webster's New World College Dictionary (4th ed. 2009) (defining "preserve" to mean, *inter alia*, "to prepare (food), as by canning, pickling, salting, etc., for future use"). Taken together, HTSUS Heading 2008 covers "seeds" that are "fit to be eaten" and either "made ready" for consumption or "treat[ed] or refrigerate[d] ... to prevent ... decomposition or fermentation." The subject merchandise indisputably is made ready for consumption through processing, flavoring, and packaging. ...

Having considered the Heading, legislative history, and Chapter Notes consistent with GRI 1, we turn to the relevant ENs. *Fuji*, 519 F.3d at 1357. The EN to HTSUS Heading 2008 confirms our conclusion. It provides that HTSUS Heading 2008 covers "fruit, nuts and other edible parts of plants, whether whole, in pieces or crushed, ... prepared or preserved" including, *inter alia*, certain nuts that are "dry-roasted, oil-roasted or fat- roasted, whether or not containing or coated with vegetable oil, salt, flavors, spices or other additives"; and explains that the products under HTSUS Heading 2008 "are generally put up in ... airtight containers." EN, Heading 2008. Thus, the EN provides that the seeds may be "prepared" using the very processes performed on the subject merchandise. *See Well Luck*, 208 F. Supp. 3d at 1367 (stating that the subject merchandise "consists of three varieties of *wet-cooked* and/or *roasted, salted, flavored* and/or unflavored *sunflower seeds* in unbroken shells" (emphases added) (internal quotation marks and citations omitted)); .... The subject merchandise thus is *prima facie* classifiable under HTSUS Heading 2008....

C. GRI 3(a) Dictates that the Subject Merchandise Properly Is Classified Under HTSUS Heading 2008

Given that the subject merchandise is *prima facie* classifiable under both HTSUS Headings 1206 and 2008, "the question is which is the more appropriate classification." *Archer Daniels*, 561 F.3d at 1317. Because GRI 2 does not apply to the subject merchandise, ... we proceed to GRI 3....

GRI 3(a) provides that "[t]he Heading which provides the most specific description shall be preferred to Headings providing a more general description." GRI 3(a). When applying GRI 3(a), "the Court should determine which Heading is most specific, comparing only the language of the Headings and not the language of the Sub-Headings." *JVC Co. of Am. v. United States*, 234 F.3d 1348, 1352 (Fed. Cir. 2000) (citation omitted). In addition, "we look to the provision with requirements that are more difficult to satisfy and that describe the article with the greatest degree of accuracy and certainty." *LeMans*, 660 F.3d at 1316....

We determine that HTSUS Heading 2008 is more specific than HTSUS Heading 1206. HTSUS Heading 1206 covers "[s]unflower seeds, whether or not broken," whereas HTSUS Heading 2008 covers "[f]ruit, nuts and other edible parts of plants, otherwise prepared or preserved, whether or not containing added sugar or other sweetening matter or spirit, not elsewhere specified or included: [n]uts, peanuts (ground-nuts) and other seeds, whether or not mixed together." HTSUS Heading 2008's requirement that the subject merchandise be "prepared or preserved" renders it more difficult to satisfy than sunflower seeds in HTSUS Heading 1206 because preparation and preservation "involve[] some degree of processing or addition of ingredients." *Orlando Food*, 140 F.3d at 1441. "Therefore, because the requirements of [HTSUS Heading 2008] are more difficult to satisfy, it is the more specific Heading, and under [GRI 3(a)], it governs the classification of the [subject merchandise]." *Id.* ... Accordingly, GRI 3(a) dictates that classification under HTSUS Heading 2008 is preferred.

Having determined that the subject merchandise properly is classified under HTSUS Heading 2008, we apply GRI 6 to determine the appropriate Sub-Heading. *See* GRI 6 (applying to "the classification of goods in the subheadings" and explaining that "only Sub-Headings at the same level are comparable").... At the six-digit Sub-Heading level, the subject merchandise does not fall within the terms of HTSUS Sub-Heading 2008.11, which covers "[p]eanuts (ground-nuts)," so we turn to HTSUS Sub-Heading 2008.19, which covers "[o]ther, including mixtures" and aptly describes the subject merchandise. Because the subject merchandise does not fall within any of the eight- digit level subheadings preceding HTSUS Sub-Heading 2008.19.90, it properly is classified under HTSUS Sub- heading 2008.19.90, which covers "[o]ther, including mixtures: [o]ther." *See Rollerblade, Inc. v. United States*, 282 F.3d 1349, 1354 (Fed. Cir. 2002) (holding that, where merchandise properly is classified under a particular heading but does not fall within a specific Sub-Heading, it properly is classified under the relevant Heading's "basket" or "catch-all" provision). Indeed, the parties do not contest the CIT's conclusion that, if the subject merchandise properly is classified under HTSUS Heading 2008, then it falls within HTSUS Sub-Heading 2008.19.90. ... Therefore, we conclude that the subject merchandise properly is classified under HTSUS Sub-Heading 2008.19.90.

[Note two important precepts the Court recounted in footnotes in its *Well Luck* decision. First, when turning to the lexicographic sources for the meanings of "sunflower seeds" and "seeds," the Court said (in footnotes 6-7) that for each term, the definitions it cited "is consistent with the definition at the time of the HTSUS's enactment." Over time, the meanings of key terms can change, so Courts must take care to use dictionaries contemporaneous with the applicable texts, here the HTSUS Headings, with which they are dealing. Second, the Court explained (in footnote 9, following its discussion of GRI 3(a):

> If HTSUS Headings 1206 and 2008 were equally specific, we would turn to GRI 3(b), which would not apply here because it only applies to "[m]ixtures, composite goods consisting of different materials or made up of different components, and goods put up in sets for retail sale." GRI 3(b). Thus, we would apply GRI 3(c), which provides that, "[w]hen goods cannot be classified by reference to [GRI] 3(a) or 3(b), they shall be classified under the heading which occurs *last in numerical order* among those which equally merit consideration." GRI 3(c). (Emphasis added.) Because HTSUS Heading 2008 occurs "last in numerical order," it would govern the classification.

Query how the case should be decided if Headings 1206 and 2008 were not equally specific?

With a 17.9% tariff on its sunflower seeds, thanks to the CBP classification of them as "prepared or preserved" fruits, nuts, and other edible plant parts Well Luck was unlucky. So, Well Luck petitioned the Supreme Court to review the Federal Circuit's decision. *See Well Luck Company, Inc. v. United States*, U.S., Number 18-534 (*certiorari petition filed* 17 October 2018); Brian Flood, *Food Distributor Sows Sunflower Seed SCOTUS Challenge (1)*, 35 International Trade Reporter (BNA) 1403 (1 November 2018). Well Luck again argued the CBP-selected category for prepared or preserved items was wrong, because it is only for such items "not elsewhere specified or included." There is an express provision for "sunflower seeds," so it should be used. CBP maintained its counter-argument that Well Luck processed, flavored, and packaged its seeds, hence they were "prepared or preserved." Well Luck again was unlucky. Well Luck tried to interest the Supreme Court by saying a general question was at issue, namely, the interpretation of "not elsewhere specified or included" as used in any HTSUS category. Well Luck was unlucky, as the Supreme Court declined to review the case.]

XI. Additional U.S. Rules of Interpretation and Notes

● ARI

Complementing and supplementing the GRI are the "Additional U.S. Rules of Interpretation," or "ARI." They apply to the HTSUS, and thus are used for classification of articles of merchandise imported into the U.S. But, they do not apply to the HTS of other countries. For example, there are Additional U.S. Rules on actual or principal use.[123]

[123] For cases on this topic, *see, e.g.*, *Tradewind Farms, Inc. v. United States*, Number 04-00642, Slip Opinion 07-62 (CIT, 30 April 2007), and *BASF Corporation v. United States*, 427 F. Supp. 2d 1200 (CIT 2006).

Under these Rules, in an HTSUS Heading, the words "to be used" relate to how an article is to be actually used, not its principal use. In turn, "actual use" means CBP can require documented proof of how an article actually was used for up to three years after that article was imported. Actual use provisions are attractive for importers, because they are often duty free. But, the threat that CBP could call upon the importer to prove actual use years after importation is a check against abuse of these provisions.

● **Shoes, Additional U.S. Note 5 to Chapter 64, and Lab Testing**

The GRI to the HS help guide customs authorities and importers in classifying merchandise. In addition to the GRI, which are prepared by the WCO, the U.S. has "Additional Notes" for many Chapters of the HTSUS. The Additional Notes supplement the GRI in the context of importation into the U.S. Those rules, while *sui generis*, sometimes reflect international standards.

Additional U.S. Note 5 to HTSUS Chapter 64 is an example.[124] Chapter 64 covers footwear. Heading 6405 pertains to footwear with an outer sole of textile materials. Such footwear has a significantly lower duty than footwear with a plastic or rubber out sole, which are classified under other Headings. Companies like New Balance, and retailers like Target, which sell athletic shoes, obviously seek to use Heading 6405.

But, what is the test to determine whether an otherwise rubber or plastic outer sole, to which textile materials are added, fits in that category? Additional Note 4(b) to Chapter 64 states:

> [T]he constituent material of the outer sole shall be taken to be the material having the greatest surface area in contact with the ground, no account being taken of accessories or reinforcements, such as spikes, bars, nail protectors, or similar attachments.

But, this Note did not stop an importer from using textile materials on an outer sole and thereby claiming lower duty treatment under Heading 6405, even if they were not tough enough for outdoor use. It could affix flimsy textile material to an outsole, ensuring that material had the "greatest surface area in contact with the ground," so as to qualify the footwear for a lower duty.

So, CBP had to figure out a way to prevent this kind of unscrupulous behavior, whereby textile materials were added to evade a higher tariff, even though they served no functional purpose. And, CBP had to give importers certainty as to what was expected of them, in terms of adding textile materials to outer soles, to qualify for a lower duty.

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[124] *See* U.S. Customs and Border Protection 47 CUSTOMS BULLETIN AND DECISIONS, number 45 (13 November 2013), *posted at* www.cbp.gov; Rossella Brevetti, *Customs Adopts New Lab Test For Classification of Certain Footwear*, 30 International Trade Reporter (BNA) 1799 (21 November 2013).

In November 2013, CBP answered the question by finalizing a laboratory test for classifying footwear with textile material on the outer sole. It established Additional Note 5, as follows:

> For the purposes of determining constituent material of the outer sole pursuant to Note 4(b) of this Chapter [64], no account shall be taken of textile materials which do not possess the characteristics usually required for normal use of an outer sole, including durability and strength.

This Note, though not a GRI but an American one, reflected developments at the international level.

In November 2012, the ISO established Standard 20871 for laboratory testing of textile materials attached to outer soles. CBP looked to that Standard. It calls for taking three samples from an outer sole and subjecting them to an abrading machine, which tests abrasion resistance. The samples are weighed beforehand, and then subject to the machine, after which they are checked for loss of mass. To be judged as strong and durable enough for use as an outer sole of outdoor footwear, textile material can be present on only one of the three samples. If textile material is the only possible constituent material on the outer sole, such as where it is not added to substrate of a second material (*e.g.*, plastic or rubber), then the footwear is for indoor use, and no testing is necessary.

Chapter 10

CLASSIFICATION CONUNDRUMS[125]

I. Substantial Completeness, 1979 Five Factor *Daisy Heddon* Test, and 1989 *Simod* Case

SIMOD AMERICA CORP. v. UNITED STATES, UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT, 872 F.2D 1572, 1573-1579 (1989)

NICHOLS, SENIOR CIRCUIT JUDGE:

Simod America Corp. ("Simod") appeals from the judgment of the United States Court of International Trade holding that its shoe components imported from Italy in 1980-84 are dutiable as footwear under items 700.35 and 700.67 of the Tariff Schedules of the United States (TSUS). *Simod America Corp. v. United States*, 693 F. Supp. 1172 (Ct. Int'l Trade 1988) (Re, C.J.). We reverse and remand.

Background

Simod imported partially constructed athletic shoes from Italy. As imported, the articles included an upper, the portion of the shoe that covers the top of the foot ("the shoe top"), and a thin piece of fabric, called an underfoot, which is sewn in the location where the shoe sole was ultimately to be placed and remained there on completion of the shoe. Some of the shoe tops had an exterior of more than 50 percent leather and others did not.

The manufacturing performed in Italy was begun by applying a cutting die to a sheet of textile or leather materials. Leather materials were cleaned and skived (pared) before proceeding to the production line. The pieces of cut material were then stitched together and ornamented. Next, eye stays were applied to the shoe material and then metal eyes were attached with the use of a fully automated machine, and a thermosetting machine. Finally, an underfoot was attached to the shoe top in the location where the sole was ultimately to be placed. The underfoot is a necessary preparation for lasting.

The shoe tops were imported into the United States where they were lasted and provided with shoe soles and manufactured into finished athletic shoes at a factory in Middletown, Rhode Island. The soles manufactured at the Middletown plant were of a type produced by injecting liquid polyurethane into a mold and allowing it to harden. The

[125] Documents References:
(1) *Havana (ITO) Charter* Articles 33, 35-37
(2) GATT Article VII
(3) *General Rules of Interpretation for the Harmonized Tariff Schedule (GRI)*
(4) *NAFTA* Chapter 5
(5) Relevant provisions in other FTAs

polyurethane injection process was skillfully demonstrated to this court and the trial court by way of a videotape.

The process of making the polyurethane shoes soles centers around a machine known to the trade as a Desma 513/24. The Desma is a massive piece of equipment costing $800,000 to one million dollars. The machine has 24 stations, each station having a mold which forms the shoe sole and a last which is used to shape the shoe top into an appropriate form. Because the shoes come in different sizes, 30 to 40 pairs of different size lasts are required. The lasts are individually hand-crafted, and one set of 30 to 40 lasts takes approximately an entire year to produce. Thus, before even beginning the shoe sole injection process, significant start-up time and start-up costs were incurred.

The shoe sole manufacturing process began by heating the polyol and isocyanate chemicals which make up the polyurethane shoe soles in separate ovens at differing temperatures for 24 and 48 hours, respectively. The polyol material was then dyed with a coloring suspension, a procedure which required 20 to 40 minutes time. The molds at each station of the Desma machine were thoroughly cleaned to remove remnants of polyol from prior injections and then sprayed with releasing agents.

Next, the imported merchandise was mounted onto the last and mold at each station and secured in place by the underfoot. The shoe top was hammered by hand to take the shape of the last. Cement was applied to the bottom and sides of the shoe top, and polyurethane was then injected into the mold to form the outsole of the shoe.

The Desma has a control panel which regulates many of the machine's operations. A timer is set to control the duration of the injection; a counter regulates the quantity of polyurethane injected into the mold and the ratio of polyurethane to isocyanate. The quantity of material injected is varied by the control panel according to the size of the shoe being made.

A first injection of polyurethane was shot into a mold at each station to form the shoe outsole. After the first injection was completed, the mold release agent was removed from the shoe outsole. Failure completely to remove the release agent would have prevented the second injection from adhering properly and ruined the partially constructed merchandise. Once the release agent was completely removed from the outsole, a second injection was shot into each mold to create the shoe midsole. The mold had to be properly sealed to the shoe top as improper sealing between the shoe top and the mold causes the polyurethane to seep out and create a defective shoe. After the second injection was successfully performed, the shoe soles required between 12 and 24 hours to harden. After hardening, the shoes were passed through a finishing line where they were trimmed, cleaned, and otherwise touched up through the use of both hand and machine labor. The operations performed on the finishing line took approximately 20 minutes per pair.

…

The imported merchandise was classified by the Customs Service ("Customs") as unfinished "footwear" under items 700.35 and 700.67, and that classification was sustained by the Court of International Trade.

Issue

Whether the trial court clearly erred in determining that the imported merchandise is properly classified under the "footwear" provisions.

Discussion

I.

General Interpretative Rule 10(h) of the TSUS provides, in pertinent part, that:

> unless the context requires otherwise, a tariff description for an article covers such article, whether assembled or not assembled, and whether finished or not finished.

Customs contends that the imported merchandise was properly classified as unfinished footwear pursuant to Rule 10(h). In order to pass on the correctness of this proposition, we must first examine the definition of unfinished footwear and determine whether the imported merchandise fits that definition.

The trial court defined unfinished footwear as "substantially complete" footwear. … Neither party contends that this definition is in error nor do we. …While Simod asserts error in the trial court's failure to establish a definition of footwear, the definition of a classification term is a question of law which we are free to determine for ourselves by resort to lexicographic and other materials. … Tariff terms are construed according to their common and commercial meanings which are presumed to be the same. *Webster's Third New international Dictionary, Unabridged*, at 886 (1976) defines footwear as:

> wearing apparel for the feet (as shoes, boots, slippers, overshoes) usu. excluding hosiery.

It is not disputed that at the completion of the manufacturing process, the imported articles will be wearing apparel for the feet; therefore, the key issue is whether the imported articles are "substantially complete" wearing apparel for the feet, or "substantially complete" footwear.

While the meaning of a classification term is a question of law, the issue of whether particular imported articles come within the definition of a classification term is a question of fact subject to the clearly erroneous standard of review. … The classification of the Customs Service is presumed to be correct and the burden of proof is upon the party challenging its classification. …

Our predecessor court fashioned a test for determining substantial completeness in *Daisy-Heddon, Div. Victor Comptometer Corp. v. United States,* 600 F.2d 799 (CCPA 1979), recognizing, however, that not all of the factors of the test will be applicable to a particular importation, and additional unstated factors may bear on the issue. The *Daisy-Heddon* factors are:

> (1) comparison of the number of omitted parts with the number of included parts; (2) comparison of the time and effort required to complete the article with the time and effort required to place it in its imported condition; (3) comparison of the cost of the included parts with that of the omitted parts; (4) the significance of the omitted parts to the overall functioning of the completed article; and. (5) trade customs, *i.e.*, does the trade recognize the importation as an unfinished article or as merely a part of that article.

600 F.2d at 803.

With regard to the first factor, the trial court properly found that 25 parts are assembled in Italy to comprise the imported article. With the addition of only four omitted parts, the shoes would be complete. This factor weighs in favor of finding substantial completeness.

Turning to the second factor, we compare the time and effort required to complete manufacture of the article after importation with the time and effort required to place the article in its imported condition. The trial court found:

> In contrast to the labor-intensive craftsmanship demonstrated at the Italian stitching rooms, the Middletown factory procedure was highly industrialized. *** None of these tasks [performed in the Middletown factory] involved considerable skill. The workers at the Italian stitching rooms, however, performed most of their work by hand. The workers employed at the Italian stitching rooms were more skilled than Simod's factory workers. Hence, Simod expended more time and effort in the production of the shoes into their imported condition than in finishing them at the Middletown factory.
>
> …

The operations performed in Italy were carried out with the aid of equipment markedly less sophisticated than the Desma machine, but requiring more hand labor. There were machines but of the individually operated tabletop variety. The Middletown factory required relatively little hand labor, but employed sophisticated and expensive equipment requiring intensive supervision and maintenance. The fact that the Middletown operation was largely mechanized does not detract from the substantial nature of the manufacturing efforts undertaken there. In its analysis, the trial court ignored the capital-intensive nature of the Middletown manufacturing plant. The expensive and sophisticated nature of the equipment used at the Middletown plant indicates to this court it is clear error to hold that a substantial effort is not needed to place the imported articles into a completed condition.

It is a principle of Customs law that imported merchandise is dutiable in its condition as imported, except in the instance (not here involved) of deception, disguise, or artifice resorted to for the purpose of perpetrating a fraud of the revenue; what is going to be done with it afterwards is not relevant. … If this writer may speak out of personal knowledge, the principle is so basic it hardly needs to be mentioned in any discussion of a classification problem by judges, officials, or lawyers having any serious involvement in such matters. The well-informed CCPA that promulgated *Daisy-Heddon, supra,* was well aware of it ... and in using, as a test of substantial completeness, the comparison of the labor required before importation, and for full completion after importation, it did not intend a breach of the basic rule. It would be a startling breach if two identical entries were classified differently because, after importation, one was destined for completion in a labor-intensive operation, and the other in a capital-intensive operation. The purpose of the *Daisy-Heddon* tests is to determine the extent the imported article is the completed article, unfinished, and that is the same in either of the cases supposed above. Accordingly, it is implicit in the *Daisy-Heddon* tests, and explicit so far as the occasional necessity of other unstated tests is there recognized, that labor-intensivity alone cannot be made a test of completeness where there is a great difference in the extent of capital intensivity in the manufacturing operation before and after importation. After all, one does not have to be a disciple of Karl Marx to recognize that somebody's labor at some time made possible the capital-intensive operation that eliminates recourse to much direct labor in the United States phase of production of the involved footwear. As the learned Chief Judge overlooks this, his analysis is clearly erroneous.

Apart from the costly equipment needed to process the imported articles, the time required to transform them into completed footwear is significant. The trial court found that the Desma machine produced 1,200 shoes in an 8-hour shift and that each shoe required less than one minute on the Desma machine. There is uncontradicted evidence that each shoe remained in its mold on the Desma machine for approximately two minutes after the two polyurethane injections were shot. In the face of this evidence, the finding that each shoe required less than one minute on the Desma machine is clearly erroneous.

Further, the trial court improperly focused on the output rate of the Desma machine without considering the fact that it processes many articles simultaneously. The relevant inquiry is not how many shoes can be produced per day. The relevant inquiry is how much time is spent to complete manufacture of each imported article. *See Daisy-Heddon,* 600 F.2d at 803 ("the time and effort required to complete the article"). The Desma machine simultaneously processes 24 articles, and the output rate must be appropriately adjusted. Using the trial court's output rate findings, the process time *per shoe* is:

$$\frac{\text{8 hours}}{\text{1,200 shoes}} \quad \text{x} \quad \text{24 stations} \quad = \quad \text{9.6 minutes per shoe}$$

or 19.2 minutes of processing time per pair. In addition to the time on the Desma machine, the shoes required between 12 and 24 hours to harden and 20 minutes on the finishing line.

The Italian stitching rooms required approximately 17 minutes (15 minutes processing time plus 2 minutes cutting time per pair) to prepare the imported merchandise.

Clearly, the time required to complete manufacture of the imported articles is greater than that required to place them in their imported condition.

Considering the substantial time and effort invested in completing construction of the athletic shoes, the trial court clearly erred in finding that "Simod expended more time and effort in the production of the shoes into their imported condition than in finishing them at the Middletown factory." …

The third *Daisy-Heddon* factor involves the cost of the imported article compared to the cost of the omitted parts. Due to the capital-intensive nature of the Middletown operation, the cost of adding the omitted shoe sole would properly include the indirect cost of using the Desma machine. Certainly the machine depreciates as each shoe comes off the production line. The record reveals the following direct costs of producing the shoe soles:

polyurethane	$1.40
insole	.21
laces	.11
mold release	.15
labor	.66
TOTAL	$2.53

The trial court apparently relied upon the above figures, as it found that the cost of producing the shoe soles was $2.50 or less. ... No evidence was introduced reflecting the indirect cost of using the Desma machine. In the absence of that information, the comparison of the cost to produce the imported articles with the cost to complete their manufacture in Middletown is not probative.

The fourth *Daisy-Heddon* factor focuses on the significance of the omitted parts. The absence of an essential part does not preclude a finding of substantial completeness, *Channel Master, Div. of Avnet, Inc. v. United States,* 856 F.2d 177, 179 (Fed.Cir.1988); *Daisy-Heddon,* 600 F.2d at 802-803, but it does tip the balance away from such a finding.

The fifth and final inquiry specified in *Daisy-Heddon* is whether the trade recognizes the article as unfinished footwear or merely a component of footwear. The evidence on this issue was vigorously disputed on both sides and the trial court did not make any specific finding on this issue, nor do we think one is needed for our decision.

As the trial Court aptly noted, the merchandise itself is often a potent witness in classification cases. … We have examined the exhibits representing the imported merchandise and while it clearly is embryo footwear, it is also clearly in the infant stages of manufacture. It does not tell us it is substantially complete. In *Channel Master, supra,* the importer urged that the imported articles were not substantially complete, because they were missing certain component parts. The Court deemed the merchandise substantially complete owing to the "relatively quick, simple, and costless steps required for untrained consumers to insert" the missing parts into the merchandise. Here, the time, effort, and cost to complete the merchandise is not insignificant. Based upon our examination of the merchandise as its own witness, as well as the above-discussed analysis, we are left with the definite and firm conviction that a mistake has been committed and therefore reverse the trial court's finding that the footwear is substantially complete as imported.

Thus, we have determined that the involved articles were not "unfinished footwear" and could not properly have been classified under TSUS items 700.35 and 700.67. On the other hand, we are unable on the present record, and in the absence of findings by the Court of International Trade, to discern what the true classification should have been. This would formerly have required affirmance of the erroneous classification since under former law, the importer had a dual burden to establish the error of the Customs classification, and the correctness of a classification properly claimed by it. By *Jarvis Clark Co. v. United States,* 733 F.2d 873 (1984), … this unique rule has been held repealed by Congress. The original classification having been tested and found wanting on our review, the case can now be remanded to the Court of International Trade to find a correct answer, whether previously claimed or not claimed by the importer. If need be, a further remand to the Customs Service for consideration by it is also permissible under the *Jarvis Clark* rules. The correctness of Customs classifications is too important a matter to be made the subject of word games any longer, and the courts are too burdened with cases for the same or similar entries to be litigated and relitigated over and over again.

II. GRI 1, Parts of Another Article and 2022 *Klerks* Case

Is it an article (namely, fabric), or parts of a different article (namely, machinery)? That is the issue in *Klerks* (below), which is distinct from the issue (above) of parts versus substantial completion with respect to a single article. In *Klerks*, the CIT held CBP properly classified synthetic fabric net wraps used to bale hay ware as warp knit fabrics in HTSUS Sub-Heading 6005.39.00, rather than as parts of harvesting or agricultural machinery in HTS Headings 8433 or 8436, thus denying RKW Klerk's (plaintiff's) motion for summary judgment.

RKW KLERKS INC. V. UNITED STATES, UNITED STATES COURT OF INTERNATIONAL TRADE, NUMBER 20-0001 (SLIP OPINION 22-115, 4 OCTOBER 2022)[126]

Barnett, Chief Judge:

This case involves the classification of two particular types of net wrap, both of which are synthetic fabrics used to wrap round bales of harvested crops (such as hay, straw, or silage), so that when the bales are released from the baling machine, they maintain their compressed, round structure and are easier to transport. Specifically, this action addresses whether Plaintiff's net wraps, TopNet and Rondotex (together, the "Netwraps"), constitute synthetic "warp knit fabrics" and U.S. Customs and Border Protection ("CBP" or "the agency") properly classified the Netwraps under Sub-Heading 6005.39.00 of the Harmonized Tariff Schedule of the United States ("HTSUS"). …

[126] www.cit.uscourts.gov/sites/cit/files/22-115.pdf. (Footnotes omitted.)

RKW Klerks Inc. ("Plaintiff" or "RKW") contends that the Netwraps are properly classified under HTSUS Sub-Heading 8433.90.50 because the Netwraps qualify as "parts" of harvesting machinery … or, alternatively, under Sub-Heading 8436.99.002 as "parts" of agricultural machinery…. The United States ("Defendant" or "the Government") maintains that the Netwraps are not "parts" of harvesting or agricultural machinery classifiable under HTSUS Sub-Headings 8433.90.50 or 8436.99.00, respectively. … The Government contends that CBP correctly classified the Netwraps under HTSUS subheading 6005.39.00.

…

Background

I. Material Facts Not In Dispute

RKW is an importer of two types of net wrap, TopNet and Rondotex. … RKW is a subsidiary of RKW SE, a film producer that manufactures nonwoven fabrics and nettings, including shrink bottle wrap, pallet stretch hoods, gardening and greenhouse films, trash bags, and other packaging solutions, as well as raw materials. … The Netwraps are manufactured in Germany by several entities and plants owned by RKW SE. … Neither RKW SE nor any of its subsidiaries sell or produce machinery, including round balers or other harvesting machinery. …

Both TopNet and Rondotex are comprised of the same materials, are manufactured in the same manner, and serve the same function – to bind and secure crops in round bales. … Manufacture of the Netwraps involves a two-step process. … First, film layers are produced – one for chains and one for connecting threads. … The film layers are then cut into strips, stretched, heated, elongated, and knitted in Raschel machines, a type of knitting machine designed for making net wraps, but which could also be used to make pallet nets, another warp knit. … These layers of film are made up of high-density polyethylene ("HDPE"), a resin that is exclusively used for net wrap. … HDPE is a synthetic material. …

RKW developed the Netwraps as a substitute for baler twine for use in round baling machines. … Round baling machines collect harvested crops, such as grass, hay, or straw, then cut the crops into pieces, compact the pieces, and form the pieces into bale form. … After compressing the crops into bale form, round baling machines can wrap the bales with net wrap. … Some round baling machines can use either net wrap or twine to wrap round bales. …

…

Jurisdiction and Standard of Review

The Court has subject matter jurisdiction pursuant to 28 U.S.C. § 1581(a).

The Court may grant summary judgment when "there is no genuine issue as to any material fact," and "the moving party is entitled to judgment as a matter of law." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247 (1986). The Court's review of a classification decision involves two steps. First, it must determine the meaning of the relevant tariff provisions, which is a question of law. *See Bausch & Lomb, Inc. v. United States*, 148 F.3d 1363, 1365 (Fed. Cir. 1998) (citation omitted). Second, it must determine whether the merchandise at issue falls within a particular tariff provision, as construed, which is a question of fact. *Id*. (citation omitted). When no factual dispute exists regarding the merchandise, resolution of the classification turns solely on the first step. *See id*. at 1365-66; see also *Sigma-Tau HealthScience, Inc. v. United States*, 838 F.3d 1272, 1276 (Fed. Cir. 2016) (citations omitted).

The Court reviews classification cases *de novo*. *See* 28 U.S.C. § 2640(a). While the court affords deference to CBP's classification rulings relative to their "power to persuade," *United States v. Mead Corp.*, 533 U.S. 218, 235 (2001) (*quoting Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944)), it has "an independent responsibility to decide the legal issue of the proper meaning and scope of HTSUS terms," *Warner-Lambert Co. v. United States*, 407 F.3d 1207, 1209 (Fed. Cir. 2005). It is "the Court's duty to find the correct result, by whatever procedure is best suited to the case at hand." *Jarvis Clark Co. v. United States*, 733 F.2d 873, 878 (Fed. Cir. 1984).

Discussion

I. Legal Framework

The General Rules of Interpretation ("GRI(s)") provide the analytical framework for the Court's classification of goods. *See* N. Am. Processing Co. v. United States, 236 F.3d 695, 698 (Fed. Cir. 2001). "The HTSUS is designed so that most classification questions can be answered by GRI 1." *Telebrands Corp. v. United States*, … 865 F. Supp. 2d 1277, 1280 (2012), *aff'd* 522 Fed. Appx. 915 (Fed. Cir. 2013). GRI 1 states that, "for legal purposes, classification shall be determined according to the terms of the Headings and any [relevant] Section or Chapter Notes." GRI 1, HTSUS; *Degussa Corp. v. United States*, 508 F.3d 1044, 1047 (Fed. Cir. 2007) ("The Section and Chapter Notes are integral parts of the HTSUS, and have the same legal force as the text of the Headings."). "The first four digits of an HTSUS provision constitute the Heading, whereas the remaining digits reflect Sub-Headings." *Schlumberger Tech. Corp. v. United States*, 845 F.3d 1158, 1163 n. 4 (Fed. Cir. 2017). Relevant here, "the classification of goods in the Sub-Headings of a Heading shall be determined according to the terms of those subheadings and any related subheading notes and, *mutatis mutandis*, to the above [GRIs] on the understanding that only subheadings at the same level are comparable." GRI 6, HTSUS; see also *WWRD U.S., LLC v. United States*, 886 F.3d 1228, 1232 (2018).

The Court considers Chapter and Section Notes of the HTSUS in resolving classification disputes because they are statutory law, not interpretive rules. *See Arko Foods Int'l, Inc. v. United States*, 654 F.3d 1361, 1364 (Fed. Cir. 2011) (citations omitted); *see also Park B. Smith, Ltd. v. United States*, 347 F.3d 922, 929 n. 3 (Fed. Cir. 2003) (Chapter and Section Notes are binding on the Court). "Absent contrary legislative intent, HTSUS terms are to be 'construed [according] to their common and popular meaning.'" *Baxter Healthcare Corp. of Puerto Rico v. United States*, 182 F.3d 1333, 1337 (Fed. Cir. 1999) (*quoting Marubeni Am. Corp. v. United States*, 35 F.3d 530, 533 (Fed. Cir. 1994)).

Courts may rely upon their own understanding of terms or consult dictionaries, encyclopedias, scientific authorities, and other reliable information. *Brookside Veneers, Ltd. v. United States*, 847 F.2d 786, 789 (Fed. Cir. 1988); *BASF Corp. v. United States*, … 798 F. Supp. 2d 1353, 1357 (2011). The Court also may consider the Explanatory Notes to the Harmonized Commodity Description and Coding System (the "Explanatory Notes"), developed by the World Customs Organization. *See Deckers Outdoor Corp. v. United States*, 714 F.3d 1363, 1367 n.1 (Fed. Cir. 2013). Although the Explanatory Notes do not bind the Court's analysis, they are "indicative of proper interpretation" of the Tariff Schedule. *Lynteq, Inc. v. United States*, 976 F.2d 693, 699 (Fed. Cir. 1992) (*quoting* H.R. Rep. No. 100-576, at (1988) (Conf. Rep.), reprinted in 1988 U.S.C.C.A.N. 1547, 1582).

II. Competing Tariff Provisions

Plaintiff contends that the Netwraps are properly classified under HTSUS Sub-Heading 8433.90.50 or, alternatively, 8436.99.00.4…. Chapter 84 covers "Nuclear reactors, boilers, machinery and mechanical appliances; parts thereof." The relevant portions of Chapter 84 of the HTSUS read:

8433: Harvesting or threshing machinery, including straw or fodder balers; grass or hay mowers; machines for cleaning, sorting or grading eggs, fruit or other agricultural produce, other than machinery of heading 8437; parts thereof:

8433.90 Parts:

8433.90.50 Other

8436: Other agricultural, horticultural, forestry, poultry-keeping or bee-keeping machinery, including germination plant fitted with mechanical or thermal equipment; poultry incubators and brooders; parts thereof:

8436.99 Parts:

8436.99.00 Other

Defendant contends that the Netwraps are properly classified under HTSUS Sub-Heading 6005.39.00. … Chapter 60 covers "knitted or crocheted fabrics." The relevant portion of Chapter 60 of the HTSUS reads:

6005: Warp knit fabrics (including those made on galloon knitting machines), other than those of headings 6001 to 6004:

6005.39 Of synthetic fibers:

6005.39.00 Other, printed

III. Classification of the Netwraps

The GRIs govern the proper classification of merchandise and are applied in numerical order. *N. Am. Processing Co.*, 236 F.3d at 698. Pursuant to GRI 1, the Court first "must determine the appropriate classification 'according to the terms of the Headings and any relative Section or Chapter Notes' … [with] terms of the HTSUS … construed according to their common commercial meaning." *Millennium Lumber Dist. Ltd. v. United States*, 558 F.3d 1326, 1328–29 (Fed. Cir. 2009) (citations omitted).

The issue in this case is whether the Netwraps are properly classified under HTSUS Heading 6005 as a "warp knit fabric" or under HTSUS Heading 8433 as "parts" of "harvesting or threshing machinery, including straw or fodder balers," or, alternatively, under HTSUS Heading 8436 as "parts" of "other agricultural … machinery."

A. Whether the Netwraps are Classifiable as "Warp Knit Fabrics" Under HTSUS Subheading 6005.39.00

As an initial matter, the parties do not dispute that the Netwraps are covered by the plain language of HTSUS Sub-Heading 6005.39.00…. However, because the Court reviews classification decisions *de novo*, the Court will ascertain the scope of this subheading and whether the Netwraps are covered by this Sub-Heading. *See Bausch*, 148 F.3d at 1365.

HTSUS Sub-Heading 6005.39.00 covers, by its express terms, "warp knit fabrics (including those made on galloon knitting machines) … of synthetic fibers … other, printed." A "warp knit" is a "knit fabric produced by machine with the yarns running in a lengthwise direction." Warp Knit, MERRIAM-WEBSTER.COM…. While not controlling, the Explanatory Notes to HTSUS Heading 6005 provide that the heading covers fabrics "made on warp knitting machines (especially Raschel machines)." Explanatory Note 60.05 at XI-6005-1.

…

[Plaintiff's Witness statements also confirmed the Netwraps possess the characteristics needed to be properly classified as "warp knit fabrics."]

B. Whether the Netwraps are Classifiable as "Parts" of "Harvesting or Threshing Machinery" Under HTSUS Sub-Heading 8433.90.50

1. Legal Test for Parts

The U.S. Court of Appeals for the Federal Circuit ("Federal Circuit") has adopted two tests for determining whether merchandise may be classified as "part" of another article. The first test is used when the merchandise in question is claimed to be a part of another article that "could not function as such article" without the claimed part. United States v. Willoughby Camera Stores, Inc., 21 C.C.P.A. 322, 324 (1933); *see also Bauerhin Techs. Ltd. v. United States*, 110 F.3d 774, 778 (Fed. Cir. 1997) (explaining that an "integral, constituent, or component part, without which the article to which it is to be joined, could not function as such article is surely a part for classification purposes").

The second test by which merchandise may qualify as a part of another article is used when the claimed part, at the time of importation, is "dedicated solely for use" in such article. *United States v. Pompeo*, 43 C.C.P.A. 9, 14 (1955). In such cases, the Curt must determine whether the claimed part, when applied to its intended use with that article, meets the definition of a "part" established in *Willoughby*. *Id.* at 14; *see also Pomeroy Collection, Ltd. v. United States*, … 783 F. Supp. 2d 1257, 1260-61 (2011) (explaining the legal framework for determining whether merchandise may be classified as a part of an article).

2. Parties' Contentions

Plaintiff contends that the Netwraps meet the Federal Circuit's definition of parts and are thus properly classified as "parts" of harvesting machines. First, Plaintiff argues that the Netwraps are dedicated to a single commercial use – baling hay. … Plaintiff also argues that the Netwraps are integral to the function of a hay baler because, without the Netwraps, a hay baler could not make usable round bales…. Furthermore, Plaintiff avers that if hay balers were "designed to make bales without the need for wrapping," it would be nonsensical that hay balers include equipment providing for the use of the Netwraps. …

Defendant contends that the Netwraps are not integral to round baling machines, because round baling machines can interchangeably use net wrap or twine to wrap the bales. … Defendant also contends that the Netwraps "cannot be an integral part of round baler machines, because the mechanical function of [the balers] is to compress and roll the hay and/or silage together, and the [Netwraps] do not contribute to that function." … Instead, Defendant contends, the Netwraps "are a consumable input" akin to a spool of thread used in a sewing machine. … Defendant contends that the Netwraps are only in the round baling machines temporarily, and that the Netwraps have a primary function distinct from the round balers – to bind crop bales after the bales have been removed from the round baling machine. …

3. Analysis

Although the parties do not contest the issue, … the Court must first determine whether the Netwraps are "dedicated solely for use" with the round baling machines, see *Pompeo*, 43 C.C.P.A. at 14. The record before the Court indicates that the Netwraps are designed specifically for use in the balers. …

Next, the Court must determine whether the Netwraps are an "integral, constituent, or component part, without which" round hay balers "could not function." *See Pompeo*, 43 C.C.P.A. at 14; see also Bauerhin, 110 F.3d at 778. Prior Court decisions have previously addressed whether merchandise used to bind bales of hay was considered "part" of a hay baler for the purposes of tariff classification, albeit pursuant to distinct versions of the Tariff Schedule.

In *Wilbur-Ellis Co. v. United States*, 26 C.C.P.A. 403 (1939), the Federal Circuit's predecessor court, the United States Court of Customs and Patents Appeals, held that bale ties were not "part" of a hay baler, finding that "the function of a hay baler is to compress hay into the form of bales and to retain it in its compressed form until the bales have been securely tied … and that the only function of bale ties [was] to hold the hay in its compressed form for storage and transportation purposes." *Id*. at 406. Thus, the bale ties were not "integral, constituent, or component parts of hay balers." *Id*. Similarly, in *Geo. Wm. Rueff, Inc. v. United States* ("*GWR*"), 28 Cust. Ct. 84 (1952), *aff'd United States v. Geo. Wm. Rueff, Inc.*, 41 C.C.P.A. 95 (1953), the U.S. Customs Court, the USCIT's predecessor, held that baler twine was not part of an agricultural implement, because the function of the hay baler was to compress the bales, not to bind them. *Id*. at 89-90. The baler twine in question in *GWR* was inserted into the hay baler, mechanically wound lengthwise around the bale, and mechanically bound. *Id*. at 87. While both cases involved different products and earlier versions of the tariff classification system, the Court finds the reasoning behind the decisions instructive.

The Court finds that the Netwraps are not integral to the functioning of round hay balers. Plaintiff's designated agent confirmed that the Netwraps have their own distinct function – to maintain the shape of the bale after it has been compressed and released from the baler. … Furthermore, the Netwraps are not integral to the function of the round hay balers because these machines generally are designed to use both twine and net wrap. … Thus, even without the Netwraps, round hay balers could compress crops into bale form and secure the bales with alternative materials. The fact that a net wrap may be the preferred method of wrapping bales is of no consequence; they are simply one of the potential inputs that round balers can use to wrap round bales.

Plaintiff also seeks to rely on *Ludvig Svensson (U.S.) Inc. v. United States*, … 62 F. Supp. 2d 1171 (1999), to argue that the Netwraps are properly classified as "parts." … In *Ludvig Svensson*, the Court determined that screens used in the construction of greenhouses were "parts" of a greenhouse, because they "were in an advanced state of manufacture, and ha[d] no other commercial uses," and the screens were an integral part of the greenhouses. … 62 F. Supp. 2d at 1178.

The facts of *Ludvig Svensson* are readily distinguished because the Netwraps are not integral to the function of hay balers. As the *Ludvig Svensson* Court noted, without the screens, the greenhouse to which they were affixed would not function for what it was designed to do – better grow [*sic*] crops. *See id*. …, 62 F. Supp. 2d at 1181 (concluding that "screens are an integral part of shade and heat retention systems because" they "permit greenhouse operators to better regulate the environment of a greenhouse, to regulate the application of chemicals and pesticides as well as irrigation, and to permit plants . . . to benefit from favorable outside weather conditions"). Round hay balers, on the other hand, are able to compact hay into round bales without the use of the Netwraps. …

Furthermore, while the screens in *Ludvig Svennson* remained affixed to the greenhouse, the Netwraps are disposable and do not remain with the hay balers after they are wrapped around the bales of hay. … Plaintiff's argument that the true function of a hay baler is "to produce commercially useable and saleable round hay bales," … does not alter the Court's analysis. Even accepting, *arguendo*, Plaintiff's contention that the function of a round hay baler is to "produce commercially useable and saleable round hay bales" by both compacting and wrapping the bales, the Netwraps would still not be integral to this function. Plaintiff's argument ignores the fact that, even without the Netwraps, round hay balers can produce commercially usable and saleable round bales by binding the compacted bales with twine.

Plaintiff further argues that even if round hay balers do not require Netwraps to make round bales, the Netwraps contribute to the performance of the function for which the hay baler was designed. … In addition to *Ludvig Svensson*, Plaintiff relies on *Trans Atlantic Co. v. United States*, 48 C.C.P.A. 30 (1960), *Gallagher & Ascher Co. v. United States*, 52 C.C.P.A. 11 (1964), and *Pompeo*, 43 C.C.P.A. 14, all of which are distinguishable. Unlike the hydraulic door closers in *Trans Atlantic*, the heaters in *Gallagher*, the superchargers in *Pompeo*, or the screens in *Ludvig Svensson*, all of which were permanently affixed to the machines of which they were a part, the Netwraps do not remain affixed to round hay balers after the baling process. The Netwraps are inserted into a chamber in the baler, fed through the baler, and wrapped around the compressed crops, and then remain with the bale once it has been released from the baler – they do not remain affixed to the balers. … The Netwraps are thus a disposable input and not a part of round baling machines.

The Court also rejects Plaintiff's argument that the Netwraps are similar to the toner cartridges for photocopiers in *Mita Copystar Am. v. United States*, or the printing cartridges used in MFC machines in *Brother Int'l Corp. v. United States*, both of which were determined to be "parts" of the respective machines in which they were used. In *Mita Copystar,* the Court reasoned that "the cartridges are sold with toner inside; they remain with the toner throughout its use by the photocopier; they are the standard device for providing toner to the photocopier." 160 F.3d at 712-13. Similarly, in *Brother*, the Court reasoned that although the cartridges contained rolls of PET film, the cartridge was the standard device for providing the MFC machines with the PET film required to be able to print images on paper. …

The products in *Mita Copystar* and *Brother* were classified in accordance with the functionality of the containers – delivery systems for the toner and PET film, respectively – and not by the substances contained within. Here, however, the Netwraps are simply on rolls, placed inside a compartment located within the baler, and held in place by claws or a metal bar, which is otherwise attached to the machine. Furthermore, while the toner and printing cartridges were necessary to the operation of the machines they were used in – without them the machines could not print – … without the Netwraps, a hay baler can compress the crops and wrap the compressed bales with twine. For these reasons, the Court concludes that the Netwraps are not classifiable under HTSUS Sub-Heading 8433.90.50 as parts of harvesting machinery.

C. Whether the Netwraps are Classifiable as "Parts" of Agricultural Machinery Under HTSUS Sub-Heading 8436.99.00

For the same reasons the Court finds that the Netwraps are not classifiable as "parts" of harvesting machinery, the Court also finds that Netwraps are not classifiable under HTSUS Sub-Heading 8436.99.00, as parts of other agricultural machinery. The Netwraps are not integral to the primary function of agricultural machinery, they do not remain affixed to such machinery, and they have their own distinct function separate from that of the machinery in which they are used.

Conclusion

For the foregoing reasons, the Court holds that CBP properly classified the Netwraps under HTSUS Sub-Heading 6005.39.00. …

III. 1963 Chicken War, Cars versus Trucks, and 1994 *Marubeni* Case

On 4 December 1963, President Lyndon B. Johnson (1908-1973, President, 1963-1969) issued Proclamation 3564 in retaliation against what he deemed "unreasonable import restrictions" the EEC put on imports of American poultry, specifically, CAP Regulation 22, which trebled the West German tariff on this merchandise. LBJ's remedy was to increase tariffs on light trucks, as well as brandy, dextrin (a food additive), and potato starch. Though the elevated tariffs on the other merchandise eventually fell, the 25% levy on trucks, aimed especially at the German manufacturer, Volkswagen, persisted. That was thanks to support from American producers, which found it an effective way to keep out competition from Japanese trucks made by Honda, Nissan, and Toyota. The Japanese producers responded to what became known as the "Chicken Tax" by setting up production plants in the U.S.

MARUBENI AMERICA CORP. v. UNITED STATES, UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT, 35 F.3D 530 (1994)

Rich, Circuit Judge:

The United States (the government) appeals the May 14, 1993, judgment of the Court of International Trade (CIT) … holding that 1989 and 1990, two door, two-wheel and four-wheel drive, Nissan Pathfinder (Pathfinder) vehicles are correctly classified under heading 8703.23.00 (8703) of the Harmonized Tariff Schedule of the United States (HTSUS) as motor vehicles principally designed for the transport of persons. [Marubeni America Corp. imports the Pathfinder, but Nissan Motor Corporation U.S.A. is the real party in interest and is treated as such in the opinion.] We affirm.

I. Background.

A. *The Merchandise.*

The merchandise at issue is a two door, two-wheel or four-wheel drive, dual-purpose or multipurpose passenger vehicle, generally referred to as a compact sports utility vehicle. The Pathfinder does not have a cargo box or bed like a truck. Instead, its body is one unit that is configured much like an ordinary station wagon in that it has rear seats that fold forward, but not flat, for extra cargo space. These seats, however, are not removable. The spare tire is housed within the cargo space or alternatively, it may be attached outside the vehicle on the rear hatch. The rear hatch operates like those on a station wagon; it has a window that may be opened to place small packages in the cargo area without opening the tailgate. The Pathfinder is mechanically designed for both on- and off-road use.

…

B. *Proceedings Below.*

The Pathfinder was classified by the United States Customs Service (Customs) under 8704.31.00 (8704) of the HTSUS as a "motor vehicle for the transport of goods." Pursuant to 9903.87. 00 of the HTSUS a 25% *ad valorem* duty was assessed.

Nissan administratively protested this decision … claiming that the Pathfinder should be classified as "motor cars and other motor vehicles principally designed for the transport of persons … including station wagons" under 8703 HTSUS. This protest was denied. Nissan then brought an action in the CIT. The CIT conducted a three week trial *de novo* … that included test driving the Pathfinder and comparison vehicles, videotape viewing, and extensive presentation of both testimonial and documentary evidence. The government argued that the Pathfinder is more like a pick-up truck; therefore, it was "motor vehicle for the transport of goods." The CIT concluded that Customs' classification of the Pathfinder under 8704 HTSUS, "motor vehicle for the transport of goods" was incorrect, and that the correct classification was under 8703 HTSUS, "motor vehicle principally designed for the transport of persons." The duty assessed under 8703 HTSUS is 2.5% *ad valorem*. The United States now appeals from the judgment of the CIT. …

II. Analysis.

The issue is whether the Pathfinder has been classified under the appropriate tariff provision. Resolution of that issue entails a two-step process: (1) ascertaining the proper meaning of specific terms in the tariff provision; and (2) determining whether the merchandise at issue comes within the description of such terms as properly construed. The first step is a question of law which we review *de novo*, and the second is a question of fact which we review for clear error.

The government asserts that the CIT erred by applying improper and inconsistent standards, and that the Pathfinder is not primarily designed for the transport of persons based on the practice of Nissan and the industry.

A. *Proper Meaning.*

It is well settled that "the ultimate issue, whether particular merchandise has been classified under an appropriate tariff provision, necessarily depends on the meaning of the terms of that provision, which is a question of law subject to *de novo* review." *Lynteq, Inc., v. United States*, 976 F.2d 693, 696 (Fed. Cir. 1992). To determine the proper meaning of tariff terms as contained in the statute, the terms are "construed in accordance with their common and popular meaning, in the absence of contrary legislative intent." *E.M. Chemicals v. United States*, 920 F.2d 910, 913 (Fed. Cir. 1990). "To assist it in ascertaining the common meaning of a tariff term, the court may rely upon its own understanding of the terms used, and it may consult lexicographic and scientific authorities, dictionaries, and other reliable information sources." *Brookside Veneers, Ltd. v. United States*, 847 F.2d 786, 789 … *cert. denied*, 488 U.S. 943 (1988)….

The two competing provisions of the HTSUS are set forth below.

8703 Motor cars and other motor vehicles principally designed for the transport of persons (other than those of heading 8702), including station wagons and racing cars.

8704 Motor vehicles for the transport of goods.

There are no legally binding notes to these headings that are relevant to the classification of dual-purpose vehicles such as the Pathfinder; therefore, we need only look to the common meaning of the terms as they appear above.

By the express language of 8703, "motor vehicle principally designed for the transport of persons," it is clear that the vehicle must be designed "more" for transport of persons than goods. *Webster's Third New International Dictionary of the English Language, Unabridged* (1986) defines "principally" as "in the chief place, chiefly;" and defines "designed" as "done by design or purposefully opposed to accidental or inadvertent; intended, planned." Thus, if the vehicle is equally designed for the transport of goods and persons, it would not be properly classified under 8703 HTSUS. There is nothing in the legislative history that indicates a different meaning.

The government argues that "the correct standard to be utilized in determining the principal design of any vehicle must be its construction – its basic structure, body, components, and vehicle layout – and the proper question to be asked is whether that construction is uniquely for passenger transportation." This standard is clearly at odds with Customs' interpretation in its March 1, 1989, memorandum providing guidance in applying these headings to sports utility vehicles. Customs stated:

> Design features, whether they accommodate passenger transport or cargo transport, or both, are of two types both of which are relevant in determining the proper classification of a sports-utility vehicle. First are what may be regarded as structural, or integral design features such as basic body, chassis, and suspension design … style and structure of the body [control access to rear]. The second type of design features, auxiliary design features are also relevant when determining whether, on the whole, the transport of persons was the principal design consideration. *Neither type by*

> *itself can be considered determinative on the issue of the purpose for which the vehicle was principally designed*. (Emphasis added.)

Thus, "requiring that the resulting product be uniquely constructed for the purpose of transporting persons to," the exclusion of any other use, is a constrictive interpretation of the terms with which we cannot agree.

There is nothing in the statute, legislative history, or prior Customs decisions that would indicate that "principally designed" refers only to a vehicle's structural design as asserted by the government. To answer the question, whether a vehicle is principally a particular purpose, not uniquely designed for a particular purpose, one must look at both the structural and auxiliary design features, as neither by itself is determinative.

The government's exclusionary construction fails on another point. Heading 8703 HTSUS specifically includes "station wagons," which are not uniquely designed for transport of persons, rather, they are designed as dual-purpose vehicles for the transport of goods and persons. The Pathfinder, like a station wagon, is a vehicle designed with a dual-purpose – to transport goods and persons.

The specific mention of "including station wagons" in 8703 can affect proper classification when dual-purpose vehicles are at issue. The Explanatory Notes define "station wagon" as "vehicles with a maximum seating capacity of nine persons (including the driver), the interior of which may be used, without structural alteration, for the transport of both persons and goods." Customs Co-operation Council (CCC), 4 HARMONIZED COMMODITY DESCRIPTION AND CODING SYSTEM, *Explanatory Notes, Heading No. 87.03* (1st ed. 1987). As noted by the CIT, the Pathfinder meets the literal definition of a station wagon. Even so, the CIT accorded proper weight to the definition offered by the CCC when it stated that the "Explanatory Note definition of station wagons should not be read too literally." As above, we can look to Customs interpretations for instruction on the intended meaning of "including station wagons." Again in its March 1, 1989, memorandum Customs stated:

> Given the wording of the heading and corroborating indications in the working papers of the Customs Cooperation Council, the correct reading that the phrase "*including station wagons*" was not intended to expand upon or be an exception to the requirement that articles are classifiable in heading 8703 only if they are "*principally designed for transport of persons*." It should be emphasized that this interpretation does *not* read the station wagon reference out of the statute; its inclusion is necessary to clarify that the cargo-carrying capacity of dual-purpose vehicles does *not* foreclose a finding that they are principally designed to carry persons. (Emphasis added.)

Therefore, notwithstanding the fact that a vehicle may fit the definition of a station wagon and that the term is expressly included in 8703 HTSUS, that vehicle is not automatically included in or excluded from 8703 HTSUS classification. It necessarily follows that correct interpretation of 8703 HTSUS requires a determination of whether or not the vehicle was "principally designed for the transport of persons," and not merely a finding that it is within the definition of a "station wagon," unless of course it is unquestionably a station wagon. The Pathfinder is not the latter.

In summary, we find that the proper meaning of "motor vehicle principally designed for the transport of persons" to be just that, a motor vehicle principally designed for the transport of persons. While we find it unnecessary to assign a quantitative value to "principally," the statutory language is clear that a vehicle's intended purpose of transporting persons must outweigh an intended purpose of transporting goods. To make this determination, we find that both the structural and auxiliary design features must be considered. This construction comports with Customs' interpretations and the CIT's analysis; and it is equally consistent with the common and popular meaning of the terms.

B. *Proper Classification*.

While the meaning of a classification term is a question of law, the issue of whether merchandise comes within the definition of a classification term is a question of fact subject to the clearly erroneous standard of review. *Simod America Corp. v. United States*, 872 F.2d 1572, 1576 (Fed. Cir. 1989)…. Customs' classification of imported merchandise is presumed to be correct, 28 USC § 2639(a)(1) (1988), and the party challenging the classification has the burden of overcoming this presumption. *Id*. To overcome this presumption, the court must consider "whether the government's classification is correct, both independently and in comparison with the importer's alternative." *Jarvis Clark Co. v. United States*, 733 F.2d 873, 878 (Fed.Cir. 1984)…. …

If the Pathfinder satisfies the requirements of 8705 HTSUS, there is no need to discuss 8704 HTSUS because under the General Rules of Interpretation (GRI) when an article satisfies the requirement of two provisions, it will be classified under the heading giving a more specific description, here 8703 HTSUS. GRI 3(a). Conversely, if the Pathfinder does not fall within 8703 HTSUS, it falls into 8704 HTSUS.

The CIT conducted a three week trial *de novo*, to determine whether the Pathfinder was principally designed for the transport of persons or goods. The CIT looked at both design intent and execution, evaluating both structural and auxiliary design features. The CIT limited evidence to the vehicle models in the entries currently under consideration with the exception of evidence that was provided for comparison with vehicles that were readily accepted as trucks or passenger cars. These included the Nissan Hardbody truck and the Nissan Maxima sedan.

It is evident that the CIT carefully applied the proper standards in making its decision. In reaching its conclusion, the CIT evaluated the marketing and engineering design goals (consumer demands, off the line parts availability, etc.), the structural design necessary to meet both cargo and passenger carrying requirements for both on- and off-road use, as well as interior passenger amenities.

The CIT also recognized that the Pathfinder was basically derived from Nissan's Hardbody truck line yet, the Pathfinder was based upon totally different design concepts than a truck. The CIT correctly pointed out these differences and more importantly, the reasons behind the design decisions, including the need for speed and economy in manufacturing to capture the changing market, a market into which Nissan was a late entrant. Specifically, the designers decided to adopt the Hardbody's frame side rails and the cab portion from the front bumper to the frame just behind the driver's seats so that they could quickly and economically reach the market. The front suspension system was also adopted from Nissan's truck line but the rear suspension was not. The fact that a vehicle is derived in-part from a truck or from a sedan is not, without more, determinative of its intended principal design objectives which were passenger transport and off-road capability.

Substantial structural changes were necessary to meet the design criterion of transporting passengers. The addition of the rear passenger seat required that the gas tank be moved to the rear and the spare tire relocated. This effectively reduces the cargo carrying capacity. Of particular importance was the design of a new rear suspension that was developed specifically to provide a smooth ride for passengers. New and different cross beams, not present on the Hardbody frame, were added to the Pathfinder's frame to accommodate the above changes.

Other design aspects that point to a principal design for passengers include: the spare tire and the rear seat when folded down intrude upon the cargo space; the cargo area is carpeted; a separate window opening in the pop-up tailgate accommodates passengers loading and unloading small packages without having to lower the tailgate. In contrast, the Hardbody truck bed can accommodate loading with a fork lift, clearly a design feature for cargo. The CIT also found that the cargo volume is greatly reduced when the rear seat is up to accommodate passengers. Moreover, the axle and wheel differences are minor and consistent with the Pathfinder's off-road mission, particularly in the loaded condition. The Pathfinder has the same engine size as the Maxima passenger car.

Auxiliary design aspects, in addition to those merely relating to the structural derivation of the Pathfinder, that indicate passenger use over cargo use include: vehicle height was lowered 50 millimeters; the seat slides were improved yet similar to those on two door passenger sedans. Other auxiliary design features that point to transport of passengers include: rear seats that recline, are comfortable, and fold to make a fairly flat cargo bed but are not removable; rear seat stereo outlets, ashtrays, cubbyholes, arm rests, handholds, footwells, seat belts, child seat tie down hooks and operable windows. The CIT noted that there is not much more that can be done to accommodate passengers in the rear seat. Moreover, the testimony of the three primary design engineers as well as the contemporaneous design development documents support the finding that the Pathfinder was principally designed for the transport of persons.

The non-tariff regulations (NHTSA and EPA regulations) are not dispositive for purposes of tariff classification. … The government concedes this point. Nonetheless, the government goes on to argue that "the fact that safety, emission and fuel design changes required by those regulations are an element of the design process … should afford greater import to Nissan's decisions of what features to incorporate under the … regulatory schemes" and that these regulations are in accord with the motor vehicle industry. As noted by the CIT, the government's assessment that these regulatory schemes contain language that is substantially the same as the statutory language in the HTSUS, therefore affording these regulations greater relevance, is misplaced. The reasoning is baseless because those regulations include a category for Multipurpose Passenger Vehicles (MPV), a category that is not specifically delineated in the HTSUS.

In its March 1, 1989, memorandum referred to above Customs has drawn what appears to be a line between two door and four door versions of sports utility vehicles. Customs' conclusion, however, that vehicles that lack rear side passenger access doors are to be classified under 8704, is *de facto* affording determinative weight to this feature. This line, classifying two door dual-purpose vehicles for the transport of goods while classifying the four-door version as principally designed for transport of persons, appears to be arbitrary.

Passenger cars with two doors also have restricted entry into the rear seat but this fact does not take these vehicles out of 8703 classification. Two door passenger cars are equipped with a seat slide mechanism that effectively slides the front seat forward to provide easier access to the rear seat. The doors of two door passenger cars are generally wider as well. The CIT found that the Pathfinder has both of these features so that passengers can be easily accommodated. Therefore, the two door Pathfinder accommodates passengers in the rear seat as well as two door passenger cars, if not as easily as four door sports utility vehicles. Consequently, the number of doors on a vehicle should not be determinative.

Conclusion

We hold that the court applied the correct legal standards, and that the evidence of record supports the CIT's decision that the Pathfinder is principally designed for the transport of persons.

Accordingly, we affirm the decision of the Court of International Trade in holding that the Pathfinder vehicle at issue is correctly classified under 8703.23.00….

IV. Tariff Engineering, Cars versus Trucks, and 2019 *Ford* Case

- **Facts**

Ford Motor Company commenced light truck manufacturing in Turkey, and shipped some of its output to the U.S. To avoid the 25% duty, and instead have its vehicles classified as passenger cars at a 2.5% tariff, Ford tried an "innovative solution," namely, "Tariff Engineering," whereby a producer-exporter structures its manufacturing, importation, and post-importation operations to minimize tariff liability:

> It [Ford] imported its Transit Connect vans from Europe with a second row of seats – but ones that lack some features of the front-row seats, like headrests, and are covered with cheaper fabric. After the vans clear customs and before they leave the port, a Ford subcontractor often removes those second rows of seats and makes other modifications. They are then sold as cargo vans.
>
> The government … did not care for Ford's tactics, calling them an illegal "artifice or disguise" to avoid the 25 percent duty rate. The government imposed the higher duties, leading Ford to sue. In a court filing, the Justice Department accused Ford of perpetrating a "ruse to fool" U.S. Customs and Border Protection. "Ford has attempted to use a disguise to make the subject merchandise appear to be something that it is not," the government said. But regardless of the second row of seats, the Transit Connects were designed, built and sold as cargo vans, the government said.[127]

As the CIT recounted the facts:

> Ford manufactures the Transit Connect 6/7s [*i.e.*, Ford Transit Connect vehicles with vehicle identification numbers ("VINs") containing either a number 6 or 7 in the 6th digit] in Turkey and imports them into the United States. Although these vehicles are made to order and are ordered as cargo vans, Ford manufactures and imports them with a second-row seat, declaring the vehicles as passenger vehicles subject to Sub-Heading 8703.23.00 and a 2.5% duty. After clearing customs but before leaving the port, Ford (via a subcontractor) removes the second-row seat and makes other changes, delivering the vehicle as a cargo van. Defendant United States [*i.e.*, CBP] determined that the inclusion of the second-row seat is an improper artifice or disguise masking the true nature of the vehicle at importation and that such vehicle is properly classified under subheading 8704.31.00 and subject to a 25% duty. Ford contends that this is legitimate tariff engineering.

In brief, Ford made Transit Connect vans at its factory in Turkey with a second row of seats and additional footwells and windows.[128] As soon as these Transit Connect vans cleared U.S. Customs at the Port of Baltimore, a Ford subcontractor removed these features, and then Ford sold the vehicles as cargo vans. CBP classified the vehicles as "cargo vans," which are trucks dutiable at 25%, based on their condition after the post-importation conversion. Ford argued CBP must classify merchandise at the time of importation, not thereafter. Ford said that at the time of importation, Transit Connect vans were "passenger vehicles" dutiable at 2.5%. Above and beyond the 10 times tariff differential, a lot was at stake for Ford: it held 40% of the American full-size commercial

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[127] Brian Flood, *1960s "Chicken War" Still Limiting Auto Trade*, 33 International Trade Reporter (BNA) 1549 (27 October 2016).

[128] *See* Brian Flood, *Trade Court Cuts Ford Motor Co. Big Tariff Break*, 34 International Trade Reporter (BNA) 1143 (17 August 2017).

van market (as of October 2016), and its Transit Connect vans were the top selling cargo van line in the world (in 2015).

- **Issue #1:**
  Classification When?, and Supreme Court Precedents

There were two key tariff classification issues – when and how? When must a classification decision be made? Once that time is determined, then how must it be made?

Specifically, the first issue was this: at what point is the determination made of what a product actually is in a scenario in which the product is altered soon after importation – at the time of importation before modification, or post-importation, once the modification is made? In its 66-page August 2017 opinion, the CIT explained:

> The task before this Court is to determine whether the MY2012 [*i.e.*, Model Year 2012] Transit Connect 6/7s imported with the CRSV-2 [*i.e.*, 2nd cost-reduced seat, which embodied 5 changes from the 1st generation cost-reduced seat, concerning seatback wiring, fire-resistant fabric, anchor covers, indicator flags and housings, and rubber pad removal (to reduce noise and vibration)] installed at the time of importation but later removed is "principally designed for the transport of persons." The Court must perform that analysis against the backdrop of Parties' arguments concerning *whether or to what extent Ford's post-importation processing (or rather, its pre-importation intent to perform post-importation processing) informs that analysis*. Thus, the Court must tread carefully in its consideration of design intent or purpose so as to not run afoul of centuries-old case law on legitimate tariff engineering that permits manufacturing with the intent to minimize customs duties. *See, e.g.*, *Citroen* [cited below] at 415. [(Emphasis added.)]

The CIT sided with Ford.[129] Over a century before, the Supreme Court had held importers must not use a "disguise or artifice" to conceal what merchandise actually is to obtain a lower duty rate. The CIT wrote:

> It is a well-settled tenet of Customs Law that "[i]n order to produce uniformity in the imposition of duties, the dutiable classification of articles imported must be ascertained by an examination of the imported article itself, in the condition in which it is imported." *Worthington v. Robbins*, 139 U.S. 337, 341 (1891). In 1881, the U.S. Supreme Court affirmed the principle that a manufacturer may purposely manufacture goods in such manner as to evade higher duties. *Merritt v. Welsh*, 104 U.S. 694, 701-02, 704 (1881) (a case involving the importation of sugar, which had been darkened with molasses during its manufacture to escape higher duties assigned to lighter-colored sugar). According to the Court, "[s]o long as no deception is practiced, so long as the goods are truly invoiced and freely

[129] *See Ford Motor Company v. United States*, Number 13-00291 (9 August 2017).

and honestly exposed to the officers of customs for their examination, no fraud is committed, no penalty is incurred." *Id*. at 704.

Seeberger v. Farwell, 139 U.S. 608 (1891) is in accord. In *Seeberger*, the manufacturer produced garments using a mixture of cotton (6%) and wool (94%) to avoid higher tariffs associated with pure wool garments. 139 U.S. at 609-10. The Customs Service (then called the "Collector") determined that the small addition of cotton had not changed the character of the goods and the plaintiff's claim to a lower rate of duty "[w]as an attempt to defraud the revenue." *Id*. at 610-11. The trial court disagreed, and the Supreme Court concurred, finding that the manufacturer "had the right to … manufacture the goods with only a small percentage of cotton, for the purpose of making them dutiable at the lower rate." *Id*. at 611.

…

Merritt and *Seeberger* involved permanent alterations to the composition of their respective merchandise; neither case addressed, as occurred here, post-importation alterations to the subject merchandise. In *Citroen*, however, the Supreme Court did not regard the pre- or post-importation condition of the subject import as material to the classification analysis. *United States v. Citroen*, 223 U.S. 407 (1912). *Citroen* concerned the importation from France of 37 unset and unstrung pearls, divided into five separate lots. *Id*. at 413. Prior to importation, the pearls had been strung and worn as a necklace by their eventual owner. *Id*. at 413-14. After importation into the United States and delivery to the owner, the pearls were strung to "form[] the necklace she desired." *Id*. at 414. The Customs Service had classified the pearls under the provision for "pearls set or strung," and the importer appealed. *Id*. at 413.

The Court discussed, and dismissed, the idea that the pre-importation stringing of the pearls or any post-importation plan to string the pearls into a necklace determined the correct classification. *See id.* at 415-16 ("Had these pearls never been strung before importation, no one would be heard to argue that they fell directly within the description of paragraph 434 [applicable to set or strung pearls] because they could be strung, *or had been collected for the purpose of stringing or of being worn as a necklace*.")) (Emphasis added.); *Id*. at 416 ("Nor can it be said that pearls, imported unstrung, are brought within the description of paragraph 434 because, at some time, or from time to time, previous to importation, they have been put on a string temporarily for purposes of display."). The *Citroen* Court created a bright line test for classification cases: "[d]oes the article, *as imported*, fall within the description sought to be applied?" *Id*. at 415 (Emphasis added.).

It is also well settled, however, that articles cannot escape a prescribed rate of duty "by resort to disguise or artifice." *Id*. at 415. In other

> words, when the article is described by a particular tariff provision at the time of importation, "an effort to make it *appear otherwise* is simply a fraud on the revenue, and cannot be permitted to succeed." *Id*. at 415 (Emphasis added.)…. … In contrast, the purposeful manufacture or preparation of an article to avoid higher tariffs is not disguise or artifice; rather, that is legitimate tariff engineering. *See id*. at 415 ("But when the article imported is not the article described as dutiable at a specified rate, it does not become dutiable [at that rate] because it has been manufactured or prepared for the express purpose of being imported at a lower rate.") (citing *Merritt*, 104 U.S at 704, *Seeberger*, 139 U.S. at 611); HQ H220856 at 11 (defining legitimate tariff engineering).

Ford persuaded the CIT that what merchandise actually is must be determined at the time it enters the U.S., even if that merchandise is altered shortly after importation. After a somewhat convoluted discussion, the Court explained:

> [T]he Supreme Court's guidance on disguise or artifice emphasizes changes to the *appearance*, not the physical characteristics, of the article. *See Citroen*, 223 U.S. at 415 (when the article is described by a particular tariff provision at the time of importation, "an effort to make it *appear otherwise* is simply a fraud on the revenue, and cannot be permitted to succeed") (Emphasis added.). … This guidance makes sense in light of the general rule that a manufacturer has the right to *make its goods* as it chooses. *See id.*, 104 U.S. at 701. Parsing manufacturing steps and the reasons behind those steps in an effort to uncover disguise or artifice threatens to turn the concept of legitimate tariff engineering on its head. Unsurprisingly, therefore, the few cases finding disguise or artifice involve post-manufacture, pre-importation efforts to conceal the nature of the imported article. … Parties have not supplied, nor has the Court located, any case law tracing disguise or artifice to the manufacturing process. [(Emphasis original.)]

Having decided that the classification decision is made at the time of importation, not after, the CIT turned to the second issue: at the time of importation, what was the proper tariff classification of the vehicles Ford imported?

- **Issue #2:**
  Classification How?, and 1994 *Marubeni* Precedent

The parties agreed the 1994 *Marubeni* case was the controlling decision to distinguish cars (passenger vehicles) from trucks (cargo vehicles). Ford said the right HTSUS Sub-Heading was 8703.23.00, covering cars, with an associated 2.5% tariff. CBP favored argued for the 25% tariff category in HTSUS Sub-Heading 8704.31.00, "motor vehicles for the transport of goods." The CIT summarized that precedent as follows:

> In *Marubeni*, the Court decided the proper classification of the 1989 and 1990, two-door, two-wheel, and four-wheel drive Nissan Pathfinder when the sports utility vehicle first entered the market. 35 F.3d at 532. The *Marubeni* court considered two possible HTSUS Headings – 8703 and 8704 – the same two headings at issue in the instant case, … and concluded that to be "principally designed for the transport of persons," the vehicle must "be designed 'more' for the transport of persons than goods," *id*. at 534 (citing *Webster's Third New International Dictionary of the English Language, Unabridged* (1986) (defining "principally" as "in the chief place, chiefly," and defining "designed" as "done by design or purposefully"); *see also id*. at 535 (classification under heading 8703 requires "that a vehicle's intended purpose of transporting persons must outweigh an intended purpose of transporting goods."). The *Marubeni* court held that the proper classification of the Nissan Pathfinder was under Heading 8703, encompassing motor cars and other motor vehicles principally designed for the transport of persons, and affirmed the … decision. … In so doing, the Federal Circuit spoke to the test to determine "whether a vehicle is principally designed for a particular purpose, not uniquely designed for a particular purpose," by looking "at both the structural and auxiliary design features, as neither by itself are determinative." *Id*. at 535.

Of course, *Marubeni* did not involve post-importation processing of imported merchandise, that is why the *Ford* Court had to decide the 1st question of "when?"

Applying the *Marubeni* precedent to the facts, the CIT began by rejecting the efforts of the CBP to focus on the intent of Ford in tariff engineering, and thus Ford's post-importation behavior. Intent is irrelevant, as is what happens after importation unless that behavior is deceitful:

> The United States [*i.e.*, CBP] interprets *Marubeni* as requiring inquiry into a vehicle's "intended purpose, *i.e.*, what the vehicle is used for." … For that reason, Defendant contends, "ephemeral features whose reason for existence is to fool CBP as to a vehicle's true nature and intended purpose should be disregarded." … Defendant argues that the subject imports are "cargo van[s] from birth," and do not actually undergo a conversion process because the features removed during post-importation processing exist only for the purpose of classification. … (pointing to the fact that Transit Connect 6/7s are offered, ordered, and sold without the second row seat, the VIN numbers reflect that they are cargo vans, and the GVWR [Gross Vehicle Weight Rating, which was 5,005 pounds] reflects two-passenger seating). According to Defendant, because "[t]he temporary 'Chicken Tax' features exist only" to obtain favorable classification and not for the purpose of transporting persons, Ford's "'Chicken Tax' scheme" constitutes disguise or artifice.

Ford emphasizes *Marubeni's* discussion of design features, … and contends that "purpose" is determined by considering "a vehicle's physical features at the point of importation, not subjective intent, post-importation processing, or actual use." … Ford contends that Defendant's disregard of "features that are not consistent with how goods are used or sold … merely walks 'intent' and 'actual use' in through the back door."

Defendant goes to great lengths to contend – paradoxically – that conducting the *Marubeni* test based on the condition of the Transit Connect 6/7s at the time of importation must account for post-importation processing and Ford's reasons for so doing. … But the Federal Circuit in *Marubeni* did not refer to the manufacturer's "intended purpose" in designing a vehicle in a particular way, but to the "vehicle's intended purpose of transporting persons" as compared to an "intended purpose of transporting goods." *Marubeni*, 35 F.3d at 535. (Emphasis added.) The Court goes on to state that the vehicle's preeminent "intended purpose" is determined from an examination of the vehicle's structural and auxiliary design features. *Id*. at 535. Although the Court approved of the CIT's consideration of Nissan's "reasons behind [certain] design decisions," it did not state that the CIT must, in all cases, consider the manufacturer's intent as part of the analysis. … *When, as here, the relevant intent is the intent to avoid higher duties, the Court is bound to follow the Supreme Court's view that such intent is immaterial to an article's classification*. *See, e.g.*, *Citroen*, 223 U.S. at 415. [(Emphasis added.)]

Additionally, Defendant's argument attempts to trace disguise or artifice to the pre-importation manufacturing process. Def[endant]'s Reply at 9 ("By adding the 'Chicken- Tax' seat and windows…, Ford has attempted to use a disguise to make the subject merchandise appear to be something that it is not."). Similarly, Defendant's focus on the Transit Connect 6/7s apparent lack of "commercial reality" as a vehicle with a second-row seat … seeks to focus the Court on events that occur post-importation. In essence, Defendant urges the court to concentrate on any time other than the time of importation. But *the well-settled "time of importation" rule, applied with Supreme Court guidance on the difference between disguise or artifice and legitimate tariff engineering, disfavors Defendant's approach*. … Moreover, *Ford has not "disguised" anything*. Rather, it manufactured a cost-reduced second row seat for the purpose of obtaining the significantly lower (one-tenth) tariff rate assigned to passenger vehicles in the most economical manner. … *That Ford ultimately removes that seat after importation is immaterial; what matters is whether, at the time of importation, the subject vehicles were "designed 'more' for the transport of persons than goods." Marubeni*, 35 F.3d at 534. [(Emphasis added.)]

Next, in applying the *Marubeni* precedent, the CIT concluded "that the Transit Connect 6/7's structural and auxiliary design features point to a principal design for the transport of persons." The gist of the CIT analysis on structural features was this:

> … the Transit Connect 6/7s share certain structural features with the Transit Connect 9, which is delivered to the customer with its rear seat in place and which was not reclassified under Heading 8704. Those structural features include engine size and type, steel unibody construction, interior volume and rear space from floor to ceiling, front-wheel drive, underbody bracing, permanent bracing in the side pillars of the car body, Macpherson strut front suspension, and ground clearance. Moreover, all Transit Connects share the same chassis and drivetrain as the Ford Focus passenger vehicle. *Cf.* Marubeni, 35 F.3d at 534 (*citing* Customs' March 1, 1989 Memorandum, which emphasized suspension design, body type, and chassis as part of a vehicle's structural design). Additional features that point to classification under Heading 8703 include the Transit Connect 6/7s second row sliding doors with windows and swing-out rear doors and the absence of a panel or barrier between the first and second row seats. [On this last point, as well as on the weight of the Transit Connect 6/7s, the CIT ruling against CBP was guided in part by the WCO EN to Heading 8703, which was amended – ironically at the suggestion of the U.S. – after the *Marubeni* decision.]
>
> According to Defendant, features that disfavor classification under heading 8703 include the Transit Connect 6/7s GVWR of 5005 pounds, as compared to the Transit Connect 9's 4965 pound GVWR, and the presence of the number 6 or 7 in the Transit Connect 6/7s VIN, which designates the vehicles as subject to post-importation removal of the rear seat. … Neither feature weighs heavily in the analysis, however. EN 87.03 contemplates motor vehicles with a GVWR of less than five tons, which describes the Transit Connect 6/7s. … The presence of the 6 or 7 in the Transit Connect 6/7's VIN merely reflects Ford's intent to alter the subject merchandise after obtaining favorable tariff treatment, which … is immaterial to the classification analysis.

Finally, in applying the *Marubeni* precedent, the CIT looked at the auxiliary design features of the Transit Connect 6/7, specifically the cost-reduced rear seat. Like the structural features, they favored the 2.5% HTSUS tariff category of passenger cars, advocated by Ford – though not exactly for the reason Ford advanced:

> Plaintiff [Ford] contends that the Transit Connect 6/7s' cost-reduced rear seat satisfies the *Marubeni* test merely because it is included at the time of importation. … Defendant [CBP] responds that the Transit Connect 6/7s' cost-reduced rear seat was never intended to remain in the vehicle, and points to its cost-reduced characteristics as evidence that the seat does not meet the Marubeni test. … *Contrary to Parties' respective positions, however, neither the seat's mere presence nor its removal is dispositive.*

> *Instead, the Court must determine whether the characteristics of the CRSV-2 indicate a principal design for the transport of persons*. [(Emphasis added.)]

As to those characteristics, Ford was right:

> The CRSV-2 consists of a seatback frame and cushion frame; it does not contain a headrest, which was removed in the creation of the CRSV-1. The seatback frame contains seatbelts for every seated position, and a seatbelt retractor mount and shoulder guide that are built to withstand a collision. The seatback and seat cushion consist of high density polyurethane foam, and are contoured on the passenger side for lumbar and lateral support. The cushion is held in place by the frame contours, cushion, seatback wires, and cover. The cushion frame includes the LATCH system, which enables a LATCH-equipped child car seat to be fitted to the seat. … *There is no indication that the grey woven cover or other cosmetic changes, including the removal of the backrest reinforcement pad, diminish the seat's utility as a seat*.
>
> The entire seat is wrapped in a cost-reduced fire-resistant grey woven cover that does not match the flame retardant fabric covering the front seat. The CRSV-2 also lacks fabric mesh covering the rear seat bottom and black paint that had previously covered the exposed metal portions of the seat frame. *However, as Ford contends, tariff classification under Heading 8703 depends less on the luxuriousness of the amenities than the degree to which their functionality reflects a principal design for transporting persons*. …
>
> The seatback frame has pivot brackets enabling it to fold forward; however, the torsion bar assembly and mounts, and associated seatback wire, which secure the seatback when folded against the seat cushion, were removed at the CRSV-1 stage. The tumble lock mechanism, which held the entire seat in place when it was folded against the front seat, was also removed. Because the torsion bar assembly and tumble lock mechanism made it easier to transport goods by securing the seat when the vehicle was being used to transport cargo instead of passengers, *the removal of those items does not diminish the seat's ability to transport passengers*.
>
> The seatback frame contains three seatback wires. Seatback wires provide lumbar support, passenger comfort, support for cargo when folded flat, and support for the seat foam and fabric. The MY2010 Transit Connect 6/7 seatback contained seven seatback wires; four were removed in the creation of the CRSV-2. *There is no evidence that the remaining three wires provided insufficient support*. …

> *The undisputed facts show that the CRSV-2 is still a seat, albeit a cheaper and, perhaps, less attractive one*. There is nothing about the seat (including the cost reduction measures Ford took in designing the CRSV-2) that convinces the court that this version of the seat is less relevant to the analysis. The presence of the LATCH equipped CRSV-2, taken together with additional auxiliary design features, including carpeted footwells in front of the second row seat, child-locks in the sliding side doors, an optional third cupholder in the rear of the center console, coat hooks in the second row, a map pocket attached to the rear of the front driver seat, and dome lighting throughout the vehicle, support classification pursuant to Heading 8703. *Cf. Marubeni*, 35 F.3d at 537 (pointing to rear seats that accommodate child seats, rear seat belts, and footwells); EN 87.03 (pointing to carpeting and lighting). [(Emphasis added.)]

So, Ford won at the CIT: tariff classification is determined pre-importation, knowing full well there will be post-importation changes to the merchandise that would change classification to a higher tariff category, but which are irrelevant because no trickery involved.

- **Limits of Tariff Engineering?**

What are the limits on Tariff Engineering? How much emphasis should be put on pre- versus post-border activity when classifying (or re-classifying) merchandise?[130] The answer to these questions came from the U.S. Court of Appeals for the Federal Circuit, which in June 2019, reversed the CIT decision. Ford lost on appeal. Per the excerpt after the Federal Circuit decision, Ford settled the case and paid a $365 million fine.

FORD MOTOR COMPANY V. UNITED STATES, UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT, NUMBER 2018-1019 (7 JUNE 2019), *WRIT OF CERTIORARI* DENIED (29 JUNE 2020)[131]

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[130] That also was the issue in the 2016 CIT case, *Ford Motor Co. v. United States*, where the CIT denied summary judgment due to the presence of genuine issues of material fact regarding the characteristics of the Transit Connect 6/7's cost-reduced rear seat. *See* Number 13-00291 (5 October 2016), 181 F. Supp. 3d 1308 (2016).

CBP appealed Ford's CIT victory, as per the excerpt above. At issue for the Federal Circuit, of course, was whether the Transit Connect vans qualify as passenger vehicles, subject to a 2.5% tariff (regardless of what Ford intended to do to them after the customs clearance process), or whether they are cargo vans subject to a 25% tariff (because after importing the merchandise with a second row of seats and additional footwells, so they are classified as "passenger vehicles," a Ford subcontractor removes these features so Ford can sell the vehicles as "cargo vans"). Stated differently, at issue was whether Ford's tariff engineering was a "disguise or artifice" for Ford to obtain one-tenth of the duty it otherwise would owe.

[131] *See* www.supremecourt.gov/search.aspx?filename=/docket/docketfiles/html/public/19-1026.html. As this decision suggests, case law discussing "principal use" is voluminous. *See, e.g., Logitech, Inc. v. U.S.*, Slip Opinion Number 21-106 (24 August 2021), www.cit.uscourts.gov/sites/cit/files/21-106.pdf (applying a principal use analysis, and holding webcams and conference cameras should be classified in HTSUS Heading 8517 (and thus duty-free) as "other apparatus for the transmission or reception of voice, images, or other data," not in Heading 8525 (which had a 2.1% *ad valorem* tariff) as television cameras, as well as reasoning Heading 8517 is more specific than 8525).

Wallach, Circuit Judge:

Background

I. Subject Merchandise

This appeal involves a single entry of subject merchandise, "which entered at the Port of Baltimore on December 26, 2011." … Ford originally began importing its line of Transit Connect 6/7s into the United States in 2009. … Ford also produces a similar vehicle called the Transit Connect. … Ford based the design of both types of Transit Connect vehicles on its then-existing European V227 line of vehicles and imported the Transit Connects from its factory in Turkey. … Specifically, "Ford's European V227 line included" (1) "the double-cab-in-van (DCIV)" and (2) "the Cargo Van." … "Ford based the subject merchandise on its European V227 DCIV, not its Cargo Van." …

Before importation into the United States, Ford avers that it "modified the European V227 DCIV to comply with all relevant U.S. safety standards," including the Federal Motor Vehicle Safety Standards ("FMVSS"). … For instance, Ford redesigned the second row of seats' underbody support structure; added side-impact beams and foam blocks for protection; and changed the vehicle's lighting, labels, and turn signals. … Moreover, "Ford designed the Transit Connect on the Ford Focus platform, which means that" the two vehicle lines share similar features, specifically, "[the Transit Connect] has the same chassis and drivetrain as the Ford Focus passenger vehicle." … Ford designated its Transit Connects in the United States as part of the V227N line, which includes the Transit Connect Van (*i.e.*, the Transit Connect 6/7) and the Transit Connect Wagon (*i.e.*, the Transit Connect 9). … Ford displayed its Transit Connect models at auto shows and advertised "in magazines and on auto shopping websites." … "Each Transit Connect was built to order," with all available customization options identified in an online brochure. …

At the time of importation, the subject merchandise had several relevant characteristics. Ford specified the subject merchandise's Gross Vehicle Weight Rating ("GVWR") as 5,005 pounds. … [As per 49 C.F.R. § 523.2, "GVWR" is "the value specified by the manufacturer as the loaded weight of a single vehicle"). The Transit Connect 9, by contrast, had a GVWR of 4,965 pounds. … The Transit Connect 6/7s had a "four cylinder gasoline engine, … a steel unibody construction[,] … front-wheel drive[,] rear passenger seats with seat anchors[,] … underbody bracing[,] … front suspension[,] … and over [fifty] inches of space from floor to ceiling in the rear." … The subject merchandise "had swing-out front doors with windows, second-row sliding doors with windows," and "swing-out rear doors, some of which had windows." … "[N]o Transit Connect 6/7s had a panel or barrier between the first and second row of seats." … When imported, the subject merchandise had "second row seats; seat belts for every seating position; permanent bracing in the side pillars of the car body," as well as "child-locks in the sliding side doors; dome lighting in the front, middle, and rear of the vehicle; a full length molded cloth headliner; coat hooks in the second row; and a map pocket attached to the front driver seat." … The vehicles also had "front vents and front speakers," cup holders in the center and rear console, and "carpeted foot- wells in front of the second row seat." … However, the vehicles "did not have rear (behind the front seats) vents, speakers, … handholds"; "side airbags in the area behind the front seats"; or "a cargo mat." … "[T]he painted metal floor of the cargo area was left exposed." …

Central to the underlying dispute were the Transit Connect 6/7s' second row seats. "[T]he second row seats … did not include headrest[s], certain seatback wires, a tumble lock mechanism, or accompanying labels, and were wrapped in cost-reduced fabric." … When Ford began importing MY [Marketing Year] 2010 Transit Connect 6/7s (as opposed to the MY 2012 versions at issue here), it used rear seats similar to those that were eventually used in the MY 2012 Transit Connect 9s. … To reduce costs, Ford created, "[i]n mid-MY[ ]2010," its "first cost-reduced seat ('CRSV-1')," which "resulted in the removal of the head restraints, torsion bar assembly and mount, tumble lock mechanism and associated labels, and backrest reinforcement pad from the MY[ ]2010 Transit Connect 6/7 rear seat." … Ford subsequently created its second cost-reduced seat ("CRSV-2"), which are the seats that were used in the subject merchandise. … These seats "incorporated the following changes from CRSV-1": (1) "removal of four of the seven seatback wires," (2) "wrapping of the seat in a cost-reduced fire-resistant grey woven cover[,] . . . which is not the same as the fabric used to cover the front seat," (3) "re-placement of the front leg seat anchor cover, which was designed to attach to the tumble lock mechanism, with a cover that did not contain a space for the tumble lock mechanism," (4) "removal of the red indicator flags and housings associated with the tumble lock mechanism to leave a bare metal lever," (5) "removal of the small rubber pad from the rear seat leg intended to decrease noise and vibration from around the rear floor latches," (6) removal of "the fabric mesh covering the rear seat bottom," and (7) discontinuation of the application of the "black paint to the visible, metal portions of the [rear] seat frame." … Although Ford's "engineers concluded that the fabric change and removal of seatback wires did not affect the CRSV-2's FMVSS compliance," "Ford did not conduct consumer testing or surveys before implementing the CRSV-2." …

After importation, Ford made several changes to the subject merchandise once the merchandise cleared Customs, but while the imported merchandise "w[as] still within the confines of the port." … For instance, all Transit Connects underwent processing, such as "removing … a protective covering," "disengaging Transportation Mode," and "checking for low fuel." … The Transit Connect 6/7s underwent "additional" processing ("post-importation processing"). … Specifically, "the second-row seat[s were] unbolted and removed, along with the associated second row safety restraints. A steel panel was then bolted into the second row footwell to create a flat surface behind the first rows of seats." … "A molded cargo mat was placed over the floor behind the first row," "[s]cuff plates were added inside the second-row doors," and "[i]n some vehicles the sliding door windows were replaced with a solid panel." …

Therefore, "[a]ll Transit Connects are imported with second row seats, but the Transit Connect 6/7s are delivered to the customer as a two seat cargo van." … "The removed seats were recycled or otherwise disposed of." … Following this additional post-importation processing, the Transit Connect 6/7s maintained the following features:

"underbody second-row seat support; anchors and fittings for the second-row seat[;] permanent bracing in the side pillars to support the removed safety restraints; and the beam and foam in the side sliding doors for rear passenger crash protection." … However, during the post-importation processing, "[t]he anchor holes for the second row seat are plugged and no longer readily accessible." …

II. Procedural History

In February 2012, "the Port of Baltimore notified Ford that [Customs] had initiated an investigation into Ford … importations." … Following the investigation, in January 2013, Customs found that the subject merchandise was properly classified under HTSUS Heading 8704, specifically HTSUS Sub-Heading 8704.31.00. Customs Ruling HQ H220856 (Jan. 30, 2013)…. Accordingly, Customs liquidated the subject merchandise at the 25% duty rate associated with HTSUS Sub-Heading 8704.31.00. … "Ford timely and properly protested" this decision. … Customs denied Ford's protest. …

Ford filed a complaint with the CIT, alleging Customs improperly denied its protest. … The CIT held that the subject merchandise should have been classified under HTSUS Sub-Heading 8703.23.00. … The CIT evaluated the subject merchandise's condition at the time of importation, … and concluded "the Transit Connect 6/7's structural and auxiliary design features point to a principal design for the transport of persons" …. The CIT explained that "because [HTSUS H]eading 8703 is not controlled by use, and an assessment of intended use is not necessary to distinguish [HTSUS Heading] 8703 from 8704," it found "it unnecessary to consider principal or intended use, or the [relevant use] factors, to define the tariff terms." … Furthermore, the CIT rejected the argument that Ford's post-importation processing constituted a disguise or artifice, determining instead that Ford's removal of the rear seats "after importation is immaterial" and that Ford engaged in legitimate tariff engineering. …

Discussion

I. Standard of Review and Legal Framework

We review the CIT's decision to grant summary judgment *de novo*, applying the same standard used by the CIT to assess Customs' classification. *See Otter Prods., LLC v. United States*, 834 F.3d 1369, 1374-75 (Fed. Cir. 2016) [excerpted in a separate Chapter]. "Although we review the decision of the CIT *de novo*, we give great weight to the informed opinion of the CIT and it is nearly always the starting point of our analysis." *Schlumberger Tech. Corp. v. United States*, 845 F.3d 1158, 1162 (Fed. Cir. 2017)…. Pursuant to U.S. Court of International Trade Rule 56(a), the CIT "shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law."

"The classification of merchandise involves a two-step inquiry." *ADC Telecomms., Inc. v. United States*, 916 F.3d 1013, 1017 (Fed. Cir. 2019). First, we ascertain the meaning of the terms within the relevant tariff provision, which is a question of law, and, second, we determine whether the subject merchandise fits within those terms, which is a question of fact. *See Sigma-Tau HealthSci., Inc. v. United States*, 838 F.3d 1272, 1276 (Fed. Cir. 2016). "Where, as here, no genuine dispute exists as to the nature of the subject merchandise, the two-step inquiry collapses into a question of law we review *de novo*." *ADC*, 916 F.3d at 1017….

The HTSUS governs the classification of merchandise imported into the United States. *See Wilton Indus., Inc. v. United States*, 741 F.3d 1263, 1266 (Fed. Cir. 2013) [excerpted in a separate Chapter]. The HTSUS "shall be considered … statutory provisions of law for all purposes." 19 U.S.C. §3004(c)(1) (2012); *see Chemtall, Inc. v. United States*, 878 F.3d 1012, 1026 (Fed. Cir. 2017) (explaining that "the tenth-digit statistical suffixes … are not statutory," as those suffixes are not incorporated in the HTSUS's legal text). "The HTSUS scheme is organized by Headings, each of which has one or more Sub-Headings; the Headings set forth general categories of merchandise, and the Sub-Headings provide a more particularized segregation of the goods within each category." *Wilton Indus.*, 741 F.3d at 1266. "The first four digits of an HTSUS provision constitute the Heading, whereas the remaining digits reflect Sub-Headings." *Schlumberger*, 845 F.3d at 1163 n.4. "[T]he Headings and Sub-Headings … are enumerated in Chapters 1 through 99 of the HTSUS (each of which has its own Section and Chapter notes)…." *R.T. Foods, Inc. v. United States*, 757 F.3d 1349, 1353 (Fed. Cir. 2014). The HTSUS "also contains the 'General Notes,' the 'General Rules of Interpretation' ('GRI'), the 'Additional [U.S.] Rules of Interpretation' ('ARI'), and various appendices for particular categories of goods." …

The GRI and the ARI govern the classification of goods within the HTSUS. *See Otter Prods.*, 834 F.3d at 1375. "The GRI apply in numerical order, meaning that subsequent rules are inapplicable if a preceding rule provides proper classification." *Schlumberger*, 845 F.3d at 1163. GRI 1 provides, in relevant part, that "classification shall be determined according to the terms of the *Headings* and any relative Section or Chapter Notes." GRI 1. (Emphasis added).) "Under GRI 1, [we] first construe[] the language of the Heading, and any Section or Chapter Notes in question, to determine whether the product at issue is classifiable under the Heading." *Schlumberger*, 845 F.3d at 1163…. "[T]he possible Headings are to be evaluated without reference to their Sub-Headings, which cannot be used to expand the scope of their respective Headings." *R.T. Foods*, 757 F.3d at 1353…. "Absent contrary legislative intent, HTSUS terms are to be construed according to their common and commercial meanings, which are presumed to be the same." *Well Luck Co. v. United States*, 887 F.3d 1106, 1111 (Fed. Cir. 2018)…. "To discern the common meaning of a tariff term, we may consult dictionaries, scientific authorities, and other reliable information sources." *Kahrs Int'l, Inc. v. United States*, 713 F.3d 640, 644 (Fed. Cir. 2013)…. By contrast, the ARI contain, *inter alia*, specific rules for interpreting use and textile provisions in the HTSUS. *See* ARI 1(a)-(d); *Schlumberger*, 845 F.3d at 1163 n.5 (explaining that the ARI do not apply to *eo nomine* provisions). ARI 1(a) provides that, when a tariff provision is "controlled by use (other than actual use)," then classification "is to be determined in accordance with the use in the United States at, or immediately prior to, the date of importation, of goods of that class or kind to which the imported goods belong, and the controlling use is the principal use." ARI 1(b) governs classification by "actual use," rather than principal use.

We may also consider the relevant Explanatory Notes ("EN"). *Fuji Am. Corp. v. United States*, 519 F.3d 1355, 1357 (Fed. Cir. 2008). "The [ENs] provide persuasive guidance and are generally indicative of the proper interpretation, though they do not constitute binding authority." *Chemtall*, 878 F.3d at 1019….

Once we determine the appropriate heading, we apply GRI 6 to determine the appropriate Sub-Heading. *See Orlando Food Corp. v. United States*, 140 F.3d 1437, 1442 (Fed. Cir. 1998). GRI 6 provides that "the classification of goods in the Sub-Headings of a Heading shall be determined according to the terms of those Sub-Headings and any related Sub-Heading notes and, *mutatis mutandis*, to the above [GRIs], on the understanding that only subheadings at the same level are comparable."

II. The CIT Erred in Granting Summary Judgment for Ford and Denying Summary Judgment for the Government

A. HTSUS Heading 8703 Is an *Eo Nomine* Provision that Inherently Suggests Use

HTSUS Heading 8703 covers "[m]otor cars and other motor vehicles principally designed for the transport of persons (other than those of [HTSUS H]eading 8702), including station wagons and racing cars." The CIT found that an examination of the vehicle's use was not "necessary or helpful to arriving at the correct classification." … The Government contends the CIT erred by classifying the subject merchandise under HTSUS Heading 8703, contrary to Customs' classification. … The Government argues Customs correctly determined that "the overwhelming majority of [the relevant design features] indicated that the [Transit] Connect 6/7 is not principally designed for the transport of persons." … According to the Government, it was proper for Customs to consider, *inter alia*, factors that are typically used to evaluate the imported product's use in the United States. … We agree, in part, with the Government, and hold the CIT erred by refusing to consider intended use as part of its analysis.

"We first must assess whether the subject [H]eading[] constitute[s an] *eo nomine* or use provision[] because different rules and analysis will apply depending upon the Heading type." *Schlumberger*, 845 F.3d at 1164 (first citing *Kahrs*, 713 F.3d at 645-46 (defining *eo nomine* provision); then citing *Aromont USA, Inc. v. United States*, 671 F.3d 1310, 1312-16 (Fed. Cir. 2012) (defining principal use provision)). "[W]e consider a HTSUS Heading or Sub-Heading an *eo nomine* provision when it describes an article by a specific name." *CamelBak Prods., LLC v. United States*, 649 F.3d 1361, 1364 (Fed. Cir. 2011)…. "Absent limitation or contrary legislative intent, an *eo nomine* provision includes all forms of the named article, even improved forms." *Id.* at 1364-65…. Generally, "a use limitation should not be read into an *eo nomine* provision." *Carl Zeiss, Inc. v. United States*, 195 F.3d 1375, 1379 (Fed. Cir. 1999). However, doing so may be appropriate where "the name itself inherently suggests a type of use." *Id.* Alternatively, "once tariff terms have been defined, … use of the subject articles [may] define[] an article[']s[] identity when determining whether it fits within the classification's scope." *GRK Can., Ltd. v. United States*, 761 F.3d 1354, 1359 (Fed. Cir. 2014) [excerpted in a separate Chapter].

Although HTSUS Heading 8703 is an *eo nomine* provision, the "principally designed for" portion inherently suggests a type of use, *i.e.*, "the transport of persons." In *Marubeni America Corp. v. United States* (*Marubeni II*), we considered the proper classification of Nissan's Pathfinder vehicle, examining the same two Headings as the present appeal, and affirmed the CIT's conclusion that the subject merchandise was properly classified under HTSUS Heading 8703, as opposed to HTSUS Heading 8704. *See* 35 F.3d 530, 532 (Fed. Cir. 1994) [excerpted in a separate Chapter]. In interpreting HTSUS Heading 8703, *Marubeni II* explained that the relevant dictionary definitions from *Webster's Third New International Dictionary of the English Language* (1986) define "'principally' as 'in the chief place, chiefly[]' and … 'designed' as 'done by design or purposefully opposed to accidental or inadvertent; intended, planned.'" *Id.* at 534. Given these definitions, HTSUS Heading 8703's purposeful language – that asks whether the merchandise is *chiefly intended* for the transportation of persons – inherently suggests intended use. …

We have held in other cases that an *eo nomine* provision may require looking to intended use. In *GRK*, we considered a tariff Heading for "other wood screws" and explained that central to the "common understanding" of that Heading is the "intended use of [the] screws," because the tariff provision is not directed to "screws made of wood," "but rather metal screws *used* to fasten wood." 761 F.3d at 1359. Similarly, in *Len-Ron Manufacturing Co. v. United States*, we considered a Heading for "vanity cases" and agreed with the CIT that the heading covered "all forms of the articles," *i.e.*, that the heading is *eo nomine*. 334 F.3d 1304, 1311 (Fed. Cir. 2003). Nevertheless, we explained that use was a relevant consideration because "for a hand-bag or case to be classified as a vanity case, containing, carrying, or organizing cosmetics must be its predominant use, rather than simply one possible use." *Id.* Therefore, we adopted the CIT's definition of vanity case as "a small handbag or case used to hold cosmetics" and explained that the at-issue "cosmetics bags are indisputably small hand-bags or cases *designed and intended to hold cosmetics*," such that they were classifiable as vanity cases. *Id.* at 1312. (Emphasis added.)…. As in those cases, use is relevant in construing "other motor vehicles principally designed for the transport of persons" in HTSUS Heading 8703, because this language suggests that classification is necessarily intertwined with whether an imported vehicle is chiefly intended to be used to transport persons. *Cf. Irwin Indus. Tool Co. v. United States*, 920 F.3d 1356, 1361 (Fed. Cir. 2019) (holding that "the terms pliers and wrenches" do not "inherently suggest … use," where "*the language of the particular Headings* … do[] not imply that use or design is a defining characteristic." (Emphasis added.)).

This conclusion follows from our precedent in *Marubeni II*, which implicitly recognized that HTSUS Heading 8703 inherently requires looking to intended use. There, the Court began its consideration of HTSUS Heading 8703 by conducting what appears to be an *eo nomine* analysis, without stating as much. *See Marubeni II*, 35 F.3d at 534-35 (construing the meaning of the Heading under the GRIs without reference to the ARIs). We explained that "the statutory language" of HTSUS Heading 8703, which employs the word "principally," "is clear that a vehicle's intended purpose of transporting persons must outweigh an intended purpose of transporting goods" and that "[t]o make this determination, … both the structural and auxiliary design features must be considered." *Id.* at 535. Then, *Marubeni II* proceeded by endorsing the consideration of use. … *Marubeni II* expressly *approved* of the CIT's reasoning below, which we acknowledged "carefully applied the proper standards" and evaluated not only the structural and auxiliary design features, but also "the marketing and engineering design goals (consumer demands, off the line parts availability, etc.)." *Id.*

… [T]he CIT's opinion discussed "marketing, as reflective of design intent and execution," under a Heading titled "[m]arketing and use indicate the Pathfinder was designed for transport of persons." *Marubeni Am. Corp. v. United States* (*Marubeni I*), 821 F. Supp. 1521, 1528 (Ct. Int'l Trade 1993). The CIT explained that the marketing evidence shows "that cargo capacity was not a major objective of the designer *vis-à-vis* the competition, at least as reflected in its polar charts. Product development documentation and advertising were consistent. The emphasis was on family use, loading groceries and sports equipment and 'go anywhere' *élan*." *Id.* … The CIT noted that, although "[t]he marketing and product planning documents mention cargo capacity[, it] does not appear to be a high priority." *Id.* at 1528 n.13. Given our endorsement of the CIT's consideration of marketing materials that speak to the *use* of the product, *see Marubeni II*, 35 F.3d at 536, we therefore have signaled that consideration of use is appropriate for HTSUS Heading 8703, *see id.*; *see also Aromont*, 671 F.3d at 1313 (listing appropriate considerations for use provisions, such as "use in the same manner as merchandise which defines the class" and "the manner in which the merchandise is advertised and dis- played").

Ford's counterarguments are unavailing. [The Court rejected two such counter-arguments. First, Ford contended "*Western States Import Co. v. United States* [154 F.3d 1380 (Fed. Cir. 1998)] supports the conclusion that "intended use" is not relevant to the HTSUS Heading 8703 analysis." In *Western States*, the Court "affirmed the classification of merchandise under a Sub-Heading for bicycles other than bicycles 'not designed for use with [wide] tires.' The bicycle importer disputed this classification, urging that Customs should have considered "the intent of the manufacturer," … as evidenced by the fact that "the bicycles were shipped with narrow tires." But, the Court "rejected this argument, because it 'changes the language of the statute, according primacy to the designer's state of mind and limiting the examination of the objective physical design features of a bicycle to a single facet of that design,' *i.e.*, 'the tire with which the bicycle is equipped.'"]

Second, Ford contends Customs improperly considered post-importation processing rather than limiting its evaluation to the subject merchandise's "condition as imported." … "The rule is well established that in order to produce uniformity in the imposition of duties, the dutiable classification of articles imported must be ascertained by an examination of the imported article itself, in the condition in which it is imported." *United States v. Citroen*, 223 U.S. 407, 414-15 (1912)…. Our holding today does not controvert this rule, as this rule does not stand for the proposition that pre-importation activities can never be relevant. Consideration of these factors flows from the plain meaning of the term "principally designed," which means chiefly "done by design or purposefully …; *intended*[or] *planned*." *Marubeni II*, 35 F.3d at 534 (emphases added)…. Indeed, Ford apparently recognizes that its argument only precludes consideration of pre-importation design goals if we construe HTSUS Heading 8703 as not allowing for consideration of use. ... Because the "principally designed for" language of HTSUS Heading 8703 inherently requires considerations of intended use, consideration of pre-importation design goals is relevant here. Therefore, we consider pre-importation design goals below, along with the subject merchandise's condition as imported.

We conclude this appeal presents one of the very limited circumstances where the relevant heading, HTSUS Heading 8703, is an *eo nomine* provision for which consideration of use is appropriate, because HTSUS Heading 8703 inherently suggests looking to intended use. *See Kahrs*, 713 F.3d at 646 ("Generally, we should not read a use limitation into an *eo nomine* provision unless the name itself inherently suggests a type of use."). The CIT erred by not considering use. … Nevertheless, because the parties do not allege that a "genuine dispute exists as to the nature of the subject merchandise, the two-step inquiry collapses into a question of law," and we proceed by conducting a proper analysis of the relevant headings. *ADC*, 916 F.3d at 1017….

B. The Subject Merchandise Does Not Fall Within HTSUS Heading 8703

In classifying the subject merchandise under HTSUS Heading 8703, the CIT held the subject merchandise's "structural and auxiliary design features point to a principal design for the transport of persons." … For structural design features, the CIT found support for this conclusion in "the Transit Connect 6/7's structural similarity to the Transit Connect 9 passenger wagon and its consistency with relevant parts of [the] [ENs]." … For auxiliary design features, the CIT determined "the CRSV-2 is still a seat, albeit a cheaper and, perhaps, less attractive one," and the CIT pointed to "additional auxiliary design features," such as "carpeted footwells" and "child-locks in the sliding doors" to support its conclusion. …

The Government argues that the CIT erred in classifying the subject merchandise under HTSUS Heading 8703, because "the structural and auxiliary design features of the [Transit] Connect 6/7 – viewed as a whole – failed to demonstrate that the vehicle was 'principally designed' for passengers." … The Government also avers that "Ford marketed the [Transit] Connect 6/7 exclusively as a cargo van; consumers and industry publications recognized the [Transit] Connect 6/7 exclusively as a cargo van; purchasers used the [Transit] Connect 6/7 exclusively as a cargo van; and Ford itself described the [Transit] Connect 6/7 exclusively as a cargo van." … We agree with the Government that the CIT erred in classifying the subject merchandise under HTSUS Heading 8703.

The relevant inquiry for classification under HTSUS Heading 8703 is "that a vehicle's intended purpose of transporting persons must outweigh an intended purpose of transporting goods" and that, "[t]o make this determination, … both the structural and auxiliary design features must be considered." *Marubeni II*, 35 F.3d at 535. Structural design features include "basic body, chassis, … suspension design, [and] style and structure of the body control access to rear." *Id.* at 534…. Auxiliary design features include "vehicle height," certain features of the "rear seats," "footwells," "seat belts," and other passenger amenities. *Id.* at 537. In addition, certain use considerations may be relevant, such as "the marketing and engineering design goals (consumer demands, off the line parts availability, etc.)." *Id.* at 536.

While not binding, the ENs help guide our understanding of the heading. *See Chemtall*, 878 F.3d at 1019. The ENs state that the Heading covers "[f]our-wheeled motor vehicles with tube chassis, having a motor-car type steering system (*e.g.*, a steering system based on the Ackerman principle)." EN(6), Heading 8703, HTSUS. The ENs identify "certain features which indicate that the vehicles are principally designed for the transport of persons rather than for the transport of goods," such as a GVWR "rating of less than [five] ton[s]," and "a single enclosed interior space comprising an area for the driver and passengers and another area that may be used for the transport of both persons and goods." EN, Heading 8703, HTSUS. The ENs also list certain features that "are indicative of the design characteristics" for HTSUS Heading 8703, such as the (1) "[p]resence of permanent seats with safety equipment (*e.g.*, safety seat belts or anchor points and fittings for installing safety seat belts) for each person or the presence of permanent anchor points and fittings for installing seats and safety equipment in the rear area," (2) "[p]resence of rear windows along the two side panels," (3) "[p]resence of sliding, swing-out or lift-up door or doors, with windows, on the side panels or in the rear," (4) "[a]bsence of a perma- nent panel or barrier between the area for the driver and front passengers and the rear area that may be used for the transport of both persons and goods," and (5) "[p]resence of comfort features and interior finish and fittings throughout the vehicle interior that are associated with the passenger areas of vehicles (*e.g.*, floor carpeting, ventilation, interior lighting, ashtrays)." EN, Heading 8703, HTSUS.

On balance, the structural design features, auxiliary design features, and inherent use considerations establish that the subject merchandise is not classifiable under HTSUS Heading 8703. The subject merchandise is not principally designed for the transport of persons. We discuss each of these considerations in turn.

1. Structural Design Features

The structural design features favor a finding that the subject merchandise is designed for transport of passengers. The Transit Connect 6/7s "shared the same chassis and drivetrain with the Ford Focus passenger vehicle." … Similarly, the imported Transit Connect 6/7s share the following structural features with Transit Connect 9s: "a Duratec 2.0 [liter], four cylinder gasoline engine"; "a steel unibody construction"; "front-wheel drive"; "Macpherson strut front suspension"; "rear passenger seats with seat anchors"6; "underbody bracing"; "permanent bracing in the side pillars of the car body"; "no … panel or barrier between the first and second row of seats"; and "ground clearance of 8.2 inches." … [The Court added in its Footnote 6, that: "Although the Transit Connect 6/7s have rear seats when imported, the discussion below regarding auxiliary design features demonstrates that the subject merchandise is not principally designed to use the rear area for the transport of persons. *See infra* Section II.B.2. That discussion, therefore, bears on our analysis of the structural design features to the extent it relates to the presence of the rear seats."] While not dispositive, *see Marubeni II*, 35 F.3d at 536 ("The fact that a vehicle is derived in-part from a truck or from a sedan is not, without more, determinative of its intended principal design objectives which were passenger transport and off-road capability."), these structural features demonstrate similarities between the subject merchandise and Ford's Transit Connect 9s, which are imported as five-passenger vehicles and do not undergo post-importation processing to convert the passenger vehicles into cargo vans…. Notably, the evidence indicates that the Duratec "2.0 liter engine" and front-wheel drive are "*more* commonly used on passenger vehicles," a fact which indicates the significance of these features for classification as a passenger vehicle. …

In addition, all Transit Connects had "swing-out front doors with windows, second-row sliding side doors with windows" that met federal "safety standards for side impact," and "swing-out rear doors, some of which had windows."…. The ENs, which list "[p]resence of rear windows along the two side panels" and "[p]resence of sliding, swing-out or lift-up door or doors, with windows, on the side panels or in the rear" as indicative of design characteristics, demonstrate that these features of the subject merchandise are consistent with a passenger vehicle. EN, Heading 8703, HTSUS. However, a Ford brochure indicates the rear doors are designed for cargo, describing the "[r]ear [*c*]*argo* [d]oors" as capable of "be[ing] opened wide, up to 180 degrees, for easy access to the expansive cargo area to make loading easier" and stating the "[w]ide rear opening makes rear access and loading or unloading easy." … Moreover, the two types of Transit Connects differed in that Ford assigned the Transit Connect 6/7s a *higher* "GVWR of 5[,]005 [pounds]," while the Transit Connect 9s "are assigned a GVWR of 4[,]965" pounds, indicating the subject merchandise is designed to bear more weight. … This factor, however, does not weigh heavily against classification under HTSUS Heading 8703, because the ENs explain a GVWR "rating of less than [five] ton[s]," which describes both types of Transit Connects, "indicate[s] that the vehicles are principally designed for the transport of persons." EN, Heading 8703, HTSUS. Therefore, many of the structural design features favor the CIT's classification under HTSUS Heading 8703.

2. Auxiliary Design Features

A review of the auxiliary design features reveals the Transit Connect 6/7s were not principally designed for the transport of passengers. Admittedly, the subject merchandise has some features indicative of passenger vehicles, including "seat belts for every seating position," …; "child-lock in the sliding side doors," …; "footwells in front of a second row seat," …, "head room of more than [fifty] inches in the rear," …; "dome lighting in the front, middle, and rear of the vehicle," …; and "coat hooks in the second row," …; *see* EN, Heading 8703, HTSUS (identifying the presence of "comfort features," such as "interior lighting" as indicative of a passenger vehicle). However, the auxiliary design features of the rear seating area, when viewed in the aggregate, demonstrate the Transit Connect 6/7s were not principally designed for the transportation of passengers, with the CRSV-2 designed to be temporary and removed during post-importation processing.

Specifically, the Transit Connect 6/7's second row seats "did not have headrests, certain comfort wires, or a tumble lock mechanism." … [The Court observed that the "seat back wires provided for lumbar support and passenger comfort.] The second row seats were "covered in a reduced cost fabric" that was "different fabric [from] the" fabric used in the Transit Connect 9s. J.A. 4847. The Transit Connect 6/7s did not have (1) "a cargo mat," …; (2) "side airbags behind the front seats," …; or (3) speakers, handholds, or vents behind the front seats, …; *see* EN, Heading 8703, HTSUS (identifying presence of "ventilation" as a "comfort feature[]" for passengers, but rear ventilation is lacking in the subject merchandise). Ford "left the painted metal floor of the cargo area exposed," which weighs against classification in HTSUS Heading 8703. …; *see* EN, Heading 8703, HTSUS (stating the presence of "interior finish[ings]" is indicative of a passenger vehicle). There is a fundamental reason behind these design decisions. *See Marubeni II*, 35 F.3d at 536 (endorsing the CIT's consideration of "the *reasons behind* [certain] de- sign decisions," as a relevant consideration. (Emphasis added.)). Ford employed the CRSV-2 to reduce costs, while facilitating post-importation processing of converting the Transit Connect 6/7s into cargo vans by using sham rear seats that would be stripped from the vehicles. … [The Court observed that the changes to the second row seats were to reduce costs, and that those seats are scrapped in the U.S. and never used. The Court added in its Footnote 7 that: "Because Ford made the subject merchandise to order, it knew that none of the CRSV-2s in the Transit Connect 6/7s would actually be used." The Court explained that before the subject merchandise was ordered or manufactured, Ford contracted with its port processor to remove and discard 100% of the second row seats, seat belts and unordered windows from that merchandise at issue, to cover the footwells, and to install a cargo mat over the exposed metal floor.] In fact, the Transit Connects 6/7s had a different sixth-digit in their VIN from the Transit Connect 9s to indicate which vehicles should undergo post-importation processing and removal of the rear seat. …

Even if the CIT is correct that the Transit Connect 6/7s' rear seat is *capable* of functioning as passenger seats in the condition as imported, … the proper inquiry is what the auxiliary design features tell us about the "intended purpose" of the vehicle, *Marubeni II*, 35 F.3d at 535; *see* Heading 8703, HTSUS (including "motor vehicles *principally designed* for the transport of persons." (Emphasis added.)). Although the EN to HTSUS Heading 8703 recognizes that indicative of passenger vehicles is the "[p]resence of *permanent seats* with safety equipment … or the presence of *permanent anchor points* and fittings for installing seats and safety equipment in the rear area," the CRSV-2 is not permanent. The seat and the attendant seatbelts are designed to be removed. [Indeed, the Court observed in its Footnote 8: "The record demonstrates the subject merchandise "was stripped of its second row seats[and] second row seat belts," … and "[t]he anchor holes for the second row seat are" designed to be "plugged and no longer readily accessible after post-importation processing"…."] Therefore, as Customs recognized, Ford's pre-importation design goals were that the subject merchandise could be constructed in such a way that "only minor interior changes were necessary to meet the design criteria of transporting cargo." HQ H220856, …; *see id.* (stating it took "less than a minute" to remove the CRSV-2 and "under [five] minutes" to add "rear flooring to cover the exposed anchor points"). Indeed, "Ford did not [even] conduct consumer testing or surveys prior to using the [CRSV-2]"…. The CIT erred in its evaluation of these auxiliary design features, which compel the conclusion that the subject merchandise is designed to transport cargo.

3. Relevant Use Considerations

The relevant use considerations strongly disfavor classification as a vehicle principally designed for the transport of passengers due to evidence of Ford's post-importation processing and its effect on the intended use of the Transit Connect 6/7s. While we conclude that HTSUS Heading 8703 is an *eo nomine* provision, not a principal use provision, the criteria for determining principal use are also relevant here. When evaluating principal use, a Court makes "a determination as to the group of goods that are commercially fungible with the imported goods." *BenQ Am. Corp. v. United States*, 646 F.3d 1371, 1380 (Fed. Cir. 2011)…. To make this determination, a Court may look to the factors outlined in *United States v. Carborundum Co.* ("the *Carborundum* factors"). *Id.*; *see Carborundum*, 536 F.2d 373, 377 (CCPA 1976). Particularly relevant here are the following *Carborundum* factors: "the general physical characteristics of the merchandise," "use in the same manner as merchandise which defines the class," "the expectation of the ultimate purchasers," and "the environment of the sale, such as accompanying accessories and the manner in which the merchandise is advertised and displayed." *Aromont*, 671 F.3d at 1313.10 Regarding general physical characteristics, we explained above that, whereas the structural design features align with a passenger vehicle, the auxiliary design features support the conclusion that the subject merchandise is not designed for passengers. *See supra* Section II.B.1-2.

Regarding manner of use and consumer expectations, the subject merchandise was made to order and, because the post-importation processing occurred immediately after entry, it "was delivered to customers as two-seat cargo vans," without rear seats, seatbelts, unordered windows, and second row footwells. … Ford's market research showed that the "Transit Connect has little appeal as a personal use vehicle – its industrial design and austere interior are keys to rejection. Nevertheless, it continues to resonate as a viable commercial vehicle," to be used for, *inter alia*, "quick deliveries, pickups, and service calls." … In *Carborundum*, our predecessor Court [the CCPA] recognized that imports may be "specially processed to provide the import with a utility *different* from the class," 536 F.2d at 377; *see Aromont*, 671 F.3d at 1313 ("[A]ctual use of the particular imported goods is evidence of the principal use of the merchandise involved."), which is the case here because the Transit Connect 6/7s undergo post-importation processing and are not utilized like passenger vehicles, …; *see also* HQ H220856 … ("The Ford website … features the Transit Connect [6/7]s *in use as cargo/delivery vehicles* by businesses such as the Maid Group, Danny Armand's Market[,] and Boo Boo Busters…." (Emphasis added.)….

Regarding advertising, Ford's brochures market the Transit Connect 6/7s as a cargo van, but list the Transit Connect 9s as passenger vehicles. … [The Court identified five marketing points that indicated they were a cargo van, namely Ford: (1) listed "the Transit Connect 6/7s (*i.e.*, the Van model) next to the Transit Connect 9s (*i.e.*, the Wagon model);" (2) advertised "that the Transit Connect 6/7s do not contain passenger space in the second row but have cargo capacity of '129.6' cubic feet '[b]ehind [the] first-row seat,' whereas the Transit Connect 9s have '67.1' cubic feet of passenger space in the second row but no cargo space behind '[b]ehind [the] first-row seat');" (3) "all Transit Connects have '[s]erious payload and GVWR capacity,' but Ford advertised only "driver and front passenger" seats in the Transit Connect 6/7s; (4) Ford provided for "optional equipment" and declared "premium carpeted floor mats" for "rear passenger area" are "not available" as an option for the Transit Connect 6/7s, but are "optional" in the Transit Connect 9s; and (5) Ford marketed Transit Connect 6/7s as having "up to 129.6 cubic feet of maximum *cargo capacity*. (Emphasis added.)"] The Transit Connect 6/7s' use weighs heavily against classification under HTSUS Heading 8703. Accordingly, the *Carborundum* factors support the conclusion that the subject merchandise is not classifiable under HTSUS Heading 8703.11

C. The Subject Merchandise Is Properly Classified Under HTSUS Heading 8704

In evaluating the competing Headings, the CIT held, "having found that the subject merchandise is classifiable under [HTSUS H]eading 8703, [it] need not determine whether the subject merchandise is also classifiable under [HTSUS H]eading 8704," because HTSUS Heading 8703 is more specific. … The CIT, however, recognized that, "if the Transit Connect 6/7 is not classifiable under [HTSUS H]eading 8703, it falls within [HTSUS H]eading 8704." … The Government argues that the Transit "Connect 6/7 should be classified as a cargo vehicle under [HTSUS] Heading 8704." … We agree with the Government.

We begin by determining whether HTSUS Heading 8704 is an "*eo nomine* or use provision[]." *Schlumberger*, 845 F.3d at 1164…. Principal use provisions are governed by ARI 1(a), and a principal use "analysis involves determining the use which exceeds any other *single* use of the merchandise in the United States." *R.T. Foods*, 757 F.3d at 1355…. HTSUS Heading 8704, which covers "[m]otor vehicles *for the transport of goods*," HTSUS Heading 8704. (Emphasis added.), is a principal use provision, because the Heading identifies the chief use of the covered merchandise as of a kind used to transport goods, *cf. Aromont*, 671 F.3d at 1312 (finding "preparations there*for*" is a "principal use provision," because it identified preparations primarily used for soups and broths); *BenQ*, 646 F.3d at 1374 (recognizing that a principal use analysis governs, where a Chapter Note clarified that a heading covered "unit … of a kind solely or principally used in an automatic data processing system").

As discussed above, the balance of the *Carborundum* factors demonstrate that the made-to-order Transit Connect 6/7s are principally (if not exclusively) used for the transport of goods, rather than passengers. *See supra* Section II.B.3. The design features demonstrate the subject merchandise is "tailored to meet the specific needs of" consumers seeking to transport goods. *United States v. Border Brokerage Co.*, 706 F.2d 1579, 1582 (Fed. Cir. 1983). Thus, classification under HTSUS Heading 8704 is appropriate.

D. The Correct Subheading for the Subject Merchandise Is HTSUS Subheading 8704.31.00

Having determined that the subject merchandise is properly classified under HTSUS Heading 8704, we now turn to GRI 6, which governs classification at the Sub-Heading level. *See Orlando Food*, 140 F.3d at 1442. At the sixth-digit Sub-Heading level, the subject merchandise is not described by HTSUS Sub-Heading 8704.10, which provides "[d]umpers designed for off-highway use," as there is no evidence that Transit Connect 6/7s are designed for transporting excavated materials. *See* EN, Heading 8704, HTSUS (explaining that dumpers are "sturdily built vehicles with a tipping or bottom opening body, designed for the transport of excavated or other materials"). HTSUS Heading 8704 is then divided into three categories: (1) HTSUS Sub-Headings 8704.21, 8704.22, and 8704.23, which cover "[o]ther [than dumpers designed for off-highway use], with compression-ignition internal combustion piston engine (diesel or semi-diesel)," (2) HTSUS Sub-Headings 8704.31 and 8704.32, which cover "[o]ther [than dumpers designed for off-highway use], with spark-ignition internal combustion piston engine," and (3) HTSUS Subheading 8704.90, which covers "[o]ther." *See Rollerblade, Inc. v. United States*, 282 F.3d 1349, 1354 (Fed. Cir. 2002) (holding that, where merchandise is properly classified under a particular Heading, but does not fall within a specific Sub-Heading, it is properly classified under the relevant Heading's "basket" or "catch-all" provision). Because the subject merchandise has "a spark-ignition internal combustion reciprocating piston engine," … it is covered by the internal combustion piston engine description that applies to both HTSUS Sub-Headings 8704.31 and 8704.32. HTSUS Sub-Heading 8704.31 covers merchandise with a "[GVWR] not exceeding [five] metric tons," while HTSUS Sub-Heading 8704.32 covers merchandise with a "[GVWR] exceeding [five] metric tons." The subject merchandise has a GVWR of 5,005 pounds, … which is less than five metric tons…. Therefore, the subject merchandise falls under HTSUS Sub-Heading 8704.31, and, because there is only one eighth-digit level designation under this subheading, we hold the subject merchandise is properly classified under HTSUS Sub-Heading 8704.31.00.

Conclusion

… [T]he Judgment of the U.S. Court of International Trade is ***reversed***.

- **Ford's Fine**

U.S. DEPARTMENT OF JUSTICE, OFFICE OF PUBLIC AFFAIRS, PRESS RELEASE, *FORD MOTOR COMPANY AGREES TO PAY $365 MILLION TO SETTLE CUSTOMS CIVIL PENALTY CLAIMS RELATING TO MISCLASSIFIED AND UNDER-VALUED VEHICLES* (11 MARCH 2024)[132]

[132] www.justice.gov/opa/pr/ford-motor-company-agrees-pay-365m-settle-customs-civil-penalty-claims-relating.

For the *Settlement Agreement*, *see* https://content.govdelivery.com/attachments/USDOJOPA/2024/03/11/file_attachments/2810412/3-8-24%20FINAL%20Fully%20Executed%20Agreed%20Ford%20Settlement%20Agreement_Redacted%202PM.pdf.

Ford Motor Company has agreed to pay the United States $365 million to resolve allegations that it violated the *Tariff Act of 1930* by misclassifying and understating the value of hundreds of thousands of its Transit Connect vehicles….

The settlement resolves allegations that Ford devised a scheme to avoid higher duties by misclassifying cargo vans. Specifically, the government alleged that from April 2009 to March 2013, Ford imported Transit Connect cargo vans from Turkey into the United States and presented them to … CBP with sham rear seats and other temporary features to make the vans appear to be passenger vehicles. These temporary rear seats were never intended to be, and never were, used to carry passengers. Rather, the government alleged, Ford included these seats and features to avoid paying the 25% duty rate applicable to cargo vehicles. By classifying the vans as vehicles for the transport of passengers, Ford instead paid a duty rate of just 2.5%. Ford submitted entry papers to CBP declaring these vehicles as classifiable under tariff heading 8703 as "Motor cars and other motor vehicles principally designed for the transport of persons." After customs clearance, each of these Transit Connect vehicles was immediately stripped of its rear seats and returned to its original identity as a two-seat cargo van.

The settlement also resolves allegations that, from April 2009 through August 2013, Ford avoided paying import duties by under-declaring to CBP the value of certain Transit Connect vehicles.

"When companies misclassify imports to avoid paying what they owe, they will be held accountable," said Acting Associate Attorney General Benjamin C. Mizer. "Today's settlement is a victory for American taxpayers and for our efforts to combat trade fraud and ensure compliance with United States trade laws. Companies that attempt to evade customs duties with sham representations and workarounds will not be rewarded."

"Importers have an obligation to truthfully declare the nature of their products and pay the duties that are owed," said Principal Deputy Assistant Attorney General Brian M. Boynton, head of the Justice Department's Civil Division. "The government will not permit companies to evade duties by adding sham features to their products and then misclassifying them."

"This settlement, which is one of the largest customs penalty settlements in recent history, demonstrates that U.S. Customs and Border Protection will pursue even the largest companies to ensure that all importers follow the rules; our intent is to enforce the customs laws fairly, which means that non-compliance is not an option for anyone," said Senior Official Performing Duties of the Commissioner Troy A. Miller of CBP. "The partnership between CBP and the Justice Department provides a critical safeguard to protect the revenue of the United States."

V. UGGs and 2014 *Deckers* Case

UGGs are popular footwear, but are they Classic Crochet slip-on type boots? If so, then they ought to be classified under HTSUS Sub-Heading 6404.19.35, and subject to a stiff tariff: 37.5%. That is what CBP thought, and rejected the argument of the importer, Deckers Outdoor Corporation, that UGGs are not footwear of the slip-on type. It said Sub-Heading 6404.19.35 is limited to shoes. Observing American teenagers put on UGGs hardly resolves the debate, so the American judiciary had to step in.

The CIT and a divided Federal Circuit sided with CBP. The Federal Circuit emphasized the plain language of the Sub-Heading. "Footwear of the slip-on type" is not limited to shoes. The word "footwear" can cover both shoes and boots. And, a Treasury Decision (93-88) stated that "slip on" includes both a shoe and a pull-on boot. That definition, said the CIT, while not a Customs Ruling, is persuasive when read in conjunction with a provision of the HTSUS. So, in previous instances, CBP has classified boots without laces or other fasteners as "footwear of the slip on type." Beyond the plain meaning of the pertinent terms, the Courts said the consistency of the CBP classifications is entitled to deference.

The Supreme Court declined to review the case, thereby leaving untouched the lower Court rulings that upheld the CBP classification.[133] Alas, parents paying for the UGGs of their teenagers continue to have to pay the 37.5% duty.

VI. Football Gear and 2014 *Riddell* Case

Is athletic apparel that has a specialized use "articles of apparel" subject to a tariff of between 14.9% and 32% tariff, or is it "sports equipment" entitled to duty-free treatment under HTSUS Sub-heading 9506.99.20? That was the issue posed to the Federal Circuit in the 2014 case of *Riddell, Inc. v. United States*.[134] The famous American sports company, Riddell, obviously argued its merchandise was "apparel." After all, the football items it made overseas and imported into the U.S. – jerseys, pants, and girdles – were worn along with protective padding. Riddell said the right classification was in Chapter 95, which covered parts or accessories to sports equipment.

Not so, said CBP: they were apparel items properly classified under HTSUS Chapters 61-62. So, CBP classified jerseys under Sub-Heading 6110.30.30, pants under 6114.30.30, and girdles under 6212.20.00. The results were tariffs of 32%, 14.9%, and 20%, respectively.

The Federal Circuit rejected Riddell's argument. First, none of the imported merchandise contained padding. Second, the precedents in two Federal Circuit decisions helped define "sports equipment:" the 2011 *Lemans* and 2004 *Bauer Nike Hockey* cases.[135] *Lemans* examined the term "sports equipment" as used in HTSUS Heading 9506 and said "the fact that articles are specialized or intended for specific purposes, such as for sports,

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[133] *See Deckers Outdoor Corp. v. United States*, U.S. Number 13-803, *certioriari denied* (19 May 2014); Rossella Brevetti, *Supreme Court Declines to Review Classification Dispute Involving Boots*, 31 International Trade Reporter (BNA) 974 (29 May 2014).
[134] *See* Federal Circuit Number 2013-1384 (20 June 2014); Rossella Brevetti, Riddell Loses Bid to Get Football Apparel Classified as Duty-Free, 31 International Trade Reporter (BNA) 1149 (26 June 2014).
[135] *See Lemans Corp. v. United States*, 660 F.3d 1311 (Fed. Cir. 2011); *Bauer Nike Hockey USA, Inc. v. United States*, 393 F.3d 1246 (Fed Cir. 2004).

does not alone remove them from the category of apparel." *Bauer Nike Hockey* dealt with hockey pants that, as imported, included hard plastic guards and soft foam padding. Even then, Bauer held those pants came within Chapters 61-62. So, in *Riddell*, the Federal Circuit concluded:

> That Riddell's merchandise has a specialized use – to be worn along with, and to accommodate, protective pads while playing football – does not make the football jerseys, pants, and girdles lose their character as "articles of apparel." Riddell's merchandise is apparel, used along with protective equipment. And it makes no difference if (as Riddell argues) the football jerseys, pants, and girdles are required to play football: a sports organization can require use of what constitutes apparel, just as it can require use of non-apparel. For those reasons, Riddell's football jerseys, pants, and girdles are not "equipment" within the scope of Heading 9506. [Further, if the merchandise is not "sports equipment," and is apparel, then it logically cannot be a part or accessory to sports equipment.] … Riddell's football jerseys, pants, and girdles, even apart from padding, perform their function as clothing. For that reason, too, they are not parts or accessories under Heading 9506.

For those reasons, buying an authentic football jersey to wear to law school classes, social events, or around the house remains 32% more expensive than otherwise would be the case.

Chapter 11

MORE CLASSIFICATION CONUNDRUMS[136]

I. Robinson and Monopolistic Competition, Galbraith and Manufactured Demand, and New Product Classification

Capitalist entrepreneurs develop new products faster than International Trade lawyers can revise product classifications in the HS. While the nearly 200 countries that are members of the WCO in Brussels, Belgium, which maintains the HS, meet periodically to revise those classifications, they cannot keep up with product innovations. Indeed, recall the Theory of Monopolistic Competition of Joan Robinson (1903-1983) (discussed in a separate Chapter), whereby capitalist businesses need to differentiate their products slightly from one another, so as to be able to price their product like a monopolist.

Their efforts are reinforced by what John Kenneth Galbraith (1908-2006), a witty, iconoclastic, non-mathematical, and widely read economist and Ambassador to India in the Administration of President John F. Kennedy (1917-1963, President, 1961-1963), called in *The New Industrial State* (1967) manufactured demand, that is, advertising by powerful corporations to influence culture and values and convince consumers they need commodities those behemoths make.

Synthesizing the two theories, it is unsurprising that capitalism requires for its sustenance and growth new products. To rely on the same line of products is to die. Service providers are subject to the same force. Consider educational institutions, like universities, graduate schools, and professional schools. What has the world witnessed recently but the proliferation of on-line learning technologies and opportunities, many of which old-fashioned bricks-and-mortar institutions sponsor? Why? In part because of product differentiation, to help one institution separate itself from others. In part because of demand, some of which is manufactured, for such courses, in a world in which every credential is seen by its holder as a competitive advantage in a tight labor market.

New products sometimes defy classification in conventional product classifications set forth in the HS. That also is true of new services and the analog, the U.N. CPC scheme and W120 List. The WCO, while it meets periodically to update the HS, cannot always keep pace with the speed of product innovation in a capitalist market. Customs authorities then are faced with classification conundrums. They can be amusing, and at bottom are redolent of a verse from the song of Big Bird on the children's TV show, Sesame Street:

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136 Documents References:
(1) *Havana (ITO) Charter* Articles 33, 35-37
(2) GATT Article VII
(3) *General Rules of Interpretation for the Harmonized Tariff Schedule (GRI)*
(4) *NAFTA* 1.0 Chapter 5
(5) Relevant provisions in other FTAs

"Which one of these things is not like the other, which one of these things is not quite the same?" As such, they call upon first-year legal reasoning skills of analogy and distinction.

II. Bras and 2014 *Victoria's Secret* Case

Classification conundrums occur with product innovations, and those innovations are common not only with respect to high-technology merchandise, but also goods from traditional industries such as T&A. Bras are an example. When is a bra not a bra?

World renowned lingerie retailer Victoria's Secret imported into America a product it called a "Bra Top," consisting of a bra made of 95% cotton and 5% spandex, with an interior fabric insert known as a "shelf bra." Victoria's Secret argued the Bra Tops qualified under Sub-Heading 6212.90.00 of the HTSUS as a brassiere, girdle, corset, or similar article, triggering a tariff of just 6.6%. That is, Bra Tops are bras, said Victoria's Secret. Or, in the alternative, they qualify under Sub-Heading 6114.20.00, a residual category for other garments of cotton, knitted, or crocheted, with a 10.8% duty. CBP disagreed with Victoria's Secret. It slotted the Bra Tops under Sub-Heading 6109.10. That category covers a tank top or t-shirt, and carries an MFN duty of 16.5%.

Another prominent business, New York & Company (formerly, Lerner New York, Inc.) imported what it called a "Body Shaper." This garment was made of 92% nylon and 8% spandex, and (like a Bra Top) had an interior fabric insert called a shelf bra. New York & Company said a Body Shaper is a bra, fitting within HTSUS 6212.90.00 at a 6.6% duty. CBP disagreed: it classified it under Sub-Heading 6114.30.10, a residual category for knitted garments of man-made fibers. The resulting tariff was stiff: 28.2%. Obviously, with respect to Bra Tops and Body Shapers, the importers picked the tariff-minimizing product category (bras), while the government picked the tariff-maximizing one (tank top or t-shirt, or residual). The dispute was an example of zero sum games intrinsic to Customs Law, with importers seeking to minimize liabilities against the government trying to maximize revenues.

Bra Tops and Body Shapers combine a camisole with a so-called "shelf bra." The latter is an interior fabric layer connected to the upper edge of the camisole, and offers bust support. Both garments can be work publicly without a separate garment on top of them, and without a separate bra underneath them.

In 2013, the CIT decided both cases, *Victoria's Secret Direct LL.C. v. United States*, and *Lerner New York Inc. v. United States*.[137] Victoria's Secret beat the government. CBP was wrong to classify a Bra Top as a tank top or t-shirt, rather than a bra or other residual garments. The best category for them was HTSUS 6114.20.00, as they were miscellaneous cotton, knitted, or crocheted garments. So, a 10.8% (not 16.5%) tariff was the right one. Why?

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[137] *See* No. 07-00347 (Slip Opinion 13-55), and No. 07-00361 (Slip Opinion 13-56), respectively, both decided 1 May 2013; Brian Flood, *Appeals Court Affirms Customs Classification Decision on Victoria's Secret, New York & Co.*, 31 International Trade Reporter (BNA) 1886 (23 October 2014).

Because, said the CIT in the *Victoria's Secret* case, a Bra Top provides bust support, as well as coverage, whereas a t-shirt gives only coverage:

> Congress intended to limit the scope of heading 6109 … to undershirts and outerwear garments of the vest type that are adaptations of undershirts. Garments such as the Bra Top, being designed to provide bust support in addition to upper body coverage, are outside that intended scope.

Why not simply classify a Bra Top as a bra under Sub-Heading 6212.90.00, at a 6.6% tariff? Because it is neither a traditional bra nor a contemporary sports bra:

> The Bra Top is neither a women's undergarment designed to provide bust support (as required by the common definitions of "brassiere"), nor an adaption of such an undergarment for sportswear (*i.e.*, a sports bra).

Yet, could the Bra Top fit under 6212.90.00 as a "similar article" to a bra? No, said the CIT, based on the Essential Character Test. The essence of a bra is to provide bust support. While a Bra Top provides some of that support, doing so is not its essential character or purpose:

> To so conclude [that a Bra Top is an article similar to a bra] would be to overlook the fact that the Bra Top is a garment that incorporates the body-supporting characteristic of a brassiere into an outerwear garment that is not a brassiere and that lacks a support function…. The uncontested facts establish that the outerwear shell provides partial covering of the wearer's torso for warmth and modesty and that the garment can be worn as an outerwear top.

However, in *Lerner New York*, the government beat New York & Company.

The CIT held that to classify a Body Shaper as a residual knitted garment of man-made fiber (rather than a bra) under HTSUS 6114.30.10, and imposing the 28.2% tariff (not 6.6% duty), was correct. The CIT said the facts the Body Shaper is a top, and is 92% nylon and 8% spandex, "answer" to the HTSUS 6114.30.10 product description. Moreover, using the same reasoning as in *Victoria's Secret*, the *Lerner New York* case explained a Body Shaper is not an undergarment whose essential purpose is to provide bust support or serve as a sports bra. The Body Shaper also has an outer shell designed to partially cover the torso, and thereby provide both warmth and modesty.

In its 2014 decision in *Victoria's Secret Direct, LLC v. United States*, a three-judge panel of the Federal Circuit affirmed both CIT decisions: the Bra Top and Body Shaper were knitted garments subject to tariffs of 10.8 and 28.2%, respectively, not brassieres or similar articles such as girdles or corsets.[138] The rates differed because of their different

[138] *See* Number 2013-1468 (16 October 2014); Brian Flood, *Appeals Court Affirms Customs Classification Decision on Victoria's Secret, New York & Co.*, 31 International Trade Reporter (BNA) 1886 (23 October 2014).

fabric: Bra Tops blended spandex and cotton, whereas the Body Shaper blended spandex and nylon. The Federal Circuit offered three rationales.

First, the HTSUS grouped bras and similar articles together based on their primary purpose, which is to provide support. Bra Tops and Body Shapers have two primary purposes: support, plus coverage to give modesty and warmth. Second, that both purposes mattered was clear from the way Victoria's Secret and Lerner marketed these garments: they stressed their function as outerwear as much as support. Third, other garments like backless evening gowns have built-in support, but are not bras, and some jeans flatten, trim, or lift part of the body, but are not girdles or corsets.

The decision was split, 2-1. The Dissent said the Majority was wrong to focus on the function of the merchandise, rather than on its essential characteristics. Essential character is the proper tariff classification concept. Applying *ejusdem generis*, the statutory interpretative rule for a provision with specifically listed items and a general term (like the HTSUS provision covering "brassieres, girdles, corsets, … and similar articles"), the general term ("similar articles") should be seen to have the same essential characteristic or purpose of giving support. The fact a Bra Top or Body Shaper has additional characteristics different from the essential purpose is irrelevant, as long as they are not inconsistent with that purpose. As for evening gowns and jeans, the Dissent said support was not their essential characteristic. Hence, the Majority's hypothetical was misleading.[139]

III. 3D Printers and 2013 *EOS North America* Case

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[139] For another Federal Circuit case involving the Essential Character Test, see *Alcan Food Packaging (Shelbyville) v. United States*, Number 2014-1003 (18 November 2014). *See also* Brian Flood, *Appeals Court Upholds Classification Of Military Food Packaging Material*, 31 International Trade Reporter (BNA) 2031 (20 November 2014) (summarizing the decision).

That case involved two components, both of which were indispensable, in merchandise: which one gave the merchandise its essential character, and why?

Alcan used imported aluminum-plastic laminate foil called "Flexalcon" for Meals Ready to Eat (MREs) used by the U.S. military. Was CBP correct to classify the foils as "plastic film," with a duty rate of 4.2%? Yes, said the Court, rejecting the argument of Alcan that Flexalcon should have duty-free treatment under the classification "aluminum foil." Flexalcon was made of a thin aluminum foil layer in between layers of plastic. Both materials were indispensable in making Flexalcon secure, soft, and lightweight. The aluminum blocked contaminants, light, and water from degrading the food, while the plastic resisted heat when the package was sterilized and sealed, and gave the package tensile strength. Alcan said the "aluminum foil" classification was correct, as it allowed for foil backed by plastic, as long as the merchandise did not "thereby assume the character of articles or products of other headings."

The Court sided with the "plastic film" category, which includes items "provided that they retain their essential character as articles of plastics." Plastic made up the majority of the bulk, quantity, weight, and value of Flexacon.

Still another – and 50-paged – opinion, this one from the CIT, involved keyed door locks. *See The Home Depot U.S.A. Inc. v. U.S.*, Number 14-00061 (Slip Opinion 20-40, 26 March 2020), www.cit.uscourts.gov/sites/cit/files/20-40.pdf. The CIT held that grasping, opening, and closing a door is the primary function of a keyed entry device, and the door knob offer this function. The lock is a secondary function. Therefore, said the CIT, the correct HTSUS classification is Sub-Heading 8302.41.6045, with a 3.9% tariff, not Sub-Heading 8301.40.6030, with a 5.7% duty. Succinctly put, in many instances, the "essential character" of merchandise is vital to proper classification.

Three-dimensional printing is an exciting new technology revolutionizing manufacturing. Laser printers can create 3D metal or plastic objects. The HTSUS contains no product category into which such printers neatly fit. In the 2003 case of *EOS North America, Inc. v. United States*, the CIT held that a 3D laser printer that makes metal objects is subject to a 2.5% *ad valorem* tariff, and one that makes plastic objects is subject to a 3.1% tariff.[140] Why?

EOS was the importer of 3D printers. In 2007, it imported two metal object printers, the M270, and one plastic object printer, the P390. Both use a laser sintering system, which created solid objects from, respectively, thermoplastic powder and metal. The M270 uses a laser to shoot light energy into metal particles. As the particles cool, they coalesce pursuant to a design into the desired object. The P390 has a recoating arm that distributes thermoplastic powder based on a computer design. It also has a laser, which shoots light energy onto the powder, thereby raising the temperature of the powder. The powder then melts and intermixes. As the temperature of each layer cools, it solidifies and attaches to the layer beneath it. Via this incremental layer-by-layer process, the intended object is built.

CBP classified the metal object printers under HTSUS 8463.90.00, as a "Machine Tool," with a duty of 4.4%. As for the 3D plastic object printer, CBP slotted it into HTSUS 8477.80.00. The product description for this Sub-Heading is: "Machinery for working rubber or plastics or for the manufacture of products from these materials, not specified or included elsewhere in this Chapter … Other Machinery." The duty rate for this Sub-Heading, which CBP imposed, was 3.1% *ad valorem*.

EOS disagreed with both CBP categorizations, and sought to slot its merchandise into lower-tariff Sub-Headings. The key issue with respect to metal and plastic object 3D printers was whether laser "sintering" is like "welding"? Or, put simply, what is "welding"?

As regards metal 3D printers like the M270, EOS argued for duty-free treatment under HTSUS Sub-Heading 8515.80.00. The CIT rejected this argument. This Sub-Heading was inapposite, said the CIT, because it covers an:

> Electric (including electrically heated gas), laser or other light or photon beam, ultrasonic, electron beam, magnetic pulse or plasma arc soldering, brazing or *welding* machines and apparatus, whether or not capable of cutting.[141]

The laser in the 3D metal printers EOS imported used a so-called "sintering" process, but "sintering" is not like "welding."

The CIT defined "welding" narrowly as referring only to the joining of parts at their surfaces to form a joint, after which each part retains its essential individual shape and

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[140] *See* No. 08-00298 (Slip. Op. 13-59, 10 May 2013); Brian Flood, *Court Determines Tariff Classifications for 3D Printers of Metal, Plastic Objects*, 30 International Trade Reporter (BNA) 792 (30 May 2013).

[141] Emphasis added.

identity. In contrast, with "sintering," the 3D printer melts metal particles, which thereafter coalesce. Their individual shapes are lost, hence "sintering" is like casting or molding, and those processes are not part of the description of HTSUS 8515.80.00. No other related provision concerning machinery and mechanical processes aptly described the laser sintering and additive manufacturing process.

But, the CIT was unmoved by the CBP classification, too. A 3D metal object printer is not a "Machine Tool" under HTSUS 8463.90.00. That is because a machine tool alters materials that are rigid or semi-rigid by reforming or removing the material. It does not perform an operation on powders or particles, as does the M270.

When merchandise does not fit neatly into one or the other HS product category, an alternative must be found. Typically, a residual category will work – a point both EOS and CBP anticipated. In their argumentation to the CIT, they wisely identified an alternative categorization, on which they agreed, namely, a residual provision of HTSUS Chapter 84. That Chapter concerns machinery and mechanical appliances, and that provision was Sub-Heading 8479.89.98. The duty rate for this Sub-Heading is 2.5%. The CIT accepted this alternative.

As for a 3D plastic object printer like the P390, EOS argued it should be classified under HTSUS Sub-Heading 8515.80.00, "Laser Beam *Welding* Machines."[142] Merchandise under this Sub-Heading is duty free. EOS explained the P390 essentially is a welding machine apparatus.

Here again, the CIT rejected the EOS classification of the P390. The CIT applied the same rationale to the P390 as it did for the M270: narrow definitions and analogical reasoning. "Welding" refers to the union of disparate parts or components, which have a pre-existing form, by creating joints or welds. "Sintering" creates a wholly new 3D object by melting powders, with no retention of the original shape or identity of those powders. So, be it a metal or plastic object, "sintering" is not "welding." In turn, the CIT said CBP got it right: the best category for the P390 is the residual Sub-Heading in the HTSUS Chapter covering machinery for working rubber or plastics, HTSUS 8477.80.00. The 3.1 levy held.

IV. iPad Covers and 2013 *Apple* Case

The Apple IPad is a portable, programmable, multi-functional personal tablet computing device. It is classified under HTSUS Sub-Heading 8471.30.01.00 as an Automated Data Processing machine. But, what about iPad covers? Apple argued they are designed exclusively for use with the iPad, and cannot be used with any other device. Thus, they should be classified under HTSUS Sub-Heading 8473.30.51.00, which covers parts and accessories of machines under Heading 8471. Apple, of course, preferred this choice, because it meant duty-free treatment.

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142 Emphasis added.

CBP took a different view, indeed, a few different views. In its initial liquidation of entries, CBP classified iPad covers under HTSUS Sub-Headings 6307.90.98.89 as "made up of articles, including dress patterns," with a tariff of 7%. It also classified them under 4205.00.80.00 as other articles of leather or composed of leather. Apple filed 11 protests with CBP, all of which CBP denied. Apple then wrote to the CBP Center of Excellence and Expertise, triggering an Internal Advice Request. On 9 October 2012, CBP Headquarters issued an IA Decision, HQ H216396. Under this Decision, some shipments of iPad covers were re-classified under HTSUS 3926.90.99 as "other articles of plastics and articles of other materials," with a tariff of 5.3%, and re-liquidated thereunder. For other entries, the Decision stayed with the HTSUS 4205.00.80.00 Sub-Heading.

Not good enough, said Apple. In July 2013, it took the dispute to the CIT.[143] What did the CIT decide? Which side has the better classification?

V. iPhone Cases and 2016 *Otter Products* Case

OTTER PRODUCTS, LLC, v. UNITED STATES, UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT, NUMBER 2015-1866, (24 AUGUST 2016)

O'Malley, Circuit Judge:

The United States appeals the judgment of the United States Court of International Trade … in which the Court classified the subject merchandise, imported by Otter Products, LLC ("OtterBox"), under Sub-Heading 3926.90.9980 of the … HSTUS as "[o]ther articles of plastics" instead of as "similar containers" under HTSUS Sub-Heading 4202.99.00. *See Otter Products, LLC v. United States*, 70 F. Supp. 3d 1281 (CIT 2015). We *affirm*.

Background
A. The Subject Merchandise

OtterBox is the owner and importer of record of the subject merchandise. The specific goods at issue are durable and protective cases designed for certain styles of smartphones – Blackberry Curve 9220, 9310, and 9320; iPhone 4S; Samsung i500; and the HTC4 My Touch – and an iPod touch, 4th generation. The cases consist of two styles: the Commuter and the Defender Series. There is no dispute as to which merchandise is at issue.

OtterBox described the Commuter Series cases as "durable protective products comprised of two basic pieces: a silicone mid-layer and, most importantly, a rigid outer plastic shell." *Otter Products*, 70 F. Supp. 3d at 1286.... The Commuter Series cases "have a smooth exterior, designed to allow them to slide easily in and out of pockets." *Id*. … "[T]he plastic components of these cases 'do not cover or enclose the screen' of the device but do allow the consumer 'the option of affixing to the screen of the electronic device a thin, plastic, self-adhesive film to protect the screen.'" *Id*. (citation omitted).

143 *See Apple Inc. v. United States*, Number 1:13-cv-00239, filed 2 July 2013.

OtterBox described the Defender Series cases as consisting of four pieces: "a clear protective plastic membrane, a high-impact polycarbonate shell, a plastic belt clip holster, and a durable outer silicone cover." *Id*.

All of the cases at issue were imported into the United States through the port of Memphis, Tennessee between April 23, 2012, and July 11, 2012. …

B. Customs' Classification

Customs classified the cases as "similar containers" under HTSUS subheading 4202.99.00 with a duty rate of 20% *ad valorem*. The relevant portions of HTSUS Heading 4202 are:

> 4202
>
> Trunks, suitcases, vanity cases, attaché cases, briefcases, school satchels, spectacle cases, binocular cases, camera cases, musical instrument cases, gun cases, holsters and similar containers; traveling bags, insulated food or beverage bags, toiletry bags, knapsacks and backpacks, handbags, shopping bags, wallets, purses, map cases, cigarette cases, tobacco pouches, tool bags, sports bags, bottle cases, jewelry boxes, powder cases, cutlery cases and similar containers, of leather or of composition leather, of sheeting of plastics, of textile materials, of vulcanized fiber or of paperboard, or wholly or mainly covered with such materials or with paper:
>
> 4202.99
>
> Other:
>
> Of materials (other than leather, composition leather, sheeting of plastics, textile materials, vulcanized fiber or paperboard) wholly or mainly covered with paper:
>
> 4202.99.9000
>
> Other…. 20%

OtterBox paid duties at the 20% *ad valorem* rate, and the goods were liquidated between March 8, 2013, and May 24, 2013, at that rate. OtterBox timely protested the liquidation of the entries and sought accelerated disposition. The protest was deemed denied on August 1, 2013.

C. Court of International Trade Decision

OtterBox filed a complaint in the Court of International Trade contesting the denial of its protest under 19 U.S.C. §1515. ... Therein, OtterBox alleged that the subject merchandise should have been classified as "other articles of plastics" under HTSUS Sub-Heading 3926.90.99, at a duty rate of 5.3% *ad valorem*. …

In a decision dated May 26, 2015, the Court of International Trade granted OtterBox's [summary judgment] motion, finding that the cases are not classifiable as "similar containers" under Heading 4202, but instead are properly classified under Heading 3926, as other articles of plastics. … [T]he Court noted that, because there is no genuine dispute as to the physical nature of the goods, the analysis "focuses on the legal question of whether heading 4202, HTSUS, is the proper tariff Heading for the subject merchandise, or if not, which other Heading, including 3926, HTSUS, is the proper heading." *Otter Products*, 70 F. Supp. 3d at 1287. The Court … explained that, because the goods are not listed *eo nomine* (by name) in Heading 4202, the relevant inquiry is whether the cases are "similar containers" to the exemplars listed therein. *Id*. at 1288. The Court concluded that they are not. … The Court … explained that, to fall under the general phrase "similar containers," the merchandise must possess the same essential characteristics or purposes that unite the exemplars. … Pursuant to this Court's precedent, the Court of International Trade noted that four characteristics unite the exemplars of Heading 4202: organizing, storing, protecting, and carrying. *Id*. at 1289 (citing *Avenues In Leather, Inc. v. United States* (*Avenues III*), 423 F.3d 1326, 1331(Fed. Cir. 2005)).

Discussion

"We … decide *de novo* the proper interpretation of the tariff provisions…." *Millenium Lumber Distrib. v. United States*, 558 F.3d 1326, 1328 (Fed. Cir. 2009).

We employ the same standard employed by the Court of International Trade in assessing Customs' classification determinations. *LeMans Corp. v. United States*, 660 F.3d 1311, 1315 (Fed. Cir. 2011). A classification decision involves two steps. First, the court must "ascertain[] the meaning of specific terms in the tariff provisions." *Victoria's Secret Direct, LLC v. United States*, 769 F.3d 1102, 1106 (Fed. Cir. 2014) (quoting *Millenium*, 558 F.3d at 1328). Second, the court determines "whether the subject merchandise comes within the description of those terms." *Id*. "Determining the proper meaning of terms is a question of law that we review *de novo*, while determining whether the item fits within such meaning is a question of fact that we review for clear error." *Avenues III*, 423 F.3d at 1330. When there is no dispute as to the nature of the merchandise, the two-step classification analysis "collapses entirely into a question of law." *Cummins Inc. v. United States*, 454 F.3d 1361, 1363 (Fed. Cir. 2006).

While we accord deference to a classification decision "relative to its 'power to persuade,' we have 'an independent responsibility to decide the legal issue of the proper meaning and scope of HTSUS terms.'" *Kahrs Int'l, Inc. v. United States*, 713 F.3d 640, 644 (Fed. Cir. 2013)….

The HTSUS scheme "is organized by Headings, each of which has one or more Sub-Headings; the headings set forth general categories of merchandise, and the Sub-Headings provide a more particularized segregation of the goods within each category." *Wilton Indus., Inc. v. United States*, 741 F.3d 1263, 1266 (Fed. Cir. 2013). The proper classification of merchandise entering the United States is governed by the General Rules of Interpretation ("GRIs") of the HTSUS and the Additional United States Rules of Interpretation. *Orlando Food Corp. v. United States*, 140 F.3d 1437, 1439 (Fed. Cir. 1998).

We apply the GRIs in numerical order, beginning with GRI 1, which provides that "classification shall be determined according to the terms of the Headings and any relative Section or Chapter Notes." *La Crosse Tech. v. United States*, 723 F.3d 1353, 1358 (Fed. Cir. 2013). Where an "imported article is described in whole by a single classification heading or subheading, then that single classification applies, and the succeeding GRIs are inoperative." *Id*. (quoting *CamelBak Prods., LLC v. United States*, 649 F.3d 1361, 1364 (Fed. Cir. 2011)).

According to GRI 1, the HTSUS Headings and Section or Chapter Notes govern the classification of a product. *Kahrs*, 713 F.3d at 644. Absent contrary legislative intent, we construe HTSUS terms according to their common and commercial meanings, which we presume are the same. *Id*. "To discern the common meaning of a tariff term, we may consult dictionaries, scientific authorities, and other reliable information sources." *Id*. After consulting the Headings and Section or Chapter Notes, we may also consult the World Customs Organization's Explanatory Notes, which accompany each Chapter of the HTSUS. *LeMans*, 660 F.3d at 1316. Although the Explanatory Notes are not legally binding, they are "persuasive" and are "generally indicative" of the proper interpretation of the tariff provision. *Id*. …

Here, the parties dispute whether the cases at issue are properly classifiable under Heading 4202 or Heading 3926. … Heading 4202 covers, *inter alia*, "[t]runks, suitcases, vanity cases, attaché cases, briefcases, school satchels, spectacle cases, binocular cases, camera cases, musical instrument cases, gun cases, holsters and similar containers." Heading 3926 covers "[o]ther articles of plastics and articles of other materials of heading 3901 to 3914." The Chapter Notes provide that "Chapter [39] does not cover … trunks, suitcases, handbags or other containers of heading 4202." Note 2(m) to Ch. 39, HTSUS. Thus, if the imported cases are properly classifiable under Heading 4202, they cannot be classified under Heading 3926 (which is part of Chapter 39).

Heading 4202 is an *eo nomine* provision, which means that it describes goods according to their specific name. *La Crosse*, 723 F.3d at 1358. It is undisputed that the protective cases at issue here are not named in Heading 4202. Accordingly, to be classified within Heading 4202, the merchandise must fall into the category of "similar containers."

Interpreting the term "similar containers" requires an *ejusdem generis* analysis to determine if the goods are "of the same kind" as those listed in the heading. *Totes, Inc. v. United States*, 69 F.3d 495, 498 (Fed. Cir. 1995). "In classification cases, *ejusdem generis* requires that, for any imported merchandise to fall within the scope of the general term or phrase, the merchandise must possess the same essential characteristics or purposes that unite the listed exemplars preceding the general term or phrase." *Avenues III*, 423 F.3d at 1330.

A Court must first "consider the common characteristics or unifying purpose of the listed exemplars in a heading." *Victoria's Secret*, 769 F.3d at 1107 (quoting *Avenues in Leather, Inc. v. United States* (*Avenues I*), 178 F.3d 1241, 1244 (Fed. Cir. 1999) …. The Court can then "consider the merchandise at issue with the identified unifying characteristics (or purpose) in mind." *Id*. "Classification of imported merchandise under *ejusdem generis* is appropriate only if the imported merchandise shares the characteristics or purpose and does not have a more specific primary purpose that is inconsistent with the listed exemplars." *Avenues I*, 178 F.3d at 1244. We have previously held that the "common characteristic or unifying purpose of the goods in heading 4202 consists of 'organizing, storing, protecting, and carrying various' items." *Avenues III*, 423 F.3d at 1332 (quoting *Avenues in Leather, Inc. v. United States* (*Avenues II*), 317 F.3d 1399, 1402 (Fed. Cir. 2003)).

…

On appeal, the government argues that the Court of International Trade committed three reversible errors. First, the government maintains that the court erred by placing a restriction on the meaning of the term "container" that is not found in dictionary definitions: requiring a concurrent and simple physical action to gain access. Second, while the Court did not formally hold that "similar containers" under Heading 4202 must satisfy all four *ejusdem generis* factors (organizing, storing, protecting, and carrying), the government argues that the Court effectively imposed such a requirement. Finally, the government argues that, even if "similar containers" must satisfy all four factors, the Court of International Trade erred by requiring that they satisfy the additional characteristic of preventing anything from being operational while in the containers. [Customs lost the 3rd argument, too, so the Federal Circuit's discussion of it is omitted.]

OtterBox responds that the Court of International Trade correctly determined that the products at issue: (1) are not "containers;" [and] (2) do not share all of the four essential characteristics of goods listed in Heading 4202…. Accordingly, the subject merchandise is precluded from classification in Heading 4202.

A. The Subject Merchandise Is Not a "Container"

To be classifiable in Heading 4202, OtterBox's products must be "containers." The word "container" is not defined in the HTSUS or in the legislative history. The Court of International Trade therefore looked to the parties' proposed dictionary definitions, including the government's preferred definitions: "a thing in which material is held or carried; receptacle" and "a thing that contains or can contain something; box, crate, can, jar, etc." *Otter Products*, 70 F. Supp. 3d at 1289. The government also cited the definition of "contain" meaning "to have within; enclose." *Id*. Looking to the list of examples in Heading 4202, the court concluded that "each of these objects allow an article to be placed inside them and/or taken out without much effort by opening or closing the receptacle." *Id*.

On appeal, the government argues that there "is no requirement that a box, crate, or receptacle require a physical action to gain access." … According to the government, some of the specific exemplars identified in Heading 4202 – such as spectacle cases or holsters – may be open at the top. The government maintains that, because "articles classifiable under Heading 4202 cannot be constrained in the manner that the trial court held, such a construction of 'container' constitutes legal error." … And, the government asserts that, because electronic devices are held inside or are enclosed by the cases at issue, each case itself is a "container" under the common meaning of the word.

The Court of International Trade noted that the items listed in the government's definition of "container" – "box, crate, can, jar" – "all require some concurrent and relatively simple act to gain access to the receptacle (*i.e.*, twisting a lid, lifting a cover)." *Otter Products*, 70 F. Supp. 3d at 1289. In contrast, the cases at issue "are specifically designed for and fit snuggly [*sic*] over particular electronic devices and do not require an action to open or uncover the item." *Id*. To that end, the Court noted that "it is more common to think of the cases as an addition/accessory to the electronic device which can be added to or removed at the consumer's liking." *Id*. at 1289-90. The Court further found that the cases only "minimally resemble containers." *Id*. at 1292.

Although the government argues that the Court erred in its construction of "container," the Court … recognized that assessing the word "container" to determine the meaning of "similar container" is only a starting point and that "some of the problems that arise from describing the electronic device cases as containers foreshadow the problems that will arise with trying to classify the cases as 'similar containers' under Heading 4202, HTSUS." *Id*. at 1289. Thus, while the trial Court did note that the examples indicate that "containers," as used in Heading 4202, implies something which encases something else, the Court did not end its inquiry there nor even rely heavily on that fact. This approach is consistent with our case law, which requires that the Court first ascertain the meaning of the specific terms in the tariff provision, and then determine whether the goods come within the description of those terms. *Kahrs*, 713 F.3d at 644. Accordingly, we see no error in the Court's analysis.

B. The Subject Merchandise Is Not a "Similar Container"

… [F]or the Commuter and Defender Series cases to fall under the general phrase "similar containers," they must "possess the same essential characteristics or purposes that unite the listed exemplars preceding the general term or phrase." *Avenues III*, 423 F.3d at 1332. … [T]he "common characteristic or unifying purpose of the goods in Heading 4202 consists of 'organizing, storing, protecting, and carrying various' items." *Avenues III*, 423 F.3d at 1332 (quoting *Avenues II*, 317 F.3d at 1402).

The parties dispute whether the subject merchandise must possess all four of the characteristics uniting the exemplars, or merely one of them, in order to be classified as "similar containers" under Heading 4202. The parties agree, however, that this Court has not directly addressed the issue. The Court of International Trade found it unnecessary to answer the question "because, in this case, coverings which minimally resemble containers, serve a protective purpose, and may at times serve some carrying purpose, while allowing full functionality of the enclosed merchandise are not 'similar containers.'" *Otter Products*, 70 F. Supp. 3d at 1292-93.

…

On appeal, the government argues that this Court's precedent provides "support for the conclusion that the four characteristics are disjunctive." …

This Court has yet to hold expressly that a product must share all four unifying characteristics to qualify as a "similar container" under Heading 4202 or that sharing some specific subset of those four characteristics is sufficient. We take this opportunity to clarify that there is no requirement that the subject merchandise meet all four characteristics to qualify as a "similar container" under Heading 4202. Courts should consider the four characteristics collectively and then determine whether, in light of those considerations, the classification would lead to an inconsistency. If, for example, an item met only one of the four characteristics, it almost certainly would not qualify as a "similar container" under Heading 4202. Allowing a single factor to satisfy the inquiry would, in almost all conceivable scenarios, render the scope of "similar containers" so broad that it would lead to absurd results and make consistent application of the standard all but impossible. … It would, moreover, divorce consideration of the individual characteristics from any consideration of a unifying purpose, making the latter virtually impossible to define.

… [T]he Court of International Trade engaged in the correct analysis. It correctly found that the subject cases satisfy only one of the four characteristics and have an essential purpose that is inconsistent with the exemplars of Heading 4202.

1. Organize

First, the Court of International Trade held that the cases "do not serve any organizational purpose," because they "can and do only hold one electronic device." *Otter Products*, 70 F. Supp. 3d at 1290. The Court explained:

> Even if it is possible to organize a single item without reference to another item, the electronic devices are not any more organized when they are in the cases. Rather, once the sole electronic device is placed inside the cases, it remains one article surrounded by the case that acts like a suit of armor. The electronic device is just as organized, tidy, arranged, or orderly before it is placed in the cases as it is after. Id.

On appeal, the government argues that the Court … ignored the fact that some of the exemplars of Heading 4202 – including camera cases, binocular cases, and holsters – each may hold only a single article. … But OtterBox presented evidence that each of these exemplars often contain multiple items. Appellee Br[ief]. 17 ("Camera cases often contain extra lenses, batteries, cables, and memory cards. Binocular cases often contain straps, cleaning cloths, lens caps, and other accessories. Gun cases and holsters may contain multiple guns and rounds of ammunition."). The same is true for the other exemplars in Heading 4202.

The government cites *Processed Plastics* [*Processed Plastic Co. v. United States*, 395 F. Supp. 2d 1296 (CIT 2005)] for the proposition that "simply 'containing' items is at least a rudimentary form of organization." 395 F. Supp. 2d at 1309. As the Court of International Trade found, however, the organizational capacity of the backpacks and beach bags at issue in *Processed Plastics* "cannot be equated to the cases at issue here." *Otter Products*, 70 F. Supp. 3d at 1293. In *Processed Plastics*, it was undisputed that the backpacks were used to carry multiple items and "the beach bag is large enough to allow several lightweight items to be organized and stored inside it, in much the same manner as the backpacks." 395 F. Supp. 2d at 1313. In a subsequent Court of International Trade decision, moreover, the Court specifically stated that, "[i]n the context of heading 4202, organization implies multiple items placed together in a single container." *Firstrax*, … 2011 Ct. Int'l Trade LEXIS 132, at 18…. We agree with the Court … that organization requires at least the possibility of storing multiple items. Unlike the subject merchandise at issue in *Processed Plastics*, the cases here contain a single item: an electronic device.

2. Store

The Court of International Trade found that the cases also do not possess the essential characteristic of "storing." Specifically, the Court … noted that the common understanding of "store" implies setting something aside – "[i]t does not include present use but looks toward using whatever item is stored in the future." *Otter Products*, 70 F. Supp. 3d at 1290.

According to the government, the cases serve the purpose of "storing" because they are "keeping the enclosed devices safe while in the pockets, backpacks or handbags of their owners until their next use." … As such, the government maintains, the cases satisfy the Court's definition. We disagree.

The government's argument conflates protection and storage, but they are different. Satisfying the former is not the same as satisfying the latter. As the Court of International Trade correctly found, "an important characteristic of the subject cases is allowing the electronic device to remain fully functional, so that it may be used while inside the subject case." *Otter Products*, 70 F. Supp. 3d at 1290. We agree that, because the devices remain fully functional, the cases do not comport with the common understanding of the term "storing."

3. Protect

It is undisputed that the electronic cases at issue protect. …

4. Carry

The Court of International Trade acknowledged that the Defender Series cases contain a belt clip that "provide[s] minimal carrying functionality for the electronic devices." *Id*. But "the belt clips are removable and, even when connected, are only used or usable for brief periods where the user is in motion and has determined to place the electronic device in the belt clip, as opposed to a pocket." *Id*. at 1290-91.

On appeal, the government argues that all of the cases satisfy the "carry" factor, because "electronic devices are held within the cases." … The government submits that "carry" is defined as "to hold or support while moving." … (citing Webster's *New World College Dictionary* 215 (Third College Ed. 1976)). As OtterBox points out, although the cases at issue "remain in place while the user moves, … they add nothing to the carrying capability that the electronic device, standing alone, would not already have." … If anything, the electronic device "carries" the case. We agree with the Court … that the subject merchandise simply does not "carry" anything for purposes of being classified under Heading 4202.

…

C. Classification under Sub-Heading 3926.90.99

The Court of International Trade held that, because the subject merchandise cannot be classified under Heading 4202, it should be classified according to its material. The Court then determined that the proper classification is Sub-Heading 3926.90.99: "[o]ther articles of plastics." *Id*. at 1295. The government does not challenge the Court's … conclusion that, if the subject cases are not classified in Heading 4202, they are properly classified in Sub-Heading 3926.90.99.

[Does the ruling of a Court on the proper tariff classification of one entry of merchandise automatically apply to other entries? The answer is no. *See United States v. Stone & Downer*, 274 U.S. 225 (1927). Applying this precedent means a 5.3% tariff under HTSUS 3926.90.99 for OtterBox items does not automatically apply to future mobile phone case shipments. Nevertheless, surely the Federal Circuit decision would be quite persuasive in a future dispute.]

VI. Waveboards and 2014 *Streetsurfing* Case

The Irvine, California company Streetsurfing LLC imported waveboards, which CBP classified as "sports equipment," thereby subjecting this merchandise to a 4% tariff. Streetsurfing disagreed, saying the articles were entitled to duty-free treatment as "wheeled toys." In the 2014 case of *Streetsurfing LLV v. United States*, the CIT sided with CBP.[144]

A waveboard has two wheels and two flexible platforms that can partially rotate. In that sense, it is similar to a skateboard – but not identical. Skateboards have four wheels and one inflexible platform. A rider of a waveboard moves the board up and down in a wave motion, and thereby can go up or downhill. The motion of a skateboarder is different, and her ability to go uphill is limited. Streetsurfing argued for the "wheeled toys" classification saying its waveboards were like a children's tricycle, push car, or pedal car.

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[144] *See* Number 09-00136 (Slip Opinion 14-110, 22 September 2014); Brian Flood, *Trade Court Upholds Customs Classification Of Waveboard Imports as Sports Equipment*, 31 International Trade Reporter (BNA) 1718 (25 September 2014).

The CIT rejected the analogy. Waveboards do not share the same five features of a wheeled toy, namely:

(1) A child can use the merchandise safely with little instruction or supervision.
(2) There is no serious risk of injury.
(3) Little skill is needed.
(4) Not much exercise is obtained from using the merchandise.
(5) The merchandise has an assistive device like a seat, hand lever, pedal, or brake.

Moreover, the CIT observed a waveboard needs the user to have coordination and balance, and engage simultaneously in steering and propulsion. Indeed, the skill needed for waveboarding is manifest in the facts Streetsurfing packaged the merchandise with a video tutorial to show its safe operation, and recommended adult supervision and protective gear. In other words, a waveboard was considerably more dangerous than a wheeled toy for kids. Further, unlike a typical toy, a waveboard involves exercise.

Streetsurfing argued its merchandise was not part of a "sport." No one recognizes "waveboarding" as a sport, the activity has no rules, and there is no organized competition. Yet, case law ran counter to this argument. Neither codified rules nor organized competition matters as to the definition of a "sport." Whether an activity is a "sport" depends on whether it involves "skillful recreation." Can users practice the activity and develop individual skills?

Yes, said the CIT. Waveboarders can and do train to enhance their balance skills, gain speed, traverse different kinds of terrain, and do tricks. So, waveboarding is a "sport," and waveboards are "sports equipment" subject to a 4% tariff.

VII. Christmas and 2018 *WWRD* Case

Since the 1990s, the proper tariff classification of "festive articles" has been in dispute. Worldwide, Thanksgiving is understood to be a celebration rooted in American culture, and Christmas is appreciated as a holiday integrally linked to Christianity. Rejecting these intuitive preconceptions, and opening the dictionary, the CIT decided in March 2017 Thanksgiving and Christmas are "rituals," because they entail predictable, scripted behavior patterns. In April 2018, the Federal Circuit affirmed. So, "entries of imports of certain ceramic plates and mugs, gravy boats, crystal flutes, and punch bowls, all of which carry a festive motif" are "served up with" applied MFN tariffs of 3%-6%.[145]

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[145] Brian Flood, *Thanksgiving, Christmas Dinnerware Served Up With Tariffs*, 35 International Trade Reporter (BNA) (5 April 2018). For a set of cases involving another religious article, namely, a menorah, see the CBP revocation of six rulings, and issuance of HQ H310688 (13 July 2021), which classifies menorahs as lamps and lighting fittings of HTSUS Heading 9405, instead of as festive articles of Heading 9505. In its issuance, CBP said menorahs still could enter duty free under a secondary classification for religious articles, namely, HTSUS Sub-Heading 9817.95.01. *See* Department of Homeland Security, U.S. Customs and Border Protection, *Revocation of Six Ruling Letters and Revocation of Treatment Relating to the Classification of Menorahs*, 55 Customs Bulletin and Decisions 8-13 (28 July 2021), www.cbp.gov/sites/default/files/assets/documents/2021-Jul/Vol_55_No_29_complete.pdf.

Is the judicial parsing of language extraordinary? Is the legitimacy of International Trade Law compromised by radical departures from shared understandings of what words mean? Should Congress and the ITC rewrite HTSUS tariff classifications at the 8-digit level to overrule the CIT?

WWRD U.S., LLC, v. UNITED STATES, UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT, 886 F.3D 1228 (2 APRIL 2018)

Clevenger, Circuit Judge:

…

Background

... WWRD appeals the ... CIT final decision denying WWRD's motion for summary judgment and granting the Government's cross-motion for summary judgment. ... [T]he CIT agreed with the CBP classification of WWRD's subject imports, finding the articles were not eligible for duty-free treatment. *WWRD U.S., LLC v. United States*, 211 F. Supp. 3d 1365 (Ct. Int'l Trade 2017). We affirm.

Background

Between October 2009 and February 2010, WWRD imported a series of decorative ceramic plates and mugs from its "Old Britain Castles" dinnerware collections; decorative ceramic plates and gravy boats from its "His Majesty" dinnerware collection; and crystal flutes, punch bowls, and hurricane lamps from its "12 Days of Christmas" collection. All of the subject imports had festive motifs, such as Christmas trees, hollies, or turkeys, and were intended to be used during Thanksgiving or Christmas dinner. Upon arrival in the United States, the CBP classified the articles based on their constituent materials, placing the various goods in Sub-Headings 6912.00.39, 7013.22.50, 7013.41.50, and 9405.50.40 of the ... HTSUS. WWRD filed multiple protests, arguing the articles should be classified in 9817.95.01, a duty-free sub-section of the HTSUS covering certain festive goods. Specifically, HTSUS 9817.95.01 provides duty-free status for "[a]rticles classifiable in Sub-Headings 3924.10, 3926.90, 6307.90, 6911.10, 6912.00, 7013.22, 7013.28, 7013.41, 7013.49, 9405.20, 9405.40, or 9405.50, the foregoing meeting the descriptions set forth below: Utilitarian articles of a kind used in the home in the performance of specific religious or cultural ritual celebrations for religious or cultural holidays, or religious festive occasions, such as Seder plates, blessing cups, menorahs or kinaras." After the CBP denied WWRD's protests, WWRD filed a complaint with the CIT, challenging the denials. WWRD argued that Thanksgiving and Christmas dinners are specific cultural ritual celebrations, its articles are used in the performance of such celebrations, and thus its articles belong in HSTUS 9817.95.01.

... [T]he trial Court began by discussing the history of Sub-Heading 9817.95.01. Specifically, the Court noted that, before the creation of Sub-Heading 9817.95.01, utilitarian items associated with holiday or festive occasions were classified within Chapter

95, under Heading 9505. This heading provided broad duty-free coverage for "[f]estive, carnival or other entertainment articles," as interpreted by our line of cases beginning with *Midwest of Cannon Falls, Inc. v. United States*, 122 F.3d 1423 (Fed. Cir. 1997). However, in 2007, Chapter 95 was amended to add Note 1(v), which removed "[t]ableware, kitchenware, toilet articles, carpets, and other textile floor coverings, apparel, bed linen, table linen, toilet linen, kitchen linen and similar articles having a utilitarian function (classified according to their constituent material)" from the scope of Chapter 95. But Note 1(v) also referred to Sub-Headings 9817.95.01 and 9817.95.05,2 which provided duty-free status to a select subset of articles that would have lost such status under the Note. Thus, while many festive utilitarian articles are no longer eligible for duty-free status, those used "in the performance of specific religious or cultural ritual celebrations" are still eligible.

The parties disputed only whether WWRD's subject imports are used "in the performance of specific religious or cultural ritual celebrations," and therefore the trial Court set about defining the scope of this phrase in Sub-Heading 9817.95.01. In assessing the phrase, the CIT analyzed the text of the subheading using the ... GRI. But because the Section and Chapter of the HTSUS did not assist in defining the phrase, the court gave the terms in the Sub-Heading their ordinary meaning, with specific focus on the word "ritual." The Court concluded that Thanksgiving and Christmas are cultural holidays, and the associated dinners are cultural celebrations, but not specific rituals. The Court found that "rituals generally encompass specific scripted acts or series of acts that are customarily performed in an often formal or solemn manner." ... While these dinners occur annually during religious or cultural holidays, that alone is not sufficient; the dinners themselves lack specific formal or solemn acts. ...

The trial Court then turned to the exemplars provided in the subheading – the Seder plates, blessing cups, menorahs or kinaras. Under the statutory construction rule of *ejusdem generis* ("of the same kind"), the trial Court reasoned that the subject imports must "possess the essential characteristics or purposes that unite the [example] articles enumerated ...." ... (quoting *Sports Graphics, Inc. v. United States*, 24 F.3d 1390, 1392 (Fed. Cir. 1994)). The Court distinguished the exemplars, which served specific purposes to advance their respective rituals, from the subject imports, which were "merely decorative items used to serve food and beverages or provide lighting." ... According to the trial Court, such general-purpose articles do not qualify as articles used in the performance of specific religious or cultural ritual celebrations.

...

Discussion

Classifying articles under the HTSUS is a two-step process. The Court first determines the proper meaning of specific terms in the tariff provisions, which is a question of law. ... Once the proper meaning of the tariff provisions are ascertained, the Court then determines which HTSUS Sub-Heading the subject goods are most appropriately classified under, which is a question of fact. ... "If we determine that there is no dispute of material facts, our review of the classification of the goods collapses into a determination of the proper meaning and scope of the HTSUS terms that, as a matter of statutory construction, is a question of law." *Aves. in Leather, Inc. v. United States*, 317 F.3d 1399, 1402 (Fed. Cir. 2003).

"The HTSUS is composed of classification Headings [the first 4 digits], each of which has one or more Sub-Headings [at the 6-, 8-, or 10-digit level]." *R.T. Foods, Inc. v. United* States, 757 F.3d 1349, 1352-53 (Fed. Cir. 2014). We construe the terms of a tariff provision by applying the GRI "in numerical order." *Wilton Indus., Inc. v. United States*, 741 F.3d 1263, 1266 (Fed. Cir. 2013). Relevant here, the classification of Sub-Headings is governed by GRI 6, which provides that "the classification of goods in the Sub-Headings of a heading shall be determined according to the terms of those subheadings and any related Sub-Heading Notes and, *mutatis mutandis*, to the above [GRIs] on the understanding that only Sub-Headings at the same level are comparable." *See Orlando Food Corp. v. United States*, 140 F.3d 1437, 1442 (Fed. Cir. 1998). GRI 1, in turn, provides that "classification shall be determined according to the terms of the headings and any relative section or chapter notes." *See Millennium Lumber*, 558 F.3d at 1328-29. Terms in the HTSUS are given "their common commercial meanings." *Id.* at 1329 (citing *Len-Ron Mfg. Co. v. United States*, 334 F.3d 1304, 1309 (Fed. Cir. 2003)).

We begin our analysis by determining the proper meaning of the tariff provisions: what constitutes an article used "in the performance of specific religious or cultural ritual celebrations." The trial Court determined that the term "specific" modifies the term "ritual" (as opposed to "religious" or "cultural"), and that, consequently, "rituals generally encompass specific scripted acts or series of acts that are customarily performed in an often formal or solemn manner." ... We agree with the trial court that "specific" modifies the term "ritual," but emphasize that formality and/or solemnity, while relevant, are not required characteristics of all specific religious or cultural ritual celebrations.

WWRD attempts to distinguish "religious" from "cultural" rituals, arguing that a "cultural ritual" does not require the same "specific scripted acts or series of acts that are customarily performed in an often formal or solemn manner." The Government, on the other hand, argued below for a much narrower definition: that "rituals" require "formal actions and words that are repeated every year in the same fashion by everyone who celebrates these events." We find neither of these interpretations compelling.

While the parties provided numerous definitions of "ritual" from a variety of sources, we can derive two underlying requirements for religious or cultural rituals. First, a ritual must have some prescribed acts or codes of behavior. *See Webster's Encyclopedic Unabridged Dictionary of the English Language* 1661 (New rev. ed. 1996) ("*Webster's*") (defining "ritual" as: "1. an established or prescribed procedure . . . 2. a system or collection of . . . rites . . . 6. a prescribed or established rite, ceremony, proceeding, or service . . . 7. prescribed, established, or regularly performed...9. a prescribed code of behavior...."); *see also Merriam-Webster's Collegiate Dictionary* 1011 (10th ed. 1993) ("*Merriam*") (defining "ritual" as "1: the established form for a ceremony; *specf*: the order of words prescribed ... [2]b: a ceremonial act or action). Second, a ritual, in the context of this Sub-Heading, must have some cultural or religious meaning. *See* Webster's (defining "ritual" as involving "[1.] a religious or other rite ... [3.] public worship . . . [7.] religious services

... [9.] regulating social conduct....”); *see also Merriam* (defining “ritual” as involving “religious law or social custom.”). The trial Court may then weigh other suggestive but non-dispositive factors, such as whether the prescribed acts or codes of behavior are performed in a formal or solemn manner, how widely recognized the prescribed acts or underlying meanings are, how established the organization performing the ritual is, what purpose the prescribed acts have in serving the organization or representing the cultural or religious meaning, among other considerations.

In this light, it appears WWRD presents a compelling argument that Thanksgiving and Christmas dinners are religious or cultural ritual celebrations, but that is not the end of our analysis. Sub-Heading 9817.95.01 also requires “specific” ritual. “Specific” is defined as “free from ambiguity,” *Merriam*, at 1128, or “[o]f, relating to, or designating a particular or defined thing; explicit,” *Black’s Law Dictionary* 1616 (10^{th} ed. 2014). Thus, the court must look for specific, well-defined prescribed acts or codes of behavior having an unambiguous cultural or religious meaning.

Generally, WWRD argues that Thanksgiving and Christmas dinners involve “prescribed and specific acts and series of acts and their own particular cultural rituals and sub-rituals, which go beyond the gathering for and consumption of ordinary meals.” For specificity, WWRD argues the prescribed acts in Thanksgiving and Christmas dinner are: “gathering together at one location, not simply to enjoy a meal, but to celebrate in a traditional family or communal way; a holiday; the consumption of special food and drink ...; more formal table settings decorated with seasonable displays ...; and, at the heart of the event, the common, shared intent to continue to celebrate the particular holiday in a familiar and time honored way.” But the last item concerning “intent” is not an act at all. The correct focus is on the acts that WWRD uses to define the ritual, and as the trial Court found, those acts do not rise to the level of specificity required by Sub-Heading 9817.95.01.

The exemplars provided in the Sub-Heading illuminate what level of specificity is required. For instance, ... a Seder plate is used during Passover to hold six symbolic foods, where each food has a particular meaning and is generally accompanied by scripted prayer. In Christian teachings, a blessing cup holds wine that symbolizes or becomes the blood of Christ, and invokes scripted Communion liturgy. A menorah is a candelabrum having nine holders for nine symbolic candles, where a candle is lit for each night of Hanukkah, and is generally accompanied by scripted prayer. And finally, a kinara is a candelabrum having seven holders for seven symbolic candles: three green candles, three red candles, and one black candle. A candle is lit on each day of Kwanzaa, and each candle represents a particular “principle” of Kwanzaa.

Based on the terms of the Sub-Heading and the exemplars, we conclude that “gathering together” and “enjoying a meal” are too ambiguous. The proposed acts say nothing about the types of food or drink served, the types of settings or displays required, whether all families celebrate in the same or similar way, or what underlying cultural or religious meaning the specific acts represent. Families celebrating Thanksgiving and Christmas dinners do so in a variety of ways, using a variety of foods, and even at a variety of times in the day. The "prescribed and specific acts" promised by WWRD's general description of Thanksgiving and Christmas dinners are missing.

But even if the acts were specific enough, there is one further requirement presented by Sub-Heading 9817.95.01: the subject import must be "used ... in the performance" of the ritual. WWRD would have us hold that an article that is used only for its utilitarian purpose, but also adds to the ambience of the event, constitutes use in the performance of the ritual. But it is not enough that a utilitarian article is merely used during the ritual. Instead, the use must advance or serve a particular purpose in the ritual. The exemplars make this clear: a Seder plate is used to present the six symbolic foods, a blessing cup holds the symbolic blood of Christ, a menorah is used to hold the nine symbolic candles, and a kinara is used to hold the seven symbolic candles. Assuming *arguendo* that Thanksgiving or Christmas dinners are specific rituals, the ritual of dinner will continue whether the serving trays and cups have festive motifs or not; the motifs themselves do nothing to further the ritual of dinner. Unless WWRD can point to specific prescribed acts having underlying religious or cultural meaning, where the subject imports are used in the performance of those acts, its imports are not eligible for duty-free status under Sub-Heading 9817.95.01.

The legislative history supports our conclusion that WWRD's subject imports do not fall within the scope of Sub-Heading 9817.95.01. This Court's decisions before 2007 provided that similar utilitarian items associated with holiday or festive occasions would be classified as duty-free. *See, e.g.*, *Park B. Smith, Ltd. v. United States*, 347 F.3d 922, 928-29 (Fed. Cir. 2003). The addition of Note 1(v) in February 2007 rejected that broad scope of duty-free treatment of utilitarian holiday items, choosing language that preserved duty-free status only for a subset of items that are used "in the performance of specific religious or cultural ritual celebrations." WWRD's interpretation of the new language would recreate much the same scope of duty-free treatment in this area that Congress abandoned in 2007.

Conclusion

While we adopt a more flexible definition of "ritual" than the trial Court, the trial Court correctly determined that WWRD's subject imports do not fall within the scope of Sub-Heading 9817.95.01. ...

VIII. Candles and 2018 *Gerson* Case

THE GERSON COMPANY V. UNITED STATES, UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT, NUMBER 2018-1011 (6 AUGUST 2018)

O'Malley, Circuit Judge:

The Gerson Company appeals a decision of the United States Court of International Trade ("Trade Court") granting summary judgment in favor of the government. *See Gerson Co. v. United States*, 254 F. Supp. 3d 1271 (Ct. Int'l Trade 2017). In that decision, the Court classified Gerson's imported light-emitting diode ("LED") candles under Sub-

Heading 9405.40.80 of the Harmonized Tariff Schedule of the United States ("HTSUS") – which covers certain "[l]amps . . . not elsewhere specified or included" – rather than under subheading 8543.70.70 – which covers "[e]lectrical machines and apparatus," including "[e]lectric luminescent lamps." We agree with the Trade Court's classification, and, accordingly, affirm.

I. Background

A. Subject Merchandise

Gerson's imported merchandise consists of finished decorative candle and tea light lamps made of plastic and/or wax. The lamps are designed to resemble ordinary candles, such as votive, pillar, taper, or tea light candles. Unlike ordinary candles, however – which generate light by using a wick to vaporize wax – Gerson's candles use battery-operated LEDs. Gerson does not dispute that its candles serve both decorative and illuminative functions. ...

Between January and October 2009, Gerson imported twenty-seven entries of its candles through the Port of Kansas City, Missouri. U.S. Customs and Border Protection ("Customs") liquidated the merchandise under HTSUS Sub-Heading 9405.40.80, which imposes a duty rate of 3.9% *ad valorem*. That provision reads:

> 9405 Lamps and lighting fittings including searchlights and spotlights and parts thereof, not elsewhere specified or included; illuminated signs, illuminated nameplates and the like, having a permanently fixed light source, and parts thereof not elsewhere specified or included:
>
> 40 Other electric lamps and lighting fittings:
>
> 80 Other......................................3.9%

Gerson objected to Customs' classification in four administrative protests, arguing that its candles should have been classified under Sub-Heading 8543.70.70, which imposes a duty rate of 2% *ad valorem*. That provision reads:

> 8543 Electrical machines and apparatus, having individual functions, not specified or included elsewhere in this chapter; parts thereof:
>
> 70 Other machines and apparatus:
>
> 70 Electric luminescent lamps...........2%

Customs denied each of Gerson's protests, leading Gerson to file suit in the Trade Court.

B. Procedural History

...

The [Trade] [C]ourt observed that it is at least "plausible" to read Heading 8543 as covering Gerson's candles to the extent they qualify as "electrical machines and apparatus." ... But the Court rejected that reading as impermissibly expanding the scope of Heading 8543 and unduly narrowing the scope of Heading 9405. ... The court also determined that such a reading would be inconsistent with the World Customs Organization's Harmonized Commodity Description and Coding System ("HS") Explanatory Notes ("ENs"), which suggest that Chapter 94 is reserved for finished household lamps like Gerson's candles, while Chapter 85 is reserved for unfinished lamps used in conjunction with other electrical devices. ... The Court therefore classified the candles under Sub-Heading 9405.40.80. ...

...

II. Discussion

"We review a grant of summary judgment by the Court of International Trade for correctness as a matter of law and decide de novo the proper interpretation of the tariff provisions as well as whether there are genuine issues of material fact to preclude summary judgment." *Otter Prods., LLC v. United States*, 834 F.3d 1369, 1374-75 (Fed. Cir. 2016). "Although we review the decision[] of the [Trade Court] *de novo*, we give great weight to the informed opinion of the [Trade Court] and it is nearly always the starting point of our analysis." *Schlumberger Tech. Corp. v. United States*, 845 F.3d 1158, 1162 (Fed. Cir. 2017)....

Classifying articles under the HTSUS is a two-step process. A Court first determines the proper meaning of specific terms in the tariff provisions, which is a question of law that we review without deference. *Otter Prods.*, 834 F.3d at 1375. Next, the Court determines under which Sub-Heading the subject merchandise is most appropriately classified, which is a question of fact that we review for clear error. *Id.* But when, as here, there is no dispute as to the nature of the merchandise, the two-step classification analysis "collapses entirely into a question of law." *Id.* (internal quotation marks omitted).

... [W]e agree with the Trade Court that Gerson's candles fall within Heading 9405 rather than Heading 8543. We also agree with the court that Gerson cannot use subheading 8543.70.70 to expand the scope of heading 8543.

A. The Trade Court Correctly Classified Gerson's Candles Under Heading 9405 Rather than Heading 8543

"The HTSUS scheme is organized by headings, each of which has one or more subheadings; the headings set forth general categories of merchandise, and the subheadings provide a more particularized segregation of the goods within each category." ... [*Citing Otter Products*.] "The proper classification of merchandise entering the United States is governed by the General Rules of Interpretation ('GRIs') of the HTSUS and the Additional United States Rules of Interpretation." *Id*.

We apply the GRIs in numerical order, beginning with GRI 1, which provides that "classification shall be deter- mined according to the terms of the headings and any relative section or chapter notes." *La Crosse Tech., Ltd. v. United States*, 723 F.3d 1353, 1358 (Fed. Cir. 2013). And, where an "imported article is described in whole by a single classification heading or subheading, then that single classification applies, and the succeeding GRIs are inoperative." *Id*.

We therefore begin, as we must, "with the language of the headings." *Orlando Food Corp. v. United States*, 140 F.3d 1437, 1440 (Fed. Cir. 1998). The two competing Headings at issue here are Headings 9405 and 8543. The former covers "[l]amps and lighting fittings including searchlights and spotlights and parts thereof, not else- where specified or included." The parties agree that Gerson's candles qualify as "lamps," as that term is commonly understood. For a lamp to be classifiable under Heading 9405, however, the plain language of the Heading requires that the lamp not be "elsewhere specified or included," meaning that the lamp must not be covered by any other heading in any chapter of the HTSUS. This criterion is consistent with Chapter 94's Note 1(f), which excludes from Chapter 94's scope "[l]amps or lighting fittings of Chapter 85." Gerson does not contend on appeal that its candles fall within any chapter *other* than Chapter 85, nor does it contend that its candles fall within any heading other than 8543. Thus, if Gerson's candles are classifiable under Heading 8543, the terms of Heading 9405 and Note 1(f) preclude classification under Heading 9405.

Heading 8543 covers "[e]lectrical machines and apparatus, having individual functions, not specified or included elsewhere in this chapter." As an initial matter, the heading does not refer to "lamps," which both parties agree Gerson's candles are. And, as the Trade Court observed, the term "electrical machines and apparatus" recited in heading 8543 "is not free of ambiguity" standing alone. ... On the one hand, it is "plausible" to read heading 8543 broadly as encompassing Gerson's candles, at least in a "hyper-technical sense," because the candles use electricity to operate and therefore arguably qualify as "electrical machines and apparatus." ... On the other hand, the terms "machine" and "apparatus" generally connote equipment designed specifically to carry out a particular function. *See* Webster's New World College Dictionary 67 (4th ed. 2009) (defining "apparatus" to mean "any complex device or machine for a specific use"); *id.* at 860 (defining "machine" to mean "a structure consisting of a framework and various fixed and moving parts, for doing some kind of work" and "any device thought of as functioning in such a way, as . . . an electronic computer"). Those terms would seem *not* to cover Gerson's candles, which are decorative articles that also serve an illuminative function. ...

Heading 8543's scope becomes clearer, however, when read in context of the HTSUS as a whole. The provision does not exist in a vacuum, and we must read it in conjunction with other relevant provisions to discern its meaning. ...

When so read, the HTSUS makes clear that Gerson's candles belong in heading 9405 rather than in heading 8543. If one were to read heading 8543 as covering Gerson's candles, it would cover *every* electric lamp, because all such lamps use electricity to generate light. And, by operation of Note 1(f), such lamps could not be classified under heading 9405. In other words, heading 9405 would be constrained to only *non*-electric lamps. That reading, as the Trade Court noted, "would impose a specific, and drastic, limitation on the scope of heading 9405, HTSUS that the article description for that heading does not express or suggest." ... In fact, such a reading would effectively remove electric "searchlights" and "spotlights" from heading 9405 even though those devices are expressly provided for in that heading. *See* HTSUS Hdg. [Heading] 9405 ("Lamps and lighting fittings including *searchlights and spotlights* and parts thereof." (Emphasis added.)). We agree with the Trade Court, therefore, that Gerson's candles do not fall within heading 8543.

The ENs to the relevant chapters further support the Trade Court's ruling.... [In Footnote 5 of its opinion, the Federal Circuit observed: "Unlike the HTSUS section and chapter notes – such as chapter 94's Note 1(f) – the ENs 'are not legally binding or dispositive, but they may be consulted for guidance and are generally indicative of the proper interpretation of the various HTSUS provisions.'" *BenQ Am. Corp. v. United States*, 646 F.3d 1371, 1376 (Fed. Cir. 2011).] ... Explanatory Note 94.05, for example, states that the term "lamps" in heading 9405 refers to lamps "constituted of *any* material" and that use "*any* source of light," including "electricity." EN 94.05(I) (emphases added). That EN also provides examples of lamps that fall within the heading and includes those that are "normally used for the illumination of rooms" such as "chandeliers" and "table lamps," as well as "[c]andelabra" and "candlesticks." ... The notes therefore suggest that chapter 94 was intended to include at least finished, standalone electric lamps used in the home.

Chapter 85's ENs, by contrast, state that Chapter 85 includes "[c]ertain electrical goods *not generally used independently*, but designed to play a particular role as components, in electrical equipment," including "[e]lectrical filament or discharge lamps." EN 85(A)(6). (Emphasis added.); HS Hdg. [Heading] 85.39. These ENs therefore suggest that chapter 85 was intended to include at least unfinished lamps that are used in conjunction with other electrical equipment. As the Trade Court found, Gerson's candles more closely resemble the lamps described in Chapter 94 than they do the lamps described in chapter 85.

Gerson challenges the Trade Court's ruling on several grounds. Gerson first argues that, by acknowledging that the candles "plausibly" fall within Heading 8543, the Trade Court found that the candles are *prima facie* classifiable in that Heading, which should have ended the inquiry. Gerson reads too much into the Trade Court's choice of words. While the court did say that it was "plausible" to read Heading 8543 as covering Gerson's candles insofar as the candles, like all electrical lamps ever in existence, qualify in the abstract as electrical machines or apparatus, the Court correctly and emphatically rejected that reading as nonsensical. The court noted that such a reading would impermissibly expand the scope of Heading 8543 and diminish the scope of Heading 9405. Thus, far from finding that the candles are classifiable under Heading 8543, the court found that reading implausible.

Gerson next argues that the Trade Court erred by allegedly using the ENs to displace the plain language of Heading 8543. Gerson relies heavily on our decision in *Midwest of Cannon Falls, Inc. v. United States*, 122 F.3d 1423 (Fed. Cir. 1997), *superseded on other grounds as stated in WWRD U.S., LLC v. United States*, 886 F.3d 1228 (Fed. Cir.

2018), to support its argument. That case, however, is inapposite. There, the Trade Court held that earthenware jack-o'-lantern mugs and pitchers did not fall within a heading covering "other festive, carnival or other entertainment articles" because all the examples provided in the ENs for the relevant chapter were non-functional in nature. *Id.* at 1429. In other words, the Trade Court in *Midwest* used the ENs to hold "as a matter of law that when an item with a particular ornamentation ... serves a utilitarian function ..., it must be classified under the utilitarian article provision." *Id.* at 1428-29. We reversed, holding that it was improper to employ the ENs' "limiting characteristics to narrow the language of the classification heading itself," which was otherwise unambiguous. *Id.* at 1429....

The Trade Court committed no such error here. First, unlike in *Midwest*, the language of Heading 8543 *is* ambiguous standing alone, as described above. Second, the court here construed heading 8543 in view of Heading 9405 to conclude that it does not cover Gerson's candles. Only after having done that did the Court note that the ENs supported its construction. In other words, the Trade Court did not begin its analysis by applying limiting characteristics gleaned from the ENs to Heading 8543, as in *Midwest*. Third, the court here did not use the ENs to limit the scope of the headings. Rather, the court used the ENs merely to "clarify the scope" of the language in Heading 8534, which is "entirely proper." *See LeMans Corp. v. United States*, 660 F.3d 1311, 1320-21 (Fed. Cir. 2011) (approving consideration of the ENs in a similar context, and noting that the Trade Court "did not find that the Explanatory Notes *precluded* classification of LeMans' goods as sports equipment" but rather "found only that these examples informed its interpretation of the term 'sports equipment'") ....

...

In sum, the Trade Court did not err in determining that Gerson's candles fall within Heading 9405 rather than Heading 8543.

Affirmed

IX. Compression Hosiery and 2018 *Sigvaris* Case

SIGVARIS, INC. V. UNITED STATES, UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT (NUMBER 17-02237, 16 AUGUST 2018)

O'Malley, Circuit Judge:

Sigvaris, Inc. ("Sigvaris") appeals the judgment of the United States Court of International Trade in which the court found that the subject merchandise is not classified as duty free under the Harmonized Tariff Schedule of the United States ("HTSUS") subheading 9817.00.96 as articles specially designed for the use or benefit of physically handicapped persons. *Sigvaris, Inc. v. United States*, 227 F. Supp. 3d 1327 (Ct. Int'l Trade 2017). Although the Court of International Trade erred in its analysis, we conclude that it reached the correct result. We therefore affirm its holding that the subject merchandise does not qualify for duty-free treatment under HTSUS subheading 9817.00.96.

I. Background

A. The Subject Merchandise

Sigvaris is the owner and importer of record of the subject merchandise. The specific goods at issue are graduated compression hosiery from three product lines – the 120 Support Therapy Sheer Fashion series for women, the 145 Support Therapy Classic Dress series for women, and the 185 Support Therapy Classic Dress series for men. All of the product lines exert 15-20 millimeters of mercury ("mmHg") of compression onto the wearer.

The 120 series consists of a variety of models, including pantyhose, maternity pantyhose, thigh-high hosiery, calf-length hosiery, and calf-length hosiery with open toe. These models are "made of a combination of nylon and spandex, and in some products, also silicone." *Id*. at 1331. The 145 series and 185 series "are calf-length graduated support dress socks made of a combination of nylon and spandex." *Id*. at 1327. Graduated compression hosiery "when properly worn, forces pooled blood to circulate out of the leg and throughout the body." Appellant's Br[ief]. at 3.

B. Customs's Classification

Between September 2008 and November 2010, Sigvaris imported 105 entries of various graduated compression merchandise, including the subject merchandise, into the United States at the Port of Atlanta, in Georgia. Customs liquidated the entries between August 2009 and September 2011.

Customs classified the subject merchandise as "[o]ther graduated compression hosiery: . . . [o]f synthetic fibers" under HTSUS subheading 6115.10.40 subject to a duty rate of 14.6% *ad valorem*. *Id*. at 1330.

Sigvaris timely protested the classification of the subject merchandise, and sought "special classification" as duty free under HTSUS subheading 9817.00.96. That subheading states:

> 9817
>
> Articles specially designed or adapted for the use or benefit of the blind or other physically or mentally handicapped persons; parts and accessories (except parts and accessories of braces and artificial limb prosthetics) that are specially designed or adapted for use in the foregoing articles:
>
> > 9817.00.96
> >
> > Other……………………………………
> > Free

Customs denied the protest on December 12, 2011. Sigvaris paid liquidated duties according to Customs's classification but challenged the classification by filing a complaint in the Court of International Trade.

C. Court of International Trade Decision

Sigvaris's complaint alleged that the subject merchandise should have been entitled to special classification as duty free under HTSUS subheading 9817.00.96. The government maintained that Customs properly classified the subject merchandise. …

… [T]he Court of International Trade … granted the government's cross-motion for summary judgment with respect to the classification of the subject merchandise, which it held was properly classified by Customs under HTSUS subheading 6115.10.40 as "[o]ther graduated compression hosiery: …[o]f synthetic fibers."

The Court of International Trade began its analysis by ascertaining the proper meaning and scope of the terms under HTSUS heading 9817. To determine the meaning of "physically . . . handicapped persons," the Court of International Trade consulted Subchapter Note 4(a) to Chapter 98, which provides that the term "includes any person suffering from a permanent or chronic[,] physical or mental impairment which substantially limits one or more major life activities, such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, or working." *Sigvaris*, 227 F. Supp. 3d at 1335.

To determine the scope and meaning of "specially designed," the Court of International Trade consulted dictionaries to conclude that "articles specially designed for handicapped persons must be made with the specific purpose and intent to be used by or benefit handicapped persons rather than the general public." *Id*.

Next, the Court of International Trade considered whether the subject merchandise qualifies as duty free under the above definitions of the terms contained in HTSUS heading 9817. Sigvaris had argued that the subject merchandise should be classified as duty free because it is designed to benefit persons who suffer from Chronic Venous Disorder ("CVD"), which is "a mechanical problem of the lower limbs that results in a deficiency in the flow of blood due to weak, damaged, or otherwise compromised veins." *Id*. at 1337. Accordingly, in its analysis, the Court of International Trade "determine[d] first whether CVD constitutes a physical handicap," *id*., and then "next whether [Sigvaris]'s compression hosiery is specially designed for the use of physically handicapped persons," *id*. at 1338.

Following this framework, the Court of International Trade found that only the more severe stage of CVD, known as Chronic Venous Insufficiency ("CVI"), constitutes a physical handicap, but that early stages of CVD do not. *Id*. at 1337. It based its finding on the fact that "[s]evere cases of CVI can interfere with and impair certain life functions, such as walking, standing, and working," *id*. at 1331, whereas patients suffering from "early stages" of CVD are ambulatory and able to perform daily tasks, id. at 1338.

The Court of International Trade then determined that the subject merchandise is not specially designed for the physically handicapped because it is designed for patients suffering from early stages of CVD and not for patients suffering from CVI. In reaching this conclusion, the Court of International Trade found significant that Sigvaris's own advertising materials state that the subject merchandise is not for patients who are bedridden or immobilized.

…

II. Discussion

… "We employ the same standard employed by the Court of International Trade in assessing Customs' classification determinations." *Otter Prods., LLC v. United States*, 834 F.3d 1369, 1375 (Fed. Cir. 2016).

A classification determination involves two steps. First, we must "ascertain[] the meaning of specific terms in the tariff provisions." *Id*. (*quoting Victoria's Secret Direct, LLC v. United States*, 769 F.3d 1102, 1106 (Fed. Cir. 2014)). Second, we must determine "whether the subject merchandise comes within the description of those terms." *Id*.

The HTSUS scheme "is organized by headings, each of which has one or more subheadings; the headings set forth general categories of merchandise, and the subheadings provide a more particularized segregation of the goods within each category." *Wilton Indus., Inc. v. United States*, 741 F.3d 1263, 1266 (Fed. Cir. 2013). General Rules of Interpretation ("GRIs") of the HTSUS govern the proper classification of merchandise entering the United States and are applied in numerical order. *Id*. According to GRI 1, we look first to the HTSUS headings and any relevant section or chapter notes. *Otter Prods*., 834 F.3d at 1375. We construe terms from the HTSUS according to their common and commercial meanings, which we presume are the same. *Id*. We may consult dictionaries, scientific authorities, and other reliable information sources to discern the common meanings. *Id*.

We conclude that the Court of International Trade reached the correct result, but that it should have focused more narrowly on the "persons" for whose use and benefit the subject merchandise is specially designed. We also find that it construed the term "specially designed" too broadly. We apply the correct analysis and interpretation below to find that the subject merchandise is not specially designed for the use or benefit of any class of persons, let alone physically handicapped persons. We therefore affirm the Court of International Trade's ultimate holding that the subject merchandise is not classifiable under HTSUS subheading 9817.00.96.

A. The Inquiry Begins with the "Persons" for Whose Use & Benefit the Merchandise Is "Specially Designed"

… HTSUS subheading 9817.00.96 allows for duty-free classification of "[a]rticles specially designed … for the use or benefit of … physically … handicapped persons." The parties dispute whether the relevant inquiry under this subheading should focus on the disorder that the subject merchandise purportedly addresses or, instead, on the persons for whose use and benefit the subject merchandise is "specially designed." The Court of International Trade began its inquiry by first determining that only CVI, the more severe stage of CVD, constitutes a physical handicap, and next, considering whether the subject merchandise is specially designed for the use and benefit of persons suffering from CVI.

Sigvaris contends that the Court of International Trade erred in its approach and that the appropriate inquiry is "whether there is a handicap that the subject merchandise is 'specially designed' to address," and not on "the degree of symptoms a particular sufferer may be experiencing." … According to Sigvaris, "HTSUS 9817.00.96 focuses on the nature of the handicap, not on the person." …

The government argues that Sigvaris's interpretation of the heading is incorrect because it allows "articles that are not specially designed for persons with a condition that substantially limits their ability to perform a major life activity" to "nevertheless be afforded duty-free status" so long as the importer "show[s] that the 'condition' may, in some people, present with severe and debilitating symptoms." …

We generally agree with the government. Under Sigvaris's suggested approach, it would not matter that persons with early stage CVD may not be physically handicapped, so long as some persons who use the subject merchandise happen to have a version of CVD which does qualify as a handicap. Such an approach is too broad and ignores the "specially designed" language of the heading. The plain language of the heading focuses the inquiry on the "persons" for whose use and benefit the articles are "specially designed," and not on any disorder that may incidentally afflict persons who use the subject merchandise. We therefore find Sigvaris's approach inconsistent with the plain language of the heading.

We also find the Court of International Trade's approach at the outset, focused on the wrong question. The Court of International Trade began its analysis by asking whether CVD is a handicap. But this approach not only incorrectly focuses the inquiry on who suffers from an alleged disorder, and to what degree, but it also presupposes that the subject merchandise is "specially designed" at all. Instead, we must ask first, "for whose, if anyone's, use and benefit is the article specially designed," and then, "are those persons physically handicapped?" Here, because we find that the subject merchandise is not "specially designed" under our interpretation of the term, we conclude that the subject merchandise is not classifiable under HTSUS heading 9817 and therefore not entitled to duty-free treatment under HTSUS subheading 9817.00.96.

B. The Subject Merchandise Is Not "Specially Designed" for the Use or Benefit of Any Class of Persons

The HTSUS does not provide a definition for "specially designed," but, as noted above, we may consult dictionary definitions to discern the common meaning of the term. *Webster's Third International Dictionary* defines "specially" as "particularly," which, in turn, is defined as "to an extent greater than in other cases or towards others." … "Designed" is defined as something that is "done, performed, or made with purpose and intent often despite an appearance of being accidental, spontaneous, or natural." *Designed*, *Webster's Third International Dictionary* (2002); *accord Marubeni Am. Corp. v. United States*, 35 F.3d 530, 534 (Fed. Cir. 1994) (defining "designed" as "done by design or purposefully opposed to accidental or inadvertent; intended, planned"). The Court of International Trade relied on these dictionary definitions to conclude that "articles specially designed for handicapped persons must be made with the specific purpose and intent to be used by or benefit handicapped persons rather than the general public." *Sigvaris*, 227 F. Supp. 3d at 1336. While this reading of "specially designed" is accurate as far as it goes, it is incomplete; it does not consider that the subject merchandise must be designed for the use or benefit of a class of persons to an extent greater than for others.

We conclude that, to be "specially designed," the subject merchandise must be intended for the use or benefit of a specific class of persons to an extent greater than for the use or benefit of others. This definition of "specially designed" is consistent with factors that Customs uses in discerning for whose use and benefit a product is "specially designed." Customs considers "the physical properties of the merchandise, whether the merchandise is solely used by the handicapped, the specific design of the merchandise, the likelihood the merchandise is useful to the general public, and whether the merchandise is sold in specialty stores." *Id*. at 1337 (citing Customs Implementation, 28 Cust. Bull. & Dec. at 242–45). These factors aid in assessing whether the subject merchandise is intended for the use or benefit of a specific class of persons to a greater extent than for the use or benefit of others. Accordingly, we adopt them in our analysis below.

Here, the Court of International Trade's findings of fact demonstrate that the subject merchandise is not specially designed for the use or benefit of any specific class of persons, and instead, is designed for use by a variety of persons. One of the defining physical properties of the subject merchandise is that it exerts only 15-20 mmHg of compression, which Sigvaris's medical expert testified "is only slightly greater than ordinary socks." *Id*. at 1339. Similarly, Sigvaris's advertising materials confirm that compression garments that exert compression of 15-20 mmHg are best suited for persons with "(1) heavy, fatigued, tired legs; (2) prophylaxis during pregnancy; (3) prophylaxis for legs predisposed to risk; and (4) long hours of standing or sitting." *Id*. Sigvaris's expert further elaborated on this, stating that "target consumers for hosiery with 15-20 mmHg of compression are 'people who have a profession or live a lifestyle that results in tired, achy, heavy feeling in their legs' and 'people who are sitting for prolonged periods of time,' such as people who take long flights in an airplane or drive long distances." *Id*. Sigvaris's advertising materials also state that these "products really appeal to people with an active lifestyle," and that "[n]ot only do they promote healthy legs, but they are also fashionable." … Thus, Sigvaris's own evidence demonstrates that the subject merchandise is generally designed for the use or benefit of a variety of persons, including those who lead an active lifestyle, are in professions that require sitting for long periods of time, are pregnant, or desire fashionable hosiery.

Sigvaris argues that the subject merchandise is specially designed for the use and benefit of patients suffering from CVD. But none of the evidence introduced by Sigvaris indicates that the subject merchandise was designed for use by patients suffering from CVD to an extent greater than it is intended for use by others. And, while the Court of

International Trade found that the subject merchandise "impart[s] levels of compression that can alleviate CVD symptoms," *id*. at 1332, that fact does no more than establish that the subject merchandise incidentally alleviates certain symptoms in people suffering from CVD. Such incidental benefits do not establish that a product is "specially designed" under the definition that we adopt.

Thus, the subject merchandise is not specially designed for the use or benefit of a specific class of persons. We need not assess, therefore, if the persons who might use the subject merchandise are physically handicapped persons.

Part Four

CUSTOMS VALUATION

Chapter 12

VALUATION METHODOLOGIES[146]

I. Skeletal GATT Article VII Framework

One Customs Law practitioner astutely summarizes the second of the two-part determination of tariff liability, namely, the process of customs valuation that occurs alongside product classification:

> The problem of valuation is inherently difficult. No one solution yields the right answer. Whether it is a taxing authority assessing property, an executor dealing with a family business or a businessman setting the price of a new product, there is simply no one way to determine the "true" value of something. Nor does a "true" value exist somewhere out there – if only we could find it. The problem is compounded in designing a customs valuation code, for the valuation formula must fit every kind of merchandise, every kind of transaction and every country – and still be easy to administer.[147]

Until the Tokyo Round *Valuation Code* (more formally known as the *Agreement on Implementation of Article VII of the General Agreement on Tariffs and Trade*), there was no single framework governing customs valuation methodology among GATT contracting parties. To be sure, GATT Article VII:2(a) states that duty should be assessed on the "actual value" of imported merchandise, not on an "arbitrary or fictitious" value, nor on a value based on the "national origin" of the merchandise.

But, GATT Article VII:2(a) proved to be more of an exhortation than a uniform standard. The definition of "actual value" in Article VII:2(b) is somewhat ambiguous and manipulable. Little specific guidance for customs officials is found elsewhere in Article VII. In addition to this GATT provision, a Brussels Definition of Value existed and was used by roughly 100 nations. Neither the U.S. nor Canada followed the Brussels Definition. They maintained their own valuation systems.

II. Pre-Uruguay Round Protectionist Disharmony Exemplified by American Selling Price Method

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146 Documents References:
(1) *Havana (ITO) Charter* Articles 33, 35-37
(2) GATT Article VII
(3) WTO *Customs Valuation Agreement*
(4) *NAFTA* 1.0 Chapter 5, *USMCA* Chapter 7
(5) Relevant provisions in other FTAs

147 Saul L. Sherman, *Reflections on the New Customs Valuation Code*, 12 LAW & POLICY IN INTERNATIONAL BUSINESS 119 (1980). [Hereinafter, *Reflections*.]

Until the *Trade Agreements Act of 1979*, which **i**mplemented the Tokyo Round *Valuation Code*, the valuation system the U.S. used was particularly complex. Two separate valuation standards existed side-by-side. The first system, called the "old" system, was set forth in Section 402a of the *Tariff Act of 1930*, as amended (19 U.S.C. § 1402). (This section was repealed by Section 201(b) of the *Trade Agreements Act of 1979*). It established a hierarchy of valuation methods, namely,

(1) Foreign Value (which is based on the value of merchandise sold in foreign markets) or Export Value, whichever is higher,
(2) United States Value, and
(3) Cost of Production.

The old system also called for the use of the American Selling Price to appraise certain designated articles like benzenoid chemicals and footwear.

The ASP method was not based on the value of the imported product, but rather on the value of a domestically produced product. The ASP was used because the U.S. Tariff Commission (the ITC's predecessor) and the President found that "the statutory duties did not equalize the difference in cost of production between the domestic and foreign producer of like or similar articles."[148] Thus, the ASP was a blatantly protectionist effort to eliminate comparative cost advantages in certain industries.

In the early 1950s, the Treasury Department attempted to eliminate Foreign Value as a basis of appraisement because Export Value data were more readily available. Moreover, by eliminating Foreign Value, the valuation process would be streamlined. There would be no need to determine simultaneously Foreign Value and Export Value in order to ascertain which is the higher figure. As a result, Congress enacted the *Customs Simplification Act of 1956*. The *1956 Act* created the "new" law, codified in Section 402 of the *Tariff Act of 1930*, as amended (19 U.S.C. § 1401a). The Foreign Value was eliminated, and Export Value was the primary basis of appraisement. The United States Value, and Cost of Production, renamed "Constructed Value," remained the first and second alternative standards, though their definitions were altered.

The key effect of the new law was the reduction in duties for many articles. Congress was unwilling to apply the new law to all imported articles. The Treasury Secretary prepared a list of those articles which, if appraised under the new law, would be valued at 95% or less of the amount at which they had been valued under the old law, *i.e.*, a list of articles whose dutiable value was reduced by 5% or more as a result of the new law. The so-called "Final List" was published on 20 January 1958 in Treasury Decision 54521. All articles on the Final List continued to be appraised under the old law.

In sum, after the *1956 Act*, there were nine separate bases for customs valuation: five under the old law (Foreign Value, Export Value, United States Value, Cost of Production and ASP), which applied to articles on the Final List, and four under the new law (Export Value, the modified United States Value, the modified Constructed Value and

[148] *Reflections*, footnote 13 at 123.

ASP), which applied to articles not on the Final List. Not only was this customs valuation system complex, but also it was unique. America's system differed from methodologies used by other countries. Further, the ASP irked many of America's trading partners:

> The most immediate and controversial of these factors [that led to the adoption of a uniform code on valuation during the Tokyo Round] was the elimination of the bitterest legacy left in the wake of the Kennedy Round – the American Selling Price (ASP) system – which arose out of a valuation provision in the U.S. *Tariff Act*. [19 U.S.C. Sections 1336(a) and (b), 1401a(a)(4) and (e), and 1402(a)(4) and (g) (1976).] This debacle, more than any other single factor, placed valuation in the limelight during the earliest days of the Tokyo Round. [According to the ASP,] the value of the imported product is measured by the price of the competing domestic product. In other words, the importer's duty value is set by his (usually high-priced) domestic competitor. Europeans, whose chemical industry was the prime target of ASP, found this approach offensive in principle, and the issue generated a great deal of emotion during the Kennedy Round negotiations (1964-67). The parties to that Round reached a side agreement on ASP, under which tariff rates on the affected products were to have been increased substantially in exchange for the abolition of ASP and reversion to the usual valuation standards. Protectionist forces in the United States were so strong, however, that this side agreement was never presented to Congress for a vote, and ASP continued as before.
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> By 1975, however, the emotional sting had been taken out of the ASP issue. The U.S. chemical industry was ready to accept the demise of ASP, seeking only compensatory duty rate adjustments. The industry apparently realized only after that it was too late to reverse gears that the side agreement rejected in 1967 had entailed so large a compensatory rate increase that it probably would have been better to accept it and drop ASP. In addition, structural changes in both domestic and foreign chemical companies made ASP less beneficial to the domestic industry. Perhaps most important, ASP was a rather outrageous protectionist device and simply could not be expected to survive another round of GATT negotiations.
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> …
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> The elegant strategy for dispatching ASP adopted by the European negotiators was to call for a uniform international code on customs valuation. ASP was such an inappropriate system that no one could seriously suggest that it be applied universally under an international agreement. Thus, the *Valuation Code* was designed largely to give ASP a decent burial….[149]

Thus, the Tokyo Round *Valuation Code* marked the demise of ASP, and the harmonization of valuation standards.

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149 *Reflections*, 123-124.

III. Uruguay Round Harmonization with *Customs Valuation Agreement*

The Uruguay Round *Agreement on Implementation of Article VII of the General Agreement on Tariffs and Trade 1994* (*Agreement on Customs Valuation*) is virtually identical to the 1979 Tokyo Round Code. So, no change in U.S. statutes or CBP regulations were needed to implement the *Agreement*. The *Agreement* augurs greater uniformity in valuation methodology, but not necessarily uniform values. The aim of the *Agreement*, like its predecessor, is to ensure that different customs officials in the WTO Members use the same approach to determine the value of an article for purposes of applying a tariff. The goal is not to ensure that they always reach the same value with respect to a given article.

A variety of economic factors may cause the price of a particular article, in dollar terms, to vary from one country to another, and from one week to the next. For example, an exporter in Country A may sell an article to a unrelated company in Country B and to an affiliate in Country C. The price of the article paid by the two companies is likely to differ. The *Nissho Iwai* case raises this point. Related-party transactions may call for a different valuation methodology from the one used for arms-length sales. Related parties are broadly defined (in 19 U.S.C. § 1401a(g)) to include:

(1) members of the same family;
(2) partners;
(3) an employer and employee;
(4) an officer or director of an organization and such organization;
(5) an officer and director of an organization and an officer or director of another organization if each individual is an officer or director in the other organization;
(6) any person (including a corporation, partnership or other business association) that directly or indirectly owns, controls or holds with the power to vote, 5% or more of the outstanding voting stock of any organization and such organization; and
(7) two or more persons directly or indirectly controlling, controlled by, or under common control with, any person.

Foreign exchange rates are another example of why valuations may differ. These rates change not just from week to week, but from minute to minute. This volatility may affect the dollar-denominated price of an article. Note carefully the currency conversion rules.

Finally, and perhaps most importantly, valuations can differ simply because an exporter may charge different prices for its product in different countries. After all, distinct local market conditions lead to differential pricing strategies for the same product sold in multiple countries. Anyone who has purchased a Big Mac at McDonald's franchises in different countries is aware of this phenomenon.

IV. Valuation Method 1: Transaction Value

Below the CBP explains the four standard methods of valuation it employs.[150] These methods are consistent with the WTO *Customs Valuation Agreement*. But, what happens if none of the standard methodologies can be used for a particular shipment of merchandise?

The answer is appraisal occurs based on one of the standard methods. CBP makes reasonable adjustments, as necessary, to that method. Moreover, appraisal is based to the greatest extent possible on previously determined values.

For example, CBP may

(1) interpret flexibly the requirement that identical or similar merchandise be exported at or about the same time as the merchandise being appraised,
(2) look to a third country, other than the country of exportation, as a basis for valuation, or
(3) consider prior appraisals of identical or similar merchandise using deductive or computed value.

What facts and circumstances might lead to the need to improvise?

U.S. CUSTOMS AND BORDER PROTECTION, *IMPORTING INTO THE UNITED STATES, A GUIDE FOR COMMERCIAL EXPORTERS* 84-90 (NOVEMBER 2006)

The entry filer is responsible for using reasonable care to value imported merchandise and provide any other information necessary to enable the CBP officer to properly assess the duty and determine whether any other applicable legal requirement is met. The CBP officer is then responsible for fixing the value of the imported merchandise. The valuation provisions of the *Tariff Act of 1930* are found in section 402, as amended by the *Trade Agreements Act of 1979*. …

Generally, the customs value of all merchandise exported to the United States will be the transaction value for the goods. If the transaction value cannot be used, then certain secondary bases are considered. The secondary bases of value, listed in order of precedence for use, are:

- Transaction value of identical merchandise,
- Transaction value of similar merchandise,
- Deductive value,
- Computed value.

The order of precedence of the last two values can be reversed if the importer so requests in writing at the time of filing the entry. …

[150] Note no tariff is assessed by CBP if the merchandise is valued at or below a *de minimis* threshold, which the 2015 *TFTEA* increased from $200 to $800. Congress agreed to the increase so as to reduce paperwork burden on CBP and facilitate cargo movement.

Transaction Value [Elements]

The transaction value of imported merchandise is the price actually paid or payable for the merchandise when sold for exportation to the United States, plus amounts for the following items if they are not included in the price:

- The packing costs incurred by the buyer,
- Any selling commission incurred by the buyer,
- The value of any assist,
- Any royalty or license fee that the buyer is required to pay as a condition of the sale,
- The proceeds, accruing to the seller, of any subsequent resale, disposal, or use of the imported merchandise.

The amounts for the above items are added only to the extent that each is not included in the price actually paid or payable and information is available to establish the accuracy of the amount. If sufficient information is not available, then the transaction value cannot be determined and the next basis of value, in order of precedence, must be considered for appraisement. …

Packing costs consist of the cost incurred by the buyer for all containers and coverings of whatever nature and for the labor and materials used in packing the imported merchandise so that it is ready for export.

Any selling commission incurred by the buyer with respect to the imported merchandise constitutes part of the transaction value. Buying commissions do not. A selling commission means any commission paid to the seller's agent, who is related to or controlled by, or works for or on behalf of, the manufacturer or the seller.

The apportioned value of any assist constitutes part of the transaction value of the imported merchandise. First the value of the assist is determined; then the value is prorated to the imported merchandise.

An assist is any of the items listed below that the buyer of imported merchandise provides directly or indirectly, free of charge or at a reduced cost, for use in the production or sale of merchandise for export to the United States.

- Materials, components, parts, and similar items incorporated in the imported merchandise,
- Tools, dies, molds, and similar items used in producing the imported merchandise,
- Merchandise consumed in producing the imported merchandise,
- Engineering, development, artwork, design work, and plans and sketches that are undertaken outside the United States.

"Engineering…," will not be treated as an assist if the service or work is:

- Performed by a person domiciled within the United States,
- Performed while that person is acting as an employee or agent of the buyer of the imported merchandise, and
- Incidental to other engineering, development, artwork, design work, or plans or sketches undertaken within the United States.

In determining the value of an assist, the following rules apply:

- The value is either: (a) the cost of acquiring the assist, if acquired by the importer from an unrelated seller, or (b) the cost of the assist, if produced by the importer or a person related to the importer.
- The value includes the cost of transporting the assist to the place of production.
- The value of assists used in producing the imported merchandise is adjusted to reflect use, repairs, modifications, or other factors affecting the value of the assists. Assists of this type include such items as tools, dies, and molds.

For example, if the importer previously used the assist, regardless of whether he acquired or produced it, the original cost of acquisition or of production must be decreased to reflect the use. Alternatively, repairs and modifications may result in the value of the assist having to be adjusted upward.

- In case of engineering, development, artwork, design work, and plans and sketches undertaken elsewhere than in the United States, the value is:

    1. The cost of obtaining copies of the assist, if the assist is available in the public domain,
    2. The cost of the purchase or lease, if the assist was bought or leased by the buyer from an unrelated person,
    3. The value added outside the United States, if the assist was reproduced in the United States and one or more foreign countries.

So far as possible, the buyer's commercial record system will be used to determine the value of an assist, especially such assists as engineering, development, artwork, design work, and plans and sketches undertaken elsewhere than in the United States.

Having determined the value of an assist, the next step is to prorate that value to the imported merchandise. The apportionment is done in a reasonable manner appropriate to the circumstances and in accordance with generally accepted accounting principles. By the latter is meant any generally recognized consensus or substantial authoritative support regarding the recording and measuring of assets and liabilities and changes, the disclosing of information, and the preparing of financial statements.

Royalty or license fees that a buyer must pay directly or indirectly as a condition of the sale of the imported merchandise for exportation to the United States will be included in the transaction value. Ultimately, whether a royalty or license fee is dutiable will depend on whether the buyer had to pay it as a condition of the sale and to whom and under what circumstances it was paid. The dutiable status will have to be decided on a case-by-case basis.

Charges for the right to reproduce the imported goods in the United States are not dutiable. This right applies only to the following types of merchandise:

- Originals or copies of artistic or scientific works,
- Originals or copies of models and industrial drawings,
- Model machines and prototypes,
- Plant and animal species.

Any proceeds resulting from the subsequent resale, disposal, or use of the imported merchandise that accrue, directly or indirectly, to the seller are dutiable. These proceeds are added to the price actually paid or payable if not otherwise included.

The price actually paid or payable for the imported merchandise is the total payment, excluding international freight, insurance, and other c.i.f. charges, that the buyer makes to the seller. This payment may be direct or indirect. Some examples of an indirect payment are when the buyer settles all or part of a debt owed by the seller, or when the seller reduces the price on a current importation to settle a debt he owes the buyer. Such indirect payments are part of the transaction value.

However, if a buyer performs an activity on his own account, other than those that may be included in the transaction value, then the activity is not considered an indirect payment to the seller and is not part of the transaction value. This applies even though the buyer's activity might be regarded as benefiting the seller; for example, advertising.

Exclusions

The amounts to be excluded from transaction value are as follows:

- The cost, charges, or expenses incurred for transportation, insurance, and related services incident to the international shipment of the goods from the country of exportation to the place of importation in the United States. [These foreign inland freight, and related charges, must be identified separately.]

- Any reasonable cost or charges incurred for:

  1. Constructing, erecting, assembling, maintaining, or providing technical assistance with respect to the goods after transportation into the United States, or
  2. Transporting the goods after importation.

- The customs duties and other federal taxes, including any federal excise tax, for which sellers in the United States are ordinarily liable.

…

Limitations

The transaction value of imported merchandise is the appraised value of that merchandise, provided certain limitations do not exist. If any of these limitations are present, then transaction value cannot be used as the appraised value, and the next basis of value will be considered. The limitations can be divided into four groups:

- Restrictions on the disposition or use of the merchandise,
- Conditions for which a value cannot be determined,
- Proceeds of any subsequent resale, disposal or use of the merchandise, accruing to the seller, for which an appropriate adjustment to transaction value cannot be made,
- Related-party transactions where the transaction value is not acceptable.

The term "acceptable" means that the relationship between the buyer and seller did not influence the price actually paid or payable. Examining the circumstances of the sale will help make this determination.

Alternatively, "acceptable" can also mean that the transaction value of the imported merchandise closely approximates one of the following test values, provided these values relate to merchandise exported to the United States at or about the same time as the imported merchandise:

- The transaction value of identical merchandise or of similar merchandise in sales to unrelated buyers in the United States,
- The deductive value or computed value for identical merchandise or similar merchandise.

The test values are used for comparison only, they do not form a substitute basis of valuation. In determining whether the transaction value is close to one of the foregoing test values, an adjustment is made if the sales involved differ in:

- Commercial levels,
- Quantity levels,
- The costs, commission, values, fees, and proceeds added to the transaction value (price paid) if not included in the price,
- The costs incurred by the seller in sales in which he and the buyer are not related that are not incurred by the seller in sales in which he and the buyer are related.

As stated, the test values are alternatives to an examination of the circumstances of the sale. If one of the test values is met, it is not necessary to examine the circumstances of the sale to determine if the relationship influenced the price.

V. Valuation Method 2: Transaction Value of Identical or Similar Merchandise

U.S. CUSTOMS AND BORDER PROTECTION, *IMPORTING INTO THE UNITED STATES, A GUIDE FOR COMMERCIAL EXPORTERS* 90-91 (NOVEMBER 2006)

When the transaction value cannot be determined, then an attempt will be made to appraise the imported goods under the transaction value of identical merchandise method. If merchandise identical to the imported goods cannot be found or an acceptable transaction value for such merchandise does not exist, then the next appraisement method is the transaction value of similar merchandise. In either case the value used would be a previously accepted customs value.

The identical or similar merchandise must have been exported to the United States at or about the same time that the merchandise being appraised is exported to the United States.

The transaction value of identical or similar merchandise must be based on sales of identical or similar merchandise, as applicable, at the same commercial level and in substantially the same quantity as the sale of the merchandise being appraised. If no such sale exists, then sales at either a different commercial level or in different quantities, or both, can be used but must be adjusted to take account of any such difference. Any adjustment must be based on sufficient information, that is, information establishing the reasonableness and accuracy of the adjustment.

The term "identical merchandise" means merchandise that is:

- Identical in all respects to the merchandise being appraised,
- Produced in the same country as the merchandise being appraised,
- Produced by the same person as the merchandise being appraised.

If merchandise meeting all three criteria cannot be found, then identical merchandise is merchandise satisfying the first two criteria but produced by a different person than the producer of merchandise being appraised.

… Merchandise can be identical to the merchandise being appraised and still show minor differences in appearance.

- *Exclusion*: Identical merchandise does not include merchandise that incorporates or reflects engineering, development, art work, design work, or plans and sketches provided free or at reduced cost by the buyer and undertaken in the United States.

The term "similar merchandise" means merchandise that is:

- Produced in the same country and by the same person as the merchandise being appraised,
- Like the merchandise being appraised in characteristics and component materials,
- Commercially interchangeable with the merchandise being appraised.

If merchandise meeting the foregoing criteria cannot be found, then similar merchandise is merchandise having the same country of production, like characteristics and component materials, and commercial interchangeability but produced by a different person.

In determining whether goods are similar, some of the factors to be considered are the quality of the goods, their reputation, and existence of a trademark.

- *Exclusion*: Similar merchandise does not include merchandise that incorporates or reflects engineering, development, art work, design work, and plans and sketches provided free or at reduced cost to the buyer and undertaken in the United States.

It is possible that two or more transaction values for identical or similar merchandise, as applicable, will be determined. In such a case the lowest value will be used as the appraised value of the imported merchandise.

VI. Valuation Method 3: Deductive Value

U.S. CUSTOMS AND BORDER PROTECTION, *IMPORTING INTO THE UNITED STATES, A GUIDE FOR COMMERCIAL EXPORTERS* 91-94 (NOVEMBER 2006)

If the transaction value of imported merchandise, of identical merchandise, or of similar merchandise cannot be determined, then deductive value is the next basis of appraisement. This method is used unless the importer designates computed value as the preferred appraisement method. If computed value was chosen and subsequently determined not to exist for customs valuation purposes, then the basis of appraisement reverts to deductive value.

Basically, deductive value is the resale price in the United States after importation of the goods, with deductions for certain items. In discussing deductive value, the term "merchandise concerned" is used. The term means the merchandise being appraised, identical merchandise, or similar merchandise. Generally, the deductive value is calculated by starting with a unit price and making certain additions to and deductions from that price.

Unit Price. One of three prices constitutes the unit price in deductive value. The price used depends on when and in what condition the merchandise concerned is sold in the United States.

1. **Time and Condition:** The merchandise is *sold in the condition as imported at or about the date of importation of the merchandise being appraised*.

   Price: The price used is the unit price at which the greatest aggregate quantity of the merchandise concerned is sold at or about the date of importation.

2. **Time and Condition:** The merchandise concerned is *sold in the condition as imported but not sold at or about the date of importation* of the merchandise being appraised.

   Price: The price used is the unit price at which the greatest aggregate quantity of the merchandise concerned is sold after the date of importation of the merchandise being appraised but before the close of the 90th day after the date of importation.

3. **Time and Condition:** The merchandise concerned is *not sold in the condition as imported and not sold before the close of the 90th day* after the date of importation of the merchandise being appraised.

   Price: The price used is the unit price at which the greatest aggregate quantity of the merchandise being appraised, after further processing, is sold before the 180th day after the date of importation.

   This third price is also known as the "further processing price" or "superdeductive."

The importer has the option to ask that deductive value be based on the further processing price.

Under the superdeductive method the merchandise concerned *is not sold in the condition as imported and not sold before the close of the 90th day* after the date of importation, but is sold before the 180th day after the date of importation.

Under this method, an amount equal to the value of the further processing must be deducted from the unit price in determining deductive value. The amount so deducted must be based on objective and quantifiable data concerning the cost of such work as well as any spoilage, waste or scrap derived from that work. Items such as accepted industry formulas, methods of construction, and industry practices could be used as a basis for calculating the amount to be deducted.

Generally, the superdeductive method cannot be used if the further processing destroys the identity of the goods. Such situations will be decided on a case-by-case basis for the following reasons:

- Sometimes, even though the identity of the goods is lost, the value added by the processing can be determined accurately without unreasonable difficulty for importers or for CBP.

- In some cases, the imported goods still keep their identity after processing but form only a minor part of the goods sold in the United States. In such cases, using the superdeductive method to value the imported goods will not be justified.

The superdeductive method cannot be used if the merchandise concerned is sold in the condition as imported before the close of the 90th day after the date of importation of the merchandise being appraised.

Additions. Packing costs for the merchandise concerned are added to the price used for deductive value, provided these costs have not otherwise been included. These costs are added regardless of whether the importer or the buyer incurs the cost. "Packing costs" means the cost of:

- All containers and coverings of whatever nature, and
- Packing, whether for labor or materials, used in placing the merchandise in condition, packed ready for shipment to the United States.

Deductions. Certain items are not part of deductive value and must be deducted from the unit price. These items are as follows:

- Commissions or profit and general expenses. Any commission usually paid or agreed to be paid, or the addition usually made for profit and general expenses, applicable to sales in the United States of imported merchandise that is of the same class or kind as the merchandise concerned, regardless of the country of exportation.

- Transportation/insurance costs.
    - (a) The actual and associated costs of transportation and insurance incurred with respect to international shipments concerned from the country of exportation to the United States, and
    - (b) The usual and associated costs of transportation and insurance incurred with respect to shipments of such merchandise from the place of importation to the place of delivery in the United States, provided these costs are not included as a general expense under the preceding item….

- Customs duties/federal taxes. The customs duties and other federal taxes payable on the merchandise concerned because of its importation plus any federal excise tax on, or measured by the value of, such merchandise for which sellers in the United States are ordinarily liable.

- Value of further processing. The value added by processing the merchandise after importation, provided that sufficient information exists concerning the cost of processing. The price determined for deductive value is reduced by the value of further processing only if the third unit price (the superdeductive) is used as deductive value.

For purposes of determining the deductive value of imported merchandise, any sale to a person who supplies any assist for use in connection with the production or sale for export of the merchandise shall be disregarded.

VII. Valuation Method 4: Computed Value

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The next basis of appraisement is computed value. If customs valuation cannot be based on any of the values previously discussed, then computed value is considered. This value is also the one the importer can select to precede deductive value as a basis of appraisement.

Computed value consists of the sum of the following items:

- The cost or value of the materials, fabrication, and other processing used in producing the imported merchandise,
- Profit and general expenses,
- Any assist, if not included in bullets 1 and 2,
- Packing costs.

Materials, Fabrication, and Other Processing. The cost or value of the materials, fabrication, and other processing of any kind used in producing the imported merchandise is based on (a) information provided by or on behalf of the producer, and (b) the commercial accounts of the producer if the accounts are consistent with generally accepted accounting principles applied in the country of production of the goods.

… If the country of exportation imposes an internal tax on the materials or their disposition and refunds the tax when merchandise produced from the materials is exported, then the amount of the internal tax is not included as part of the cost or value of the materials.

Profit and General Expenses

- The amount is determined by information supplied by the producer and is based on his or her commercial accounts, provided such accounts are consistent with generally accepted accounting principles in the country of production.
- The producer's profit and general expenses must be consistent with those usually reflected in sales of goods of the same class or kind as the imported merchandise that are made by producers in the country of exportation for

export to the United States. If they are not consistent, then the amount for profit and general expenses is based on the usual profit and general expenses of such producers.

- The amount for profit and general expenses is taken as a whole.

Basically, a producer's profit could be low and his or her general expenses high, so that the total amount is consistent with that usually reflected in sales of goods of the same class or kind. In such a situation, a producer's actual profit figures, even if low, will be used provided he or she has valid commercial reasons to justify them and the pricing policy reflects usual pricing policies in the industry concerned.

Under computed value, "merchandise of the same class and kind" must be imported from the same country as the merchandise being appraised and must be within a group or range of goods produced by a particular industry or industry sector. Whether certain merchandise is of the same class or kind as other merchandise will be determined on a case-by-case basis.

In determining usual profit and general expenses, sales for export to the United States of the narrowest group or range of merchandise that includes the merchandise being appraised will be examined, providing the necessary information can be obtained.

If the value of an assist used in producing the merchandise is not included as part of the producer's materials, fabrication, other processing, or general expenses, then the prorated value of the assist will be included in computed value. It is important that the value of the assist not be included elsewhere because no component of computed value should be counted more than once in determining computed value.

… The value of any engineering, development, artwork, design work, and plans and sketches undertaken in the United States is included in computed value only to the extent that such value has been charged to the producer.

The cost of all containers and coverings of whatever nature, and of packing, whether for labor or material, used in placing merchandise in condition and packed ready for shipment to the United States is included in computed value.

Chapter 13

VALUATION CONUNDRUMS[151]

I. Currency Conversion

Intra-day, not to mention inter-day, volatility in FX markets is common. For purposes of customs valuation, and likewise for trade remedy computations (such as dumping margins and subsidization rates), what is the "correct" rate at which to exchange a foreign currency into U.S. dollars? Asked differently, what is the best way to ensure everyday FX risk does not adulterate everyday calculations mandated by International Trade Law?

U.S. CUSTOMS AND BORDER PROTECTION, *IMPORTING INTO THE UNITED STATES, A GUIDE FOR COMMERCIAL EXPORTERS* 84 (NOVEMBER 2006)

The conversion of foreign currency for customs purposes must be made in accordance with the provisions of 31 U.S.C. [Section] 5151(e). This Section states that CBP is to use rates of exchange determined and certified by the Federal Reserve Bank of New York. These certified rates are based on the New York market buying rates for the foreign currencies involved.

In the case of widely used currencies, rates of exchange are certified each day.

The rates certified on the first business day of each calendar quarter are used throughout the quarter except on days when fluctuations of five percent or more occur, in which case the actual certified rates for those days are used. For infrequently used currencies, the Federal Reserve Bank of New York certifies rates of exchanges upon request by CBP. The rates certified are only for the currencies and dates requested.

For CBP purposes, the date of exportation of the goods is the date used to determine the applicable certified rate of exchange. This remains true even though a different rate may have been used in payment of the goods. Information as to the applicable rate of exchange in converting currency for customs purposes in the case of a given shipment may be obtained from a CBP port director.

II. Software, 1984 Decision 4.1, and 2014 Uruguay Proposal

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[151] Documents References:
(1) *Havana (ITO) Charter* Articles 33, 35-37
(2) GATT Article VII
(3) WTO *Customs Valuation Agreement*
(4) *NAFTA* 1.0 Chapter 5, *USMCA* Chapter 7
(5) Relevant provisions in other FTAs

In 1984, the GATT Customs Valuation Committee adopted Decision 4.1, *Valuation of Carrier Media Bearing Software for Data Processing Equipment*, which allowed allowing contracting parties to value software and data based on the cost of the carrier media.[152] Such media include magnetic tapes, CD-ROMs, and DVDs. Software and data are stored on them, and thereby transported across international boundaries. Decision 4.1 said customs officials in the importing country can value software or data simply based on the value of the media in which the software or data are stored. The Committee declared this "Carrier Medium" Rule to be consistent with GATT Article VII.

There were two exceptions to Decision 4.1. First, "software" and "data" excluded cinematic, sound, or video recordings. So, customs authorities could value a film stored on a DVD, or music recorded on a CD, based on the value of that film or music, not the DVD or CD. Second, "carrier medium" did not include integrated circuits or semiconductors, or other devices incorporating such circuits or conductors. That meant customs officials could value a computer chip based on features such as size, speed, and capacity – not simply the cost of the chip.

But, to articulate the Carrier Medium Rule is to realize how outdated it is in light of IT developments since 1984. First, the true value of software and data often is far higher than the pittance it costs for a CD or DVD. Second, the cost of media varied considerably. In May 2014, during meetings of the WTO Committee on Customs Valuation, Uruguay pointed out that software imported on a CD might be valued at $5, but if stored on a USB key, at $1,000. Surely the valuation of the same data should not vary so greatly just because of the media costs. Software trade could be affected adversely based on the medium, which was orthogonal to the aim of Decision 4.1, namely, facilitate this trade.

Uruguay proposed to deal with the second problem by amending the second exception to Decision 4.1: "carrier medium" would include an integrated circuit or semiconductor device presented to customs officials "solely as a means of temporary storage for transfer of data or instructions (software) to data processing equipment in order to be used."[153] Consequently, the officials could value the software and data based solely on the storage medium itself, even if it is a newly developed device like a flash drive. Simply put, the Carrier Medium Rule would cover both old and new media.

Argentina and Mexico supported the Uruguay proposal. Canada, China, the EU, Japan, Philippines, and U.S. called for further study, but were disposed favorably to it.

III. Related Parties and 1992 *Nissho Iwai* Case

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[152] *See* World Trade Organization, *Members Look at Proposal to Update Decision on Customs Valuation of Software*, 12 May 2014, www.wto.org/english/news_e/news14_e/good_12may14_e.htm; Brian Flood, *WTO Customs Committee Considers Update to Software Import Standard*, 31 International Trade Reporter (BNA) 933 (22 May 2014).

[153] World Trade Organization, Committee on Customs Valuation, *Proposal for Updating the "Decision on the Valuation of Carrier Media Bearing Software for Data Processing Equipment" – Revision*, ¶ 3:2, G/VAL/W/241/Rev.1 (2 May 2014), www.wto.org/english/news_e/news14_e/good_12may14_e.htm.

NISSHO IWAI AMERICAN CORP. v. UNITED STATES, UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT, 982 F.2D 505, 506-511 (1992)

Lourie, Circuit Judge:

Nissho Iwai American Corporation (NIAC) appeals from the judgment of the United States Court of International Trade granting the government's cross-motion for summary judgment and counterclaim on NIAC's challenge of a valuation determination by the United States Customs Service. *Nissho lwai American Corp. v. United States*, 786 F. Supp. 1002 (1992). [Omitted is the discussion of the counter-claim.] … [T]he trial Court held that the transaction value of the imported merchandise at issue, as defined in 19 U.S.C. § 140la(b)(1) (1988), was properly based on the price of the sale from the middleman to the ultimate United States purchaser. Because the transaction value in this case must be based on the price of the sale from the foreign manufacturer to the middleman, we reverse the trial court's grant of summary judgment. …

Background

This appeal concerns the proper dutiable value of 205 rapid transit passenger cars imported to the United States from Japan during 1983-1985. The vehicles at issue were imported pursuant to a three-tiered distribution arrangement involving a manufacturer, Kawasaki Heavy Industries Ltd. (KHI), a middleman, Nissho lwai Corporation (NIC), and a purchaser, the Metropolitan Transportation Authority of New York City (MTA). NIC and KHI are independent corporations organized under the laws of Japan. The MTA is a public benefit corporation of the State of New York.

In 1981, NIC and KHI conducted preliminary negotiations regarding the possible manufacture of subway cars by KHI for the MTA. By means of a contract dated March 17, 1982, the MTA agreed to purchase 325 passenger cars from NIAC, a wholly-owned U.S. subsidiary of NIC, for use in the New York City Transit System. Article VI-C of the contract specified that "the passenger cars to be furnished hereunder will be manufactured and produced by Kawasaki Heavy Industries, Ltd., Japan." The contract also stipulated that the vehicles would be manufactured using components from both the United States and Japan. The MTA purchased the cars at the unit price of $844,500 per car as provided in Article VII-A(a) of the contract. On the same day the contract was entered into by the MTA and NIAC, NIAC assigned all of its rights and obligations under the contract to NIC pursuant to Article VI-A. KHI also signed a warranty of performance to the MTA and NIAC on that date.

Pursuant to a contract dated March 23, 1983, NIC placed an order with KHI for the production of the 325 passenger cars subject to the NIC/NIAC-MTA contract of March 17, 1982. Under the KHI-NIC agreement, KHI agreed to manufacture the 325 vehicles in Japan in accordance with the specifications of the NIC/NIAC-MTA contract, said vehicles to be delivered to NIC "FOB, Kobe Japan." ["FOB" is an international contract law term standing for "free on board."] The vehicles manufactured and delivered by KHI were specifically intended for sale to the MTA and could not be used for any other purpose. The payment by NIC to KHI was negotiated to be ¥ [Japanese yen] 80,002,100 per vehicle, plus escalation and change order payments determined under a formula specified in the NIC/NIAC-MTA contract.

The 325 passenger cars subject to the NIC/NIAC-MTA and KHI-NIC contracts were imported in sixteen entries from August 18, 1983 through June 27, 1985. Upon entry, the imported vehicles were classified under item 690.10, Tariff Schedules of the United States (TSUS), dutiable (at the rate in effect at the time of each entry) on the full value of the imported merchandise less the cost or value of products of the United States included in such value pursuant to item 807.00, TSUS. [The HTS took effect on 1 January 1989. Neither party disputed either the applicability of the TSUS or the specific classification thereunder.]

Duties were assessed by Customs on the basis of the "transaction value" of the imported vehicles, as that term is defined in 19 U.S.C. § 140la(b)(1). The transaction value of the first 120 passenger cars (the first eleven entries) was determined on the basis of the KHI-NIC sales price. The entry of those vehicles is not at issue. The remaining 205 cars, however, were appraised by Customs at the price paid by the MTA to NIC/NIAC, less certain deductions which Customs considered appropriate. Specifically, Customs determined that each of the imported vehicles at issue had a dutiable value of "US$542,036.45, per unit less appropriate duties net." Upon making the necessary duty deductions, the final dutiable value per vehicle was assessed at $497,737.61 for vehicles entered in 1983, $500,495.16 for vehicles entered in 1984, and $503,751.17 for vehicles entered in 1985.

On August 4, 1983, NIAC protested Customs' appraisals of the value of the imported merchandise and requested that Customs issue a ruling holding that the dutiable value of the vehicles should be based on the price paid by NIC to KHI. Customs responded that it "was [initially] refraining from issuing a ruling in this case," because the issue whether the KHI-NIC sales price could represent the "relevant sale for exportation to the United States under 19 U.S.C. § 140la(b)(1)" was "involved in a case which [was then] currently pending" before the Court of International Trade. That case was *American Air Parcel Forwarding Co. Ltd. v. United States*, 664 F. Supp. 1434 (1987), … *rev'd sub nom. E.C. McAfee Co. v. United States*, 842 F.2d 314 (Fed. Cir. 1988).

The entries at issue were finally liquidated in December 1985. Customs adhered to its determination that the transaction value of the imported vehicles was represented by the contract price between the MTA and NIC/NIAC. NIAC commenced an action in the Court of International Trade for re-liquidation of the imported vehicles based upon the price paid by NIC to KHI. NIAC argued that this court's decision in *McAfee* mandates that the appraisal of the value of the imported vehicles be based on the price paid by the middleman to the manufacturer, *i.e.*, the KHI-NIC price.

Before the trial court, the parties filed cross motions for summary judgment on the re-liquidation claim. Following the analysis of *Brosterhous, Coleman & Co. v. United States*, 737 F. Supp. 1197 (Ct. Int'l Trade 1990), the court determined that the contract between the MTA and NIC/NIAC "was the contract which most directly caused the goods to be exported to the United States" and thus held that the value of the vehicles was properly based on the NIC/NIAC-MTA contract. …

Discussion

On appeal to this court, NIAC argues that the trial court failed to follow the holding in *McAfee* that the price of the initial sale from the manufacturer to the middleman must be used for appraisal, not the price of the sale from the middleman to the purchaser. …

I. *Transaction Value*

The parties do not dispute that the imported vehicles must be appraised on the basis of "transaction value." The transaction value of imported merchandise is defined in Section 402(b)(1) of the *Tariff Act of 1930*, as amended by section 201 of the *Trade Agreements Act of 1979*, codified at 19 U.S.C. § 140la(b)(1), as the "price actually paid or payable for the merchandise when sold for exportation to the United States," subject to certain additions and deductions as noted earlier. The primary issue here is whether the trial court erred in determining that the NIC/NIAC–MTA contract price is the price actually paid or payable for the imported vehicles when sold for exportation to the United States.

McAfee similarly involved a three-tiered system for distributing custom-made clothing assembled in Hong Kong to purchasers in the United States. Under this system, purchasers' orders for the clothing were taken by a distributor who then contracted with tailors in Hong Kong to produce the clothing. Upon receipt of the completed clothing, the distributor imported the items into the United States and forwarded them to the purchasers. The clothing entries were liquidated pursuant to an assessment of transaction value based on the price to the U.S. purchasers rather than the price paid by the distributor to the Hong Kong manufacturers.

The principal issue addressed by the court in *McAfee* concerned the proper transaction value of the imported merchandise. In resolving that issue, the court in *McAfee* essentially addressed two separate questions: (1) whether the sale between the manufacturer and the middleman involved merchandise that was "for exportation to the United States," and if so, (2) which of the two possible sales prices (*i.e.*, the price paid by the middleman or the price paid by the purchaser) was proper for valuation purposes.

Regarding the first question, the court determined that "[w]here clothing is made-to-measure for individual United States customers and ultimately sent to those customers, the reality of the transaction between the distributors and the tailors is that the goods, at the time of the transaction between the distributors and tailors, are 'for exportation to the United States.'" … Upon concluding that the merchandise sold by the manufacturers to the middleman was made for exportation to the United States, the Court was then faced with deciding which price should be used as the basis for appraising the transaction value.

In addressing that question, the Court found guidance from *United States v. Getz Bros. & Co.*, 55 CCPA 11 (1967), a decision binding upon us in which the determination of transaction value of imported merchandise in the context of a three-tiered distribution was also involved. As the court in *McAfee* succinctly stated:

> [t]he issue in *Getz* was whether valuation of certain plywood should be at the manufacturer's price to a foreign middleman or that middleman's price to the United States customer. Two holdings in that case are significant here. First, a sale need not be to purchasers located in the United States to provide the basis for valuation. Second, *if the transaction between the manufacturer and the middleman falls within the statutory provision for valuation, the manufacturer's price, rather than the price from the middleman to his customer, is used for appraisal.* [Citations omitted.]

McAfee, 842 F.2d at 318. (Emphasis added.). Following the holdings of *Getz,* the Court in *McAfee* held that the transaction value of the imported garments should have been determined on the basis of the Hong Kong tailors' assembly price, rather than on the basis of the price paid by the U.S. purchasers to the distributor.

Although the Court in *McAfee* recognized that "[a] determination that goods are being sold or assembled for exportation to the United States is fact-specific and can only be made on a case-by-case basis" … that caveat pertains specifically to determining whether a certain sales price falls within the statutory definition of transaction value under 19 U.S.C. § 140la(b)(1). However, once it is determined that both the manufacturer's price and the middleman's price are statutorily viable transaction values, the rule is straightforward: the manufacturer's price, rather than the price from the middleman to the purchaser, is used as the basis for determining transaction value. Indeed, the court noted that

> … if the importer establishes that his claimed, lower valuation falls within the statute, the importer is entitled to the benefit of that valuation even though Customs' valuation also satisfies the same statutory requirements. While an argument could be made that Customs should have the option to impose the higher duty in such circumstances, ... precedent is to the contrary.

Id. at 318.

The government argues that the so-called "first sale" rule of *Getz* and *McAfee* should not apply to every case where there is a manufacturer, a middleman, and a purchaser, regardless of the facts involved. We agree. Conceivably, mechanical application of the rule whenever there is a three-tiered distribution system could lead to inequitable results where the manufacturer's price is set artificially low. However, the rule only applies where there is a legitimate choice between two statutorily viable transaction values. The manufacturer's price constitutes a viable transaction value when the goods are clearly destined for export to the United States and when the manufacturer and the middleman deal with each other at arm's length, in the absence of any non-market influences that affect the legitimacy of the sales price. As the government itself recognizes, that determination can only be made on a case-by-case basis. In this case, the vehicles that were the subject of the KHI-NIC contract were manufactured for a specific United States purchaser, the MTA. They were unquestionably intended "for exportation to the United States" and had no possible alternative destination.

At trial, the government argued that the transaction between KHI and NIC did not fall within the statutory definition of transaction value because the sales price negotiated between KHI and NIC was not the product of arm's length bargaining. The trial Court, however, rejected the government's allegations that KHI and NIC were "related parties" under 19 U.S.C. § 140la(g) and that there was no sale for exportation between KHI and NIC. The court determined that the "agreements between NIC and KHI were [not] of a different nature from the foreign transactions in … *Getz* and *McAfee*" ….

On appeal, the government contends that the price paid by NIC to KHI under the KHI–NIC contract cannot represent the correct appraised transaction value of the imported vehicles because that contract did not involve the sale of complete vehicles. According to the government, KHI did not "own" the U.S.-made components found in the imported vehicles and thus the contract between KHI and NIC only involved the sale of the vehicles' Japanese-made components. In support of its position, the government relies on Article 3 of the KHI-NIC contract, which provided that the price negotiated between KHI and NIC of ¥ 80,002,100 per vehicle was subject to change with any change in the quantity of Japanese-made components as compared to U.S.-made components. We reject the government's contention.

Under the KHI-NIC contract, KHI agreed to manufacture 325 rapid transit passenger vehicles in accordance with the contract between NIC/NIAC and the MTA, and NIC agreed to pay for them. Although KHI was required to use a specified quantity of U.S.-made components in the fabrication of the vehicles, that requirement did not render the contract as merely one for the sale of components made in Japan. A breakdown between the Japanese and American content of the vehicles was necessary for purposes of establishing financing credit from the Export-Import Bank of Japan. Any change in the content ratio would have an effect on such credit, and thus the KHI-NIC contract provided for compensatory price adjustments. The government has failed to establish that the use of U.S.-made components in the manufacture of the imported vehicles in any way undermined the legitimacy of the price negotiated between KHI and NIC for the purchase of the completed vehicles or that the sales price did not accurately reflect the price that would exist in a true arm's length transaction.

Accepting that both the manufacturer's price and the middleman's price may serve as the basis of transaction value, the critical issue on appeal here centers upon which price is legally proper. In view of the controlling and binding authority of *McAfee*, we hold that the transaction value of the imported passenger cars at issue must be based on the KHI-NIC contract price.

The trial Court, however, determined that *McAfee* was distinguishable from the instant case and thus did not consider it controlling authority in appraising the transaction value of the imported vehicles. Instead, the court employed the analysis set forth in *Brosterhous* … in determining that the transaction value should be based on the price paid by the purchaser. We agree with NIAC that the trial Court committed reversible error in failing to follow the controlling authority of *McAfee*.

…

The ultimate issue in *McAfee* was whether the assembly price of the imported merchandise, rather than the price paid by the purchaser, should serve as the basis for determining transaction value. Similarly, the critical issue here is whether the sales price paid by NIC to KHI should serve as the basis for appraising the transaction value of the imported vehicles. *McAfee* speaks directly to that question and answers it in the affirmative. That case is not only applicable here, it is dispositive.

In the interest of clarifying the law, we consider it necessary to examine the case of *Brosterhous, Coleman & Co. v. United States* … upon which the trial court relied in reaching its decision. The Court in *Brosterhous* held that where there are two transactions that can be considered to be sales for importation to the United States, "Customs policy is that transaction value should be calculated according to the sale which most directly caused the merchandise to be exported to the United States." …

The U.S. Customs Service issued a seminal ruling in C.S.D. 83-46, 17 Cust. B. 811 (January 21, 1983) in which it stated its position that "the transaction to which the phrase 'when sold for exportation to the United States' refers when there are two or more transactions which might give rise to a transaction value, is the transaction which most directly causes the merchandise to be exported to the United States." … In so ruling, Customs acknowledged that under 19 U.S.C. § 140la(b), as it existed before amendment by the *Trade Agreements Act of 1979*, "it was possible to use as the sale for exportation to the United States for purposes of determining statutory export value a sale from a foreign seller to a foreign buyer, who in turn sold the merchandise to a United States importer." However, Customs departed from that view because the *Trade Agreements Act* replaced "export value" with "transaction value" as the primary basis for valuation. Thus Customs concluded that "[c]ases decided under the prior law are not, therefore, necessarily precedent under the [*Trade Agreements Act*]." …

We reject the Customs Service's rationale as being legally unsound. A similar argument was rejected by the court in *McAfee,* which recognized that "the language of the earlier statute is not significantly different from the … provision of the current statute." … We agree with NIAC that the 1979 amendment did not change the operative language of the statutory provision for valuation which requires that the sale be "for exportation to the United States." Further, we can discern nothing in the legislative history of the 1979 amendment that suggests that Customs, in determining the transaction value of imported merchandise, should undertake an investigation focusing on which of two transactions most directly caused the exportation. The "Customs policy" followed by *Brosterhous* proceeds from an invalid premise. To the extent *Brosterhous* is inconsistent with this court's decision in *McAfee* by requiring a weighing of the relative importance of two viable transactions, it is overruled.

IV. Robust First Sale Program

The "First Sale" Doctrine articulated in the above-excerpted 1992 *Nissho Iwai* case provides importers an opportunity to save on tariff liability in instances in which they order and purchase merchandise in a multi-tiered transaction, that is, deals involving one or more intermediaries. CBP presumes the Transaction Value the importer cites reflects the price actually paid or payable by the importer for the merchandise. So, importers should have a robust First Sale program whereby they can declare as the basis for tariff valuation the (1) price charged for merchandise by its manufacturer, and which in a multi-tiered transaction is paid by a middleman or trading company, as in the *Nissho Iwai* case, not (2) price the importer pays to that middleman or trading company. Because in most instances price (2) will be higher than the price (1), that is, because the first sale price of (1) is lower than the follow-on price of (2), valuation is minimized. In turn, tariff liability is minimized. Simply put, a smart First Sale program reduces the dutiable value of imported merchandise.

Of course, as the Federal Circuit articulated in *Nissho Iwai*, to claim the First Sale price as the Transaction Value for valuation purposes, an importer must show the transaction meets four criteria: (1) *bona fide* sale transaction that (2) is clearly destined for the U.S, (3) occurs at arm's length, and (4) is not distorted by any non-market influence that would affect the legitimacy of the sales price.

In the March 2021 *Meyer* case the CIT reaffirmed these criteria, and in February 2023 the CIT did so again following a remand of the case from the Federal Circuit. At issue was the fourth criterion, because the subject merchandise was produced in China, an NME. So, the CIT questioned whether and how the importer could prove the Chinese-based manufacturer's price could be free from any distortive NME factors. Historically, CBP and Courts applied statutory tests for Transaction Value, such as examining the circumstances of a sale, to determine if merchandise sold by a Chinese manufacturer was at an arm's length. But, they did not delve into possible distortive NME factors. That is, if a U.S. importer purchased goods directly from an unrelated Chinese producer, then CBP and the Courts presumed the price the importer paid was the appropriate customs value under the standard Transaction Value methodology – the authorities did not weigh China's NME status.

V. 2021-2023 *Meyer II, III,* and *IV* Cases, and *Nissho Iwai* First Sale Doctrine in NME Context

Alas, in its controversial March 2021 *Meyer* decision, the CIT looked askance at this presumption, thus casting doubt on the invocation of the First Sale doctrine articulated 29 years earlier in *Nissho Iwai*. *Nissho Iwai* involved Japan, which obviously is a market economy. In *Meyer*, the country of origin for merchandise imported into the U.S. was China. The CIT questioned whether the first sale doctrine is appropriate for use with China. The CIT reasoned that because China is an NME, various non-market factors made it was difficult to discern whether first-sale valuation was valid. The context of the *Meyer* decision (as discussed in other Chapters) is noteworthy: DOC had decided for AD-CVD purposes China was an NME, and America was in the midst of a Trade War with China. In reading this decision, the following synopsis and analysis is useful.

So, too, is the August 2022 decision (excerpted below) of the U.S. Court of Appeals for the Federal Circuit. The Appeals Court set aside the CIT decision that had denied *Nissho Iwai* first sale customs valuation owing to China being an NME. The Court held that under Customs Law, NME status is not indicative of "non-market influences" as between a buyer and seller.

JOHN BREW & MARIA VANIKIOTIS, CROWELL & MORING LLP, *TROUBLE FOR IMPORTERS ON THE "FIRST SALE" HORIZON?*, THE MONTH IN INTERNATIONAL TRADE – MARCH 2021[154]

In *Meyer Corp.*, the Court stated that, given China's status as a non-market economy, the real costs of inputs were suspect. The Court identified concerns regarding market-distortive influences based on, *e.g.*, the lack of financial statements, without which "the Court has no concept of the extent to which the finances of the Meyer group units are truly independent 'silos' of one another, or the extent to which there might have been state influence or assistance to some degree." While the plaintiff, as a subsidiary to its parent corporation, could claim an inability to obtain financial information from the Meyer parent, the court surmised that given that the parent has an interest in a favorable resolution to such matters and is presumed to be forthcoming to provide whatever CBP requires to assist in this resolution, "the fact that in that regard there has apparently been considerable 'resistance' throughout this case to that not-unreasonable discovery request and the 'assistance' that the parent could have provided its subsidiary to address necessary questions with respect to concerns over non-market influences, speaks volumes." The court ultimately ruled that it had doubts as to whether the true value of the price paid or payable at the first sale level had been demonstrated in this case.

Further, the *Meyer Corp.* Court noted that China is a non-market economy and proposed a standard by which companies can establish the absence of non-market influence, for purposes of first sale, by applying tests developed by the U.S. Department of Commerce in the context of … AD cases. Specifically, the Court proposed the factors used for establishing AD rates for specific entities within a non-market economy, *i.e.*, the non-country-wide AD rates. According to the CIT in *Meyer Corp.*, such entities must satisfy the following *de jure* and *de facto* factors to obtain a separate rate in the AD context:

The *de jure* factors are (1) an absence of restrictive stipulations associated with an individual exporter's business and export licenses, (2) any legislative enactments decentralizing control of companies, and (3) other formal measures by the government decentralizing control of companies. Typically considered *de facto* factors include (1) the ability to set export prices independently of the government and without the approval of a

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[154] www.crowell.com/NewsEvents/AlertsNewsletters/all/The-Month-in-International-Trade-March-2021#ITB09.

government authority, (2) the authority to negotiate and sign contracts and other agreements, (3) the possession of autonomy from the government regarding the 'selection' of management, and (4) the ability to retain the proceeds from sales and make independent decisions regarding the disposition of profits or financing of losses.

Notably, while the Court propose[d] the application of these factors as part of the first sale appraisement analysis, these factors are not specifically provided within the customs valuation statute, 19 U.S.C. § 1401a.

The potential impact of *Meyer* on the importing community was of yet, unclear. Judge Aquilino stated that the Appellate Court "could provide clarification" as to the nexus between first sale appraisement and non-market economies. Importers should carefully monitor not only whether this case is appealed and other court cases in this space, but also future determinations by U.S. Customs and Border Protection regarding the eligibility and standard applied for first sale appraisements involving transactions with ties to non-market economies.

MEYER CORPORATION v. UNITED STATES, UNITED STATES COURT OF INTERNATIONAL TRADE, NUMBER 13-00154, SLIP OPINION 21-26 (1 MARCH 2021) (_MEYER II_)[155]

AQUILINO, SENIOR JUDGE:

This test case considers valuation under 19 U.S.C. §1401a of 125 different sets of cookware (pots and pans) imported from the People's Republic of China and the Kingdom of Thailand, a beneficiary developing country ("BDC"). Its focus is (1) the "first sale" rule articulated by *Nissho Iwai America Corp. v. United States*, 982 F.2d 505 (Fed. Cir. 1992); (2) preferential treatment of entries from Thailand under the *Generalized System of Preferences* ("*GSP*"), 19 U.S.C. § 2461 *et seq*.; and (3) whether circular metal "blanks" imported into Thailand from the People's Republic of China ("PRC") underwent a "double substantial transformation" as required by Customs and Border Protection ("CBP") interpretation of the *GSP* for purposes of both of those valuation issues.

[*GSP*, the double substantial transformation test, and the 1985 *Torrington* case are discussed in a separate Chapter; this portion of the *Meyer* case is omitted. Briefly, as the CIT noted in Footnote 1 of the Meyer opinion, "double substantial transformation" means "there first must be substantial transformation of the non-BDC material into a new and different article of commerce, which then becomes "materials produced" that then must be substantially transformed into a new and different article of commerce in order to be *GSP*-eligible. *See, e.g.*, *The Torrington Company v. United States*, 8 CIT 150 (1984), *aff'd*, 764 F.2d 1563 (Fed. Cir. 1985). Meyer sought *GSP* treatment for sets procured through the Thai supply chain because Thailand is a *GSP* BDC. The *Meyer* Court observed:

155 www.cit.uscourts.gov/sites/cit/files/21-26_A.pdf.
Meyer Corporation appealed the CIT decision to the Court of Appeals for the Federal Circuit (CAFC). *See Meyer Corp. v. U.S.*, CAFC Case Number 21-1932 (10 May 2021).

With respect to Meyer's *GSP* claims, in order to be eligible, an imported article must satisfy the following conditions:

> (1) the article must be the 'growth, product or manufacture' of a beneficiary developing country (BDC);
> (2) the article must be imported directly from a BDC into the customs territory of the United States; and
> (3) the sum of (a) the cost or value of the material produced in the BDC plus (b) the direct costs of processing operations performed in the BDC must not be less than 35% of the appraised value of such article at the time of its entry into the customs territory of the United States.

See 19 U.S.C. §2463(a)(2)(A). …

In addition, in order to count towards *GSP* a non-BDC material input as an article that is "produced" in a BDC, the raw material must undergo a double (or dual) substantial transformation. *Torrington Co. v. United States*, 764 F.2d 1563, 1567 (Fed. Cir. 1985). In that case, the appellate court affirmed the trial Court's determination that a dual substantial transformation occurred when wire was first transformed into swages, a separate article of commerce with a "distinctive name, character, or use," and the second substantial transformation occurred when the swages were transformed into needles, another distinctively named article of commerce. *Id*.

A September 2011 CBP Internal Advice Report (IAR) found that the presence of glass lids disqualified the sets from *GSP* eligibility, and that the clad metal discs imported from China that were worked into the finished pots and pans could not be counted as "Thai originating" material for purposes of the 35% requirement under the *GSP*. At an earlier stage in the case, ruling on summary judgment motions, the CIT "concluded that the sets did not appear to be disqualified from *GSP* preferential treatment as a matter of law simply by reason of the presence of non-BDC components among the sets. … 255 F. Supp. 3d at 1358." Following a trial, the Court denied the *GSP* claim, holding: "[B]ased on the applicable law and the evidence adduced at trial, the plaintiff has failed to meet its burden of establishing its entitlement to *GSP* dispensation of duty-free treatment for cookware manufactured by the Thai producer from steel discs obtained from the PRC, because the manufacturing process did not result in a double substantial transformation of them."]

I.

A.

…

The *Nissho Iwai* "first sale" rule requires (1) *bona fide* sales that are (2) clearly destined for the United States (3) transacted at arm's length and (4) absent any distortive nonmarket influences. Whether due to first sale tests being generally applied to transactions from market economy countries, the last consideration has generally been neglected, but it is not irrelevant in the context of this case.

CBP's interpretation of *Nissho Iwai's* first sale rule led it to the following considerations: In order to establish "entitlement" to first sale valuation, an importer needs to provide (1) a detailed description of the roles of each of the parties involved in a multi-tiered transaction and (2) a complete paper trail relating to the imported merchandise that shows the structure of such transaction. … Thus, the same documentation required to establish a *bona fide* sale and an export destined for the United States are applicable for a multi-tiered transaction, even when the parties to that transaction are related.

The valuation statute applies special rules when the buyer and seller are related parties under 19 U.S.C. §1401a(g). *See* 19 C.F.R. §152.103(j), (l)…. These rules state that when parties are related, a sale is at "arm's length" only if (i) an examination of the "circumstances of the sale" of the imported merchandise indicates that the relationship between the buyer and seller did not influence the price actually paid or payable, or (ii) the transaction value closely approximates a test value. 19 U.S.C. §1401a(b)(2)….

These foregoing CBP publications are entitled to a degree of deference. "[T]he well-reasoned views of the agencies implementing a statute constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance … and [w]e have long recognized that considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer." *United States v. Mead Corp.*, 533 U.S. 218, 227-28 (2001)….

Under *Nissho Iwai*, 982 F.2d at 509, Meyer must further establish the absence of any market-distortive influences on the price of the cookware, both for that manufactured in the PRC and for the Thai cookware with components from China. The Court previously took judicial notice of the fact that the PRC is a non-market economy. … 255 F. Supp. 3d at 1361. One method that could be used to establish the absence of PRC non-market influence are the factors used by entities located there to obtain a duty rate other than the country-wide rate established by the U.S. Department of Commerce in antidumping-duty proceedings involving non-market economy participants. *See, e.g.*, *Advanced Tech. & Materials Co. v. United States*, … 885 F. Supp. 2d 1343 (2012).

To obtain a separate rate in that context, an entity must satisfy three *de jure* factors and four *de facto* factors. "The *de jure* factors are (1) an absence of restrictive stipulations associated with an individual exporter's business and export licenses, (2) any legislative enactments decentralizing control of companies, and (3) other formal measures by the government decentralizing control of companies." *Id.*, … 885 F. Supp. 2d at 1347. Typically-considered *de facto* factors include "(1) the ability to set export prices independently of the government and without the approval of a government authority, (2) the authority to negotiate and sign contracts and other agreements, (3) the possession of autonomy from the government regarding the "selection" of management, and (4) the ability to retain the proceeds from sales and make independent decisions regarding the disposition of profits or financing of losses." *Id*.

Further, for viable transaction value, there must be sufficient information available with respect to the amounts of the statutory additions, if any, set forth in 19 U.S.C. §1401a(b)(1):

> The transaction value of imported merchandise is the price actually paid or payable for the merchandise when sold for exportation to the United States, plus amounts equal to –
>
> (A) the packing costs incurred by the buyer with respect to the imported merchandise;
> (B) any selling commission incurred by the buyer with respect to the imported merchandise;
> (C) the value, apportioned as appropriate, of any assist;
> (D) any royalty or license fee related to the imported merchandise that the buyer is required to pay, directly or indirectly, as a condition of the sale of the imported merchandise for exportation to the United States; and
> (E) the proceeds of any subsequent resale, disposal, or use of the imported merchandise that accrue, directly or indirectly, to the seller.

… "If sufficient information is not available, for any reason, with respect to any amount referred to in the preceding sentence, the transaction value of the imported merchandise concerned shall be treated, for purposes of this section, as one that cannot be determined." *Id*.

B.

Plaintiff's papers herein explain that in 2006, having arranged "middleman" procurement by that point to its apparent satisfaction, it sought approval from CBP to appraise the imported sets on the basis of the "first sale" rule between related parties articulated by *Nissho Iwai*. *Se*e 19 U.S.C. §1401a. …

…

In September 2011, [CBP] headquarters transmitted an "internal advice response" ("IAR") to the port. It agreed with the audit findings that Meyer had failed to show its relationship with its suppliers and middlemen had not influenced the prices paid or payable and had been at arm's length. …

…

C.

…

… [At an earlier stage in the case, ruling on summary judgment motions,] [o]n the first sale issue, the Court first noted that the preferred or primary method of appraisal for imported merchandise is "transaction value," see 19 U.S.C. §1401a(b)(1), which is "the price actually paid or payable for the merchandise when sold for exportation to the United States." … 255 F. Supp. 3d at 1359, *citing Luigi Bormioli Corp. v. United States*, 304 F.3d 1362, 1366 (Fed. Cir. 2002).

Also noting that transactions between a related buyer and seller will "normally" be considered acceptable if examination of the circumstances of the sale indicates that the buyer-seller relationship did not influence settling the price actually paid or payable, or, if that price approximates other test values [see 19 U.S.C. §1401a(b)(2)(B); 19 C.F.R. 152.103(l)], the court previously held that CBP had not erred in declining to appraise the sets pursuant to the first sale rule on the basis of the arguments presented. … 255 F. Supp. 3d at 1362.

Observing that *Nissho Iwai* had interpreted §1401a(b)(2)(B) to mean "if the price paid can be determined to have been reached 'at arm's length, in the absence of any non-market influences that affect the legitimacy of the sales price'", *id*., … 255 F. Supp. 3d at 1358 (*quoting Nissho Iwai*, 982 F.2d at 509), the Court concluded that material facts remained in dispute as to both issues, and also (obviously) with respect to the third (unaddressed) issue of whether circular steel "blanks" undergo a double substantial transformation in the manufacture of pots and pans in Thailand, which affects both of the first two issues. The Court thus denied both parties' motions for summary judgment.

With respect to trial of all three issues, to which this opinion applies, the burden remained on the plaintiff to prove its case with respect to each element through a preponderance of the evidence. *See, e.g.*, *Fabil Mfg. Co. v. United States*, 237 F.3d 1335, 1340 (Fed. Cir. 2001), *quoting St. Paul Fire & Marine Ins. Co. v. United States*, 6 F.3d 763, 769 (Fed. Cir. 1993) ("[t]he preponderance of the evidence formulation is the general burden assigned in civil cases for factual matters"). …

… [W]orth noting, perhaps, in light of the relatedness of companies involved in plaintiff's claim of first sale valuation, is that one of the disputes between the parties concerned defendant's attempt at discovery of financial information from Meyer Holdings, the ultimate parent of the Meyer Group.

In accordance with *Nissho Iwai*, the Court's initial opinion was that "financial information pertaining to the parent is also relevant to examining whether any non-market influences affect the legitimacy of the sales price." … 255 F. Supp. 3d at 1358. The parent's financial documents could reveal whether "parental support or guidance has a market-distortive effect on the cost of inputs or of financing", thereby resulting in a "'booked' profit" "unrepresentative of sales or merchandise of the same class or kind that have been made without the distortion of non-market influences." *Id*. The Court further took "judicial notice of the fact that the United States has yet to recognize that the PRC has attained 'market economy' status under Articles 15(a)(ii) and (d) of the PRC's agreement to the World Trade Organization, and thus it presumptively remains a non-market economy in this and other proceedings." *Id*. Accordingly, Meyer has the burden of demonstrating that inputs from the PRC, as well as with respect to the transactions from its producer/seller to its middleman/buyer, were procured at undistorted prices. *See id*.

D.

The following are pertinent facts upon which the parties have agreed, as summarized by the defendant:

1. Meyer Corporation, U.S. (Meyer) is a Delaware corporation with its principal place of business in Vallejo, California and is the importer of record of the merchandise subject to protest and the plaintiff in this case. …
2. Meyer purchases a wide variety of cookware, both in sets and in individual pieces, from overseas affiliates and resells them in the United States for use in the home. It is the exclusive distributor in the United States for all Meyer cookware products. …
3. Meyer Industries, Ltd. (Thai Producer…) is located in Laem Chabang, Thailand and is the producer of the Thai origin goods that are the subject of this proceeding. …
4. Meyer Zhaoqing Metal Products Co., Ltd. (China Producer…) is located in Zhaoqing, China and is the producer of the Chinese origin goods that are the subject of this proceeding. …
5. Meyer Marketing (Macau Commercial Offshore) Co. Ltd. (Meyer Macau or Thai Middleman …) is a corporation located in the Chinese Special Administrative Region of Macau and the middleman purchaser of the goods produced by the Thai Producer. …
6. Meyer Manufacturing Company Ltd. (Meyer Hong Kong or China Middleman) is a corporation located in the Chinese Special Administrative Region of Hong Kong and the middleman purchaser of certain goods produced by the China Producer. …
7. Each of the entities identified in Paragraphs 3-6 is a related party to Meyer within the meaning of 19 U.S.C. § 1401a(g)1)(F). …
8. Meyer International Holdings Ltd. (Meyer Holdings …) is a corporation organized under the laws of the British Virgin Islands and is the parent company of Meyer. …
9. At all times relevant to this proceeding, the Kingdom of Thailand was designated by the President of the United States as a … BDC within the meaning of 19 U.S.C. § 2462(a)(1), also known as a *GSP* country, *i.e.*, a country designated for preference under the *GSP* legislation. …
10. At all times relevant to this proceeding, certain of the Thai merchandise under review was an "eligible article," *i.e.*, the merchandise was classified under a provision of the … HTSUS, which qualified the article for *GSP* treatment if it otherwise met the requirements of the *GSP* statute. …
11. The merchandise was classifiable at entry under Sub-Heading 7323.93.0045 of the HTSUS, the provision for "table, kitchen or household articles … of stainless steel." …
12. Each of the cookware items subject to the set issue was imported as a set of cookware, and the common denominator of each of the sets is that the set includes one or more glass lids made in China, a non-BDC country. …

13. All of the pots and pans constituting the cookware sets that are the subject of the [*GSP*] set issue were manufactured by the Thai Producer. …
14. The glass lids in the sets referenced in preceding paragraphs 12 and 13 were produced in China and sold to the Thai Producer, but the glass lids themselves were not substantially transformed in Thailand. …
15. The cookware at issue in this case was produced by either the Thai Producer or the China Producer. …
16. The PRC is not recognized by the United States as a "market economy" and is, therefore, considered a non- market economy in this proceeding. …
17. Meyer Holdings is the only shareholder of Meyer. …
18. Meyer, the Thai Producer, the China Producer, Meyer Macau and Meyer Hong Kong are subsidiaries of Meyer Holdings. …
19. Other subsidiaries of Meyer Holdings are in the business of cookware, such as Meyer Cookware Australia Pty Ltd. (distributor), Meyer New Zealand (distributor of kitchenware, which includes cookware, *i.e.*, pots and pans), Meyer UK Limited (distributor), Meyer Europe SRL (manufacturer), Meyer Japan, Meyer Canada Housewares, Inc. (distributor), Meyer Taiwan Limited (distributor), and Meyer Housewares Singapore (distributor). …
20. The subsidiaries listed in paragraph 19 consolidate their financial statements with Meyer Holdings. …
21. The Thai Producer, the China Producer, Meyer Macau, and Meyer Hong Kong consolidate their financials with Meyer Holdings. …
22. Meyer Macau and Meyer Hong Kong occasionally work together. …
23. Meyer Macau sells to Meyer UK Limited, Meyer Cookware Australia Pty Ltd., Meyer New Zealand, Meyer Canada Housewares, Inc., QVC, Costco, Walmart, Meyer Japan, Amway, and WMF (a non-Meyer affiliate and competitor cookware company). …
24. Meyer Hong Kong also sells to Meyer UK Limited, Meyer Cookware Australia Pty Ltd., Meyer New Zealand, Meyer Canada Housewares, Inc., QVC, Costco, Walmart, and Meyer Japan. …
25. The Thai Producer and the China Producer both sell to their domestic markets directly. Docket No. …
26. Meyer Hong Kong owns the Anolon and Circulon brand names. …
27. Meyer Macau owns the exclusive right to the brand name Rachel Ray for cookware, bakeware, tabletops (aka dinnerware, server ware and glassware), gadgets and cutlery for the western hemisphere and some Meyer affiliates have the right to sell with the licensor's consent in UK, South Africa, Ireland and Australia. …
28. Meyer Macau owns the exclusive license for the brand name Paula Deen for cookware, bakeware, tabletops (aka dinnerware, server ware and glassware), gadgets and cutlery for the western hemisphere. …
29. The Rachel Ray and Paula Deen licenses were granted to Meyer Macau plus affiliates, including those like Meyer, that are under the common ownership of Meyer Holdings. …
30. Meyer Macau can sell to U.S. Retailers other than Meyer but only in exchange for a commission it pays to Meyer. …

31. The commissions paid by the middlemen for sales to U.S. retailers other than Meyer vary based on lines and customers. …
32. The Thai Producer and the China Producer purchase some components of their cookware from Meyer affiliates that are direct or indirect subsidiaries of Meyer Holdings. …
33. The Thai Producer also sold cookware to a customer in Vietnam. …

Def[endant's]. Proposed Findings of Fact and Conclusions of Law ….

II.

A.

…

At the conclusion of trial, the Court requested the parties to submit proposed findings of fact and conclusions of law. …

…

IV.

D.

… [T]he defendant argues that the plaintiff has failed to establish that its merchandise should be valued at the price between the manufacturer and the middleman. The applicable law is that imported merchandise must be appraised so that the final amount of duty can be fixed, and by law, Customs is required to appraise imported merchandise in the manner set forth in 19 U.S.C. §1401a. *VWP of Am., Inc. v. United States*, 175 F.3d 1327, 1330 (Fed. Cir. 1999). In a civil action commenced in the Court of International Trade to challenge a CBP appraisal, the agency decision is "presumed to be correct" and the "burden of proving otherwise shall rest upon the party challenging such decision." *VWP* at 1342.

The primary method of valuation is the "transaction value" of the merchandise provided for under 19 U.S.C. § 1401a(b). Section 1401a(b) provides that the transaction value of imported merchandise "is the price actually paid or payable for the merchandise when sold for exportation to the United States," plus specified additions.

In a multi-tiered transaction, like that at issue in this case, when an importer seeks to use the transaction price paid between a manufacturer/producer and a middleman as the value for appraisement, it must prove through credible and admissible evidence that: (i) a *bona fide* sale occurred; (ii) the sale was for export to the United States; (iii) the transaction was at arm's length; and (iv) all other criteria for the transaction value were met. See 19 U.S.C. § 1401a(b)(1).

Under the *de novo* standard of review applicable here, Meyer must establish every element of its claim. Meyer must prove that "[t]he manufacturer's price constitutes a viable transaction value when the goods are clearly destined for export to the United States and when the manufacturer and middleman deal with each other at arm's length, in the absence of any non-market influences that affect the legitimacy of the sale price." *Nissho Iwai*, 982 F.2d at 509. This standard assumes that the use of transaction value is not otherwise precluded by valuation law. For example, that there are no restrictions on the disposition or use of the merchandise; there are no conditions or considerations for which a value cannot be determined; or there is insufficient information concerning an enumerated statutory addition to the price actually paid or payable.

The defendant points out … the presumption is that transaction value is based on the price actually paid or payable by the importer for the imported merchandise, and the burden is on an importer to rebut this presumption. … Recounting the statutory and regulatory framework … the defendant explains that in addition to *bona fide* sales and sale for export to the United States, the plaintiff at trial was required to establish arm's length transactions….

…

…[T]he defendant proposes findings of fact with respect to two critical aspects of this case as follows:

<u>… Absence of non-market influence on price</u>

1. The PRC is a non-market economy. 255 F. Supp. 3d at 1361.
2. PwC [*i.e.*, PricewaterhouseCoopers, the accounts for plaintiff Meyer] has provided no information addressing the absence of a non-market influence on price in any of the studies it prepared. …
3. PwC does not have information about any potential non-market economy effect for comparable companies. …
4. The Thai Producer receives some raw materials for the manufacture of its cookware from companies in the PRC. …
5. The China Producer is located in the PRC. …
6. Although Mr. Kam [*i.e.*, Kan Ming Kam, a production manager of the stainless steel department at the China producer] testified initially that, as one of the top five managers at the China Producer, he would have knowledge about local, provincial, or national PRC governmental subsidies, he acknowledged that Ken Chan, the general manager of the China Producer, not he, would know whether there was any type of subsidy from the PRC. …
7. The China Producer does not own the land on which the factory sits but has a right to use the land for a certain period of time. …
8. Mr. Kam testified that he does not know whether any of the Chinese companies that provide water, electricity or other materials used in the production of the China Producer's goods receive subsidies from China at the national, regional, or local levels. …

…

Based on the foregoing, the defendant proposes the following conclusions of law:

… <u>Arm's Length Transaction</u>

…

… <u>Absence of Non-Market Influence on Price</u>

> Meyer has not established that the prices from the China Producer or the Thai Producer to Meyer Hong Kong and Meyer Macau were not influenced by the non-market economy effect of the PRC. Meyer attempted to elicit testimony from Mr. Kam that, although the China Producer is located in the PRC and obtains raw materials from other entities located in the PRC, there is no influence on the China Producer's prices. However, Mr. Kam lacked knowledge to establish such an absence of influence.
>
> Although the Thai Producer receives some raw materials from entities located in the PRC, Meyer did not attempt to establish that the Thai Producer's price was not influenced by prices for materials that themselves were influenced by the non-market economy effect of the PRC.
>
> Finally, Meyer provided no financial information from its parent company, Meyer Holdings, notwithstanding that this Court observed, due to the relatedness of the parties to the transaction, that "financial information pertaining to the parent is also relevant to examining whether any non-market influences affect the legitimacy of the sales price." *Meyer*, 255 F. Supp. 3d at 1361. This Court further noted that the parent's financial documents could reveal whether "parental support or guidance has a market-distortive effect on the cost of inputs or of financing" thereby resulting in a '"booked' profit" "unrepresentative of sales or merchandise of the same class or kind that have been made without the distortion of non-market influences." *Id*.
>
> …

V.

Upon due and lengthy deliberation, the court finds defendant's recital of the facts from trial, above, accurate, and they are hereby adopted as the findings of the court. Plaintiff's proposed findings of fact are not inaccurate, but they do not provide a complete picture of what is necessary to its case for establishing entitlement to first sale valuation.

…

Based on the applicable law and the evidence adduced at trial, the plaintiff has also failed to establish that it should be entitled to use the transaction value between the China producer and Meyer Hong Kong or the Thai producer and Meyer Macau ("first sale") for the appraisement of the imported cookware.

Regarding plaintiff's arguments that because Meyer Holdings is an investment holding company without cookware operations, is not a party to any of the transactions between Meyer Hong Kong and the China producer and does not engage in the sale of merchandise of the same class or kind as the China producer, and that the China producer is the appropriate "firm" to analyze under the "all costs plus profit test" …, whether it is true that for the "all costs plus profit" test no CBP regulation requires that the "firm" mentioned in 19 C.F.R §152.103(l)(1)(iii) be the "parent" of the importing party …, costs are obviously critical to that determination, and the real costs of inputs from the PRC are suspect, given its status as a nonmarket economy country.

Even if "true" costs of such inputs could be determined, Meyer Holding presumptively has had the ability to influence the price paid or payable for them, for example by providing its subsidiaries access to credit and capital on terms that are not available to competitors without the same level of bargaining power with creditors, or even at "below market" rates. Without financial statements, the court has no concept of the extent to which the finances of the Meyer group units are truly independent "silos" of one another, or the extent to which there might have been state influence or assistance to some degree. Statutory assists do not encompass financial assistance, of course, but the broader concern here is over market-distortive influence, either with respect to the plaintiff directly or the provision of inputs generally.

The most that plaintiffs' witnesses could testify to was that they were unaware of any such assistance, and to a person they flatly denied that the PRC government provided any assistance or influence whatsoever, arguably a dubious proposition. At trial, the defendant only lightly explored the extent to which such considerations might be considered market-distortive. But then again, the defendant never had the ability to probe deeper, in part because it was never provided the financial information it requested in discovery in order to be able to ask or answer probing questions.

The Court understands that the Meyer parent is not subject to this litigation and that the plaintiff, as its "independent" subsidiary, can claim an inability to obtain such information from it. However, given that the parent has an interest in seeing these types of matters resolved favorably, it is therefore presumed to be forthcoming, even unprompted, to provide whatever CBP deems necessary to assist in their resolution, and the fact that in that regard there has apparently been considerable "resistance" throughout this case to that not-unreasonable discovery request and the "assistance" that the parent could have provided its subsidiary to address necessary questions with respect to concerns over non-market influences, speaks volumes.

All of the foregoing leads the Court to doubt that accurate ascertainment of the "true" value of the "price paid or payable" at the first sale level in the customs duty sense has been demonstrated in this case. Whether the same can be said with respect to the second-level "price paid or payable," *i.e.*, by Meyer itself as importer, the court need not opine, for no party has proposed an alternative method of appraisement in any event. Such matters are best left to the parties in any further negotiations as a result of this opinion.

Second, and more broadly, as a result of its consideration of the issues presented here, this court has doubts over the extent to which, if any, the "first sale" test of *Nissho Iwai* was intended to be applied to transactions involving non-market economy participants or inputs. In that regard, the Court of Appeals for the Federal Circuit could provide clarification.

Judgment for the defendant will enter accordingly.

…

MEYER CORP., U.S. v. U.S., UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT, SLIP OPINION 2021-1932, 43 F.4TH 1325 (11 AUGUST 2022) (*MEYER III*)[156]

HUGHES, CIRCUIT JUDGE:

This appeal involves two issues related to duties assessed on cookware that Meyer Corporation, U.S. imported. First, Meyer sought duty-free treatment for cookware manufactured in Thailand. Thailand is a beneficiary developing country under the Generalized System of Preferences, so certain products manufactured there with 35% or more Thai inputs are eligible for duty-free treatment. Materials imported to Thailand from other countries must undergo a "double substantial transformation" in Thailand to count toward the 35%. The United States Court of International Trade ruled that Meyer's pots and pans manufactured in Thailand are not eligible for duty-free treatment because they were made of steel discs from China that underwent only one substantial transformation. The Court of International Trade did not clearly err in finding only one substantial transformation, so we affirm.

[In reading the Part I of the Court's opinion below, note the basic parameters of *GSP* BDC status, and return to this portion of the case when studying, in a separate Chapter, the *GSP* system.]

Second, Meyer sought to establish the dutiable value of its cookware using the "first-sale" price from affiliated manufacturers to affiliated distributors. Relying on language from our decision in *Nissho Iwai American Corp. v. United States*, 982 F.2d 505 (Fed. Cir. 1992), the Court of International Trade required Meyer to prove that these first sales were not only at arm's length but were also unaffected by China's status as a nonmarket economy. Finding that Meyer did not prove the absence of "nonmarket influences" for its cookware imported from China or produced with Chinese inputs, the trial court did not allow Meyer to rely on its first-sale prices. The trial Court misinterpreted Nissho Iwai to impose a requirement beyond what the statute and regulations demand, so we vacate and remand for the trial court to reconsider whether Meyer may rely on its first-sale prices.

Background:

This appeal concerns duties that U.S. Customs and Border Protection assessed on cookware imported by Meyer Corporation, U.S. (Meyer). Some cookware was manufactured in Thailand, and some was manufactured in China.

Each piece of cookware manufactured in Thailand began as a steel disc imported from China. In Thailand, the manufacturer used a deep drawing process to produce "shells" having the rough shape and size of the finished cookware. Then, the manufacturer turned the shells into finished cookware in a series of steps including trimming the edges,

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[156] https://cafc.uscourts.gov/opinions-orders/21-1932.OPINION.8-11-2022_1990690.pdf. (Footnotes omitted.)

removing grease, polishing, flattening the bot- tom, wrapping in plastic, marking with the product's specifications, punching holes for the handle, and attaching the handle.

The manufacturers in Thailand and China sold finished cookware to distributors in Macau and Hong Kong, respectively, and then to the U.S. importer, Meyer. The manufacturers, distributors, and importer are all related, with common parent/shareholder Meyer International Holdings, Ltd.

Meyer requested duty-free treatment for the cookware produced in Thailand, based on Thailand's status as a beneficiary developing country under the *Generalized System of Preferences*. *Meyer Corp., U.S. v. United States*, No. 13-00154, 2021 WL 777788, at *3 (Ct. Int'l Trade Mar. 1, 2021) (Decision). Meyer also asked Customs to value its cookware based on the first-sale price that its affiliated distributors paid to the manufacturers. *Id*. Following an audit, Customs ultimately denied duty-free treatment. *Id*. at *4; Summons at 2, *Meyer Corp., U.S. v. United States*, No. 13-00154 (Ct. Int'l Trade Apr. 16, 2013), ECF No. 1. Customs also assessed duties based on the second-sale price that Meyer paid to its distributors, rejecting Meyer's request to use the first-sale price. Decision at *4; Summons at 2, *Meyer*, No. 13-00154.

Meyer protested Customs' decisions and then appealed to the Court of International Trade. … Following a bench trial, the trial Court ruled that Meyer failed to prove it was entitled to duty-free treatment for the cookware manufactured in Thailand. … It explained that under *Torrington Co. v. United States*, 764 F.2d 1563, 1567 (Fed. Cir. 1985), raw materials from non- beneficiary developing countries must undergo a "double substantial transformation" in the beneficiary developing country to count toward duty-free treatment. … It found that Meyer had shown that the manufacturer substantially transformed steel discs once, "when a flat blank [wa]s deep drawn into a shell that [wa]s an unfinished pot or pan." … But, in the trial Court's view, the manufacturer did not substantially transform the input a second time by converting the shell into a finished pot or pan. … Further, the trial court found that Meyer failed to show that an unfinished shell is a "distinct article of commerce" that is "readily susceptible to trade," as Torrington also requires. *Id*. at *38 (citing *Torringto*n, 764 F.2d at 1570). Having found that Meyer failed to satisfy the requirements of *Torrington*, the trial Court concluded that the steel discs could not count toward the value added in Thailand, and thus Meyer failed to prove its cookware was eligible for duty-free treatment. …

The trial Court also affirmed Customs' decision "to deny 'first sale' treatment." Judgment, *Meyer Corp., U.S. v. United States*, No. 13-00154 (Ct. Int'l Trade Mar. 1, 2021), ECF No. 187. It held that, under our decision in Nissho Iwai, an importer wishing to rely on the first-sale price bears the burden to show that the first sales were "(1) bona fide sales that are (2) clearly destined for the United States (3) transacted at arm's length and (4) absent any distortive nonmarket influences." Decision at *1, *5 (citing *Nissho Iwai Am. Corp. v. United States*, 982 F.2d 505 (Fed. Cir. 1992)). The trial Court suggested that Meyer could prove the absence of nonmarket influences with "the factors used by entities located [in China] to obtain a duty rate other than the country-wide rate" in antidumping proceedings. *Id*. at *2. For both Meyer's Chinese-manufactured products and its Thai-manufactured products made in part from Chinese inputs, the trial Court found that Meyer had not provided adequate information to prove that its first sales met the last requirement: that they were free of "market-distortive influence, either with respect to the plaintiff directly or the provision of inputs generally." *Id*. at *6, *51. It thus concluded that Meyer could not rely on the first-sale prices. …

Meyer appeals the trial Court's determinations that its products manufactured in Thailand were not eligible for duty-free treatment and that it could not rely on first-sale prices. We have jurisdiction under 28 U.S.C. § 1295(a)(5).

Analysis:

"We review the Court of International Trade's conclusions of law de novo." *Ford Motor Co. v. United States*, 286 F.3d 1335, 1340 (Fed. Cir. 2002). "Following a trial, we review the Court's findings of fact for clear error." *Id*.

I.

The *Generalized System of Preferences* statute "represents the United States' participation in a multinational effort to encourage industrialization in lesser developed countries through international trade." *Torrington*, 764 F.2d at 1565. Under the [1974 *Trade*] *Act*, the President "prepare[s] a list of beneficiary developing countries" and designates eligible products from those countries. *Id*. (citing 19 U.S.C. § 2462). "A designated product imported from a listed country may enter the United States duty free." *Id*. (citing 19 U.S.C. § 2461).

To be eligible, the sum of "the cost or value of the materials produced in the beneficiary developing country" and "the direct costs of processing operations performed in such beneficiary developing country" must be at least 35% of the appraised value of the article. 19 U.S.C. § 2463(a)(2)(A)(ii).

Regulations define materials "produced in the beneficiary developing country" to include materials imported from other countries but "[s]ubstantially transformed in the beneficiary developing country into a new and different article of commerce." 19 C.F.R. § 10.177(a)(2).

In *Torrington*, we interpreted the statute and regulation to require a "dual transformation." 764 F.2d at 1567-68. A raw material from another country must be substantially transformed once to become an intermediate article "produced in the beneficiary developing country" under 19 C.F.R. § 10.177(a), and then a second time to be considered an input into the final product – rather than the final product itself – under 19 U.S.C. § 2463(a)(2)(A)(ii)(I). *Torrington*, 764 F.2d at 1567-68.

The intermediate article cannot be the output of any arbitrary step in the manufacturing process. Instead, un- der 19 C.F.R. § 10.177(a), it must be an article "of commerce." The "regulation imposes the requirement that the 'new and different' product be commercially recognizable as a different article, i.e., that the 'new and different' article be readily susceptible of trade, and be an item that per- sons might well wish to buy and acquire for their own purposes of consumption or production." *Torrington*, 764 F.2d at 1570.

To find a "substantial transformation," we consider whether "an article emerges from a manufacturing process with a name, character, or use which differs from those of the original material subjected to the process." *Id*. at 1568. "The name element … has received less weight and is considered 'the weakest evidence of substantial transformation.'" *Koru N. Am. v. United States*, 12 C.I.T. 1120, 1126 (1988)….

The trial Court found "no change in character" from a shell to a finished pot or pan. Decision at *37. Analyzing the manufacturing steps after deep drawing, the trial court noted "that there [wa]s no annealing or galvanizing per- formed or any change in chemical composition or mechanical properties." *Id*. (citing *Ferrostaal Metals v. United States*, 11 C.I.T. 470 (1987)). "Nor was there any significant change in shape or form" because "the drawing process g[ave] the article its final form, not the subsequent finishing operations." Id. (citing *Nat'l Hand Tool Corp. v. United States*, 16 C.I.T. 308 (1992), aff'd, 989 F.2d 1201 (Fed. Cir. 1993) (*per curiam*)).

Meyer argues that those specific types of changes are not required; the change in character here is from "producers' goods" to "consumers' goods" as discussed in *Torrington*, 764 F.2d at 1571, and *Midwood Industries, Inc. v. United States*, 64 Cust. Ct. 499, 507 (1970). But Meyer takes references to producers' and consumers' goods out of context. In Torrington and Midwood, the articles changed from "producers' goods" to "consumers' good" because of substantial changes in shape, form, chemical properties, and mechanical properties. *Torrington*, 764 F.2d at 1571 (citing *Midwood*, 64 Cust. Ct. at 504-07). For example, in *Torrington*, creating the consumers' needles from the producers' swages required changing the shape and form by cutting the swage to the right length, adding a hole, and sharpening the tip. … It also involved changing the chemical and mechanical properties by hardening, tempering, and plating the needle. … Because of these changes, the court considered swages to be producers' goods distinct from finished needles.

Here, the trial Court correctly focused its inquiry on manufacturing steps that changed the shape, form, chemical properties, and mechanical properties. It did not clearly err in finding no substantial change in character from the shells to the final product. The trial Court also found "no change in use" because "the use of the [shells] [wa]s predetermined; they w[ould] be finished and used as a specific pot or pan." Decision at *37 (citing *Nat'l Hand Tool*, 16 C.I.T. at 311-12). Meyer argues that the district Court relied on the wrong test to identify a change in use – rather than consider whether each shell's use is predetermined, the court should have considered whether a consumer can use a shell as a pot or pan. The shells have no handles, making them useless as pots and pans, so Meyer argues that adding a handle changes the use.

The trial Court got the test right. In both *Torrington* and *National Hand Tool*, the court considered whether the intermediate article was useful only for producing a specific finished product, not whether it was usable as the finished product. Compare *Torrington*, 764 F.2d at 1566 (finding a change in use because although "the swage is useful solely in the production of sewing-machine needles with a predetermined blade diameter, … the resulting needle may vary in other respects (*e.g.*, eye placement, eye size, and needle length)"), with *Nat'l Hand Tool*, 16 C.I.T. at 311 (finding no change in use because "[e]ach component was intended to be incorporated in a particular finished mechanics' hand tool"). Applying this test, the trial Court found, and Meyer does not now contest, that each shell was meant to be finished into a specific model of pot or pan. Decision at *37.

Although the record does suggest that the article underwent a change in name, that is not dispositive. Both parties called the intermediate article a "'work in progress' shell[]," *id*. at *42, *30-31, or just a "shell," *id*. at *37. The finished product was a pot or pan. But it is unclear from the record whether "shell" is a convenient term adopted for this litigation or for Meyer's internal use, or if instead it is a common term across the industry. Even so, this difference in name, the least important factor, is not enough to show clear error in the district court's conclusion that there was no second substantial transformation. *See Koru*, 12 C.I.T. at 1126.

The trial Court did not clearly err in finding only one substantial transformation. We thus affirm the trial Court's denial of duty-free treatment for the cookware manufactured in Thailand. We need not reach Meyer's argument that it satisfied the separate requirement that the shells be an article of commerce susceptible to sale.

II.

Customs primarily uses the "transaction value" of im- ported merchandise as the dutiable value. 19 U.S.C. § 1401a(a)(1). The transaction value "is the price actually paid or payable for the merchandise when sold for exportation to the United States," plus specified additions. 19 U.S.C. § 1401a(b)(1).

To be viable as a basis for valuation, a transaction must meet the requirements of 19 U.S.C. § 1401a(b)(2), including, for transactions "between a related buyer and seller," that either "an examination of the circumstances of the sale of the imported merchandise indicates that the relationship between such buyer and seller did not influence the price actually paid or payable" or "the transaction value … closely approximates" a test value. 19 U.S.C. § 1401a(b)(2)(B). The corresponding regulation, 19 C.F.R. § 152.103(l)(1), lists ways for Customs to find that the relationship between the buyer and seller did not influence the price, for example, by finding that "the price has been settled in a manner consistent with the normal pricing practices of the industry in question," or that "the price is adequate to ensure recovery of all costs plus a profit which is equivalent to the firm's overall profit."

In *Nissho Iwai American Corp. v. United States*, we addressed which price Customs should use in a multi-tiered import scheme in which all the entities are related – the first-sale price the distributor paid to the manufacturer, or the second-sale price the importer paid to the distributor. 982 F.2d 505, 508-11 (Fed. Cir. 1992). "[O]nce it is deter- mined that both the [first- and second-sale] price[s] are statutorily viable transaction values, the rule is straight- forward: the manufacturer's [first-sale] price, rather than the [distributor's second-sale] price …, is used as the basis for determining transaction value." *Id*. at 509. Our decision elaborated on the meaning of "statutorily viable:" "[t]he manufacturer's price constitutes a viable transaction value when the goods are clearly destined for export to the United States and when the manufacturer and middleman deal with each other at arm's length, in the absence of any non-market influences that affect the legitimacy of the sales price." *Id*.

Here, the trial Court articulated four requirements for a viable transaction under Nissho Iwai, including that the sale be "(3) transacted at arm's length and (4) absent any distortive nonmarket influences." Decision at *1. The court noted that the fourth factor "has generally been neglected" but was relevant here because China "presumptively re- mains a non-market economy in this and other proceedings," *id*. at *1, *6. The court placed the burden on Meyer to prove that the first sale met these requirements, including to prove "the absence of any market-distortive influences" arising in a nonmarket economy. *Id*. at *2, *5-6.

The trial Court misinterpreted our decision in *Nissho Iwai* to require any party to show the absence of all "distortive nonmarket influences." There is no basis in the statute for Customs or the court to consider the effects of a non-market economy on the transaction value. The statute requires only that "the relationship between [the] buyer and seller did not influence the price actually paid or payable." 19 U.S.C. § 1401a(b)(2)(B). This provision concerns effects of the relationship between the buyer and seller, not effects of government intervention, and especially not with government intervention that affects the industry as a whole. Neither Nissho Iwai nor the government's briefing identifies other statutes or regulations that could require Customs or the Court of International Trade to consider whether the goods were sold in a nonmarket economy or were otherwise affected by a nonmarket economy.

When Congress wants to distinguish between market and nonmarket economies in the trade laws, it does so expressly. *E.g.*, 19 U.S.C. §§ 1677b(c), 1671(f)(2), 1677f-1(f)(1) (providing special rules for nonmarket economy countries in antidumping and countervailing duty investigations). Congress has not provided for differing treatment in 19 U.S.C. § 1401a. Further, the trade laws "must be interpreted to be consistent with [international] obligations, ab- sent contrary indications in the statutory language or its legislative history." *Allegheny Ludlum Corp. v. United States*, 367 F.3d 1339, 1348 (Fed. Cir. 2004) (alteration in original) (citation omitted). The General Agreement on Tariffs and Trade (GATT) requires that all Member States be treated equally unless a specific provision authorizes differing treatment. GATT at Art. 1, Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194. The GATT *Valuation Agreement*, on which § 1401a is based, does not distinguish between "market economy" and "nonmarket economy" countries and says that valuations should be made "without distinction be- tween sources of supply." *Agreement on Implementation of Article VII of the General Agreement on Tariffs and Trade 1994* (*Customs Valuation Agreement*), 1868 U.N.T.S. 279 (1994). The trial Court's reading of *Nissho Iwai* creates a risk that Customs will value goods from different countries unequally, even though neither the valuation code nor another specific provision authorizes differing treatment.

With all this in mind, we read *Nissho Iwai* as merely restating the statutory requirements for a transaction value, rather than introducing a new requirement separate from the arm's-length requirement. The decision lays out two requirements, both enumerated in the statute, and then elaborates on the second:

> The manufacturer's price constitutes a viable transaction value when [1] the goods are clearly destined for export to the United States [§ 1401a(b)(1)] and [2] when the manufacturer and the middleman deal with each other at arm's length [§ 1401a(b)(2)(B)], in the absence of any non-market influences that affect the legitimacy of the sales price.

982 F.2d at 509. In context, "nonmarket influences" just refers to influences growing out of the relationship of buyer and seller that distort the "price paid or payable," which Customs must consider under 19 U.S.C. § 1401a(b)(2)(B).

Because the Court of International Trade relied on its misreading of *Nissho Iwai* to reject Meyer's first-sale price, we vacate and remand for the court to reconsider whether Meyer may rely on the first-sale price. We need not reach Meyer's alternative argument that the Court should have subjected Meyer's second-sale price to the same non-market-influences requirement it imposed on the first-sale price.

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For the reasons set forth above, the decision of the Court of International Trade is Affirmed In Part, Vacated in Part, and Remanded.

MEYER CORP. U.S. v. UNITED STATES, UNITED STATES COURT OF INTERNATIONAL TRADE, NUMBER 13-00154, SLIP OPINION 23-13 (9 FEBRUARY 2023) (_MEYER IV_)[157]

Aquilino, Senior Judge

The mandate of the U.S. Court of Appeals for the Federal Circuit (CAFC) having issued pursuant to its decision to remand *supra sub nom*. *Meyer Corp. v. United States*, 43 F.4th 1325, 1333 (2022) ("*Meyer III*"), has led the parties to file papers in regard thereto.

Presumed herein is familiarity with this test case on valuation under 19 U.S.C. §1401a of 125 different sets of pots and pans imported from the People's Republic of China ("PRC") and the Kingdom of Thailand and the extensive record and prior decisions thereon. *See Meyer Corp. v. United States*, … 255 F. Supp. 3d 1348 (2017) ("*Meyer I*") (summary judgment granted in part and denied in part); *Meyer Corp. v. United States*, 45 CIT ___, Slip Op. 21-26 (March 1, 2021) ("*Meyer II*") (opinion after trial; judgment for defendant).

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157 www.cit.uscourts.gov/sites/cit/files/23-13.pdf. (Footnotes omitted.)

The CAFC affirmed the finding that steel discs exported to Thailand from China underwent only one substantial transformation, not two, and that the resultant cookware for the U.S. was thus not entitled to duty-free treatment. *Meyer III*, 43 F.4th at 1330-32. It also vacated and remanded plaintiff-appellant's first-sale claim, stating that "there is no basis in the statute for Customs or the court to consider the effects of a nonmarket economy on the transaction value and require a party to show the absence of all 'distortive nonmarket influences.'" … The CAFC decision goes on to state that 19 U.S.C. §1401a(b)(2)(B) "concerns effects of the relationship between the buyer and seller, not effects of government intervention, and especially not with government intervention that affects the industry as a whole." …

From this Court's perspective, because the purpose of the General Agreements [*sic*] on Tariff and Trade was to promote trade liberalization among market-oriented countries and help spread democratic values that were associated with capitalism, in opposition to fascism and the "Iron Curtain" that was descending on Europe in the aftermath of World War II,1 the fact that the valuation statute presupposes a "market" environment focusing on the individual transaction is unsurprising. [In Footnote 1, the CIT cited *GATT 1947: How Stalin and the Marshall Plan Helped to Conclude the Negotiations*, www.wto.org/english/tratop_e/gatt_e/stalin_marshall_ conclude_negotiations_e.htm.] That was the purpose of the GATT negotiations.

That does not mean, however, the statute as written necessarily contemplates zero distinction between sellers operating in market economies and those operating in nonmarket economies, particularly in view of the judge-made "first sale" rule on the "price paid or payable" of 19 U.S.C. §1401a(b)(1) ("[i]f sufficient information is not available, for any reason, with respect to any amount" necessary to increase the "price actually paid or payable for imported merchandise … by the amounts attributable" to the items listed as (A) through (E) of §1401a(b)(1) (packing costs, selling commissions, assists, royalties, license fees, and, of some import to this case, "the proceeds of any subsequent resale, disposal, or use of the imported merchandise that accrue, directly or indirectly, to the seller"), then the transaction value of the imported merchandise concerned "shall" be treated as one that cannot be determined). [The CIT explained in Footnote 2 that the First Sale Rule "evolved from the prior concept of "export value." *See Tariff Act of 1930* §402(d) (June 17, 1930). It has been maintained by various judicial decisions, even under the current valuation statute. *See, e.g.*, *United States v. S.S. Kresge Co.*, 26 CCPA 349, 352 (1939); *R.J. Saunders & Co. v. United States*, 42 CCPA 55, 59 (1954); *United States v. Getz Bros. & Co.*, 55 CCPA 11 (1967); *E.C. McAfee Co. v. United States*, 842 F.2d 314 (Fed. Cir. 1988); and *Nissho Iwai Am. Corp. v. United States*, 982 F.2d 505 (Fed. Cir. 1992)."] It was the CAFC itself, in fact, which articulated the concept of "the absence of any non-market influences that affect the legitimacy of the sales price" – apart from the language of the statute itself. *See Nissho Iwai Am. Corp. v. United States*, 982 F.2d 505, 509 (Fed. Cir. 1992).

Be that as it has been, the current CAFC panel having, seemingly unequivocally, answered *Meyer II's* earlier question or observation on that point, this court, accordingly, will continue its consideration of the substance of the matter, as developed before, during, and after trial.

I.

The plaintiff commenced this action seeking first-sale treatment for its imported cookware from the PRC, and duty-free treatment under the … *GSP* for certain cookware imported from Thailand, a … BDC. After extensive discovery, the parties cross-moved for partial summary judgment on whether cookware sets containing a non-*de minimis*, non-BDC component could qualify the entire set for *GSP* treatment; and whether Meyer's imported cookware is viably valued at the price between the Thai producer and a middleman (first-sale price), both of which are Meyer related. …

On the set issue, this Court determined that the presence of a non-BDC component in a set would not preclude BDC components from receiving *GSP* treatment, although such treatment would not extend to a non-BDC component. … However, the issue of whether the Thai-made components were entitled to duty-free treatment under the *GSP* was yet to be resolved. In determining whether first-sale could present a viable value for the related entities, this Court found that the government had not waived the issue of Meyer's failure to provide its parent's financial information as requested during discovery. … This Court further held that "[a]ll of the entities relevant to that issue [*i.e.*, dealing at arm's length] are related, and therefore the financial information pertaining to the parent is also relevant to examining whether any non-market influences affect the legitimacy of the sales price." … Finally, after noting that the first-sale-transaction issue revealed disputed material facts, this court required the parties to confer and propose how to proceed. …

Ultimately, a trial was held on the issue of whether certain Thai cookware had undergone double substantial transformation and thus satisfied the requirements for duty-free treatment under the *GSP*, and also the issue of whether the first-sale-transaction price was a viable value for the imported merchandise. Between the *Meyer I* decision and commencement of the trial, Meyer did not amend its discovery responses to include its parent's financial information. Although the plaintiff presented direct testimony from five witnesses at trial, such testimony did not include witnesses from Meyer Manufacturing Company Limited (Meyer Hong Kong) or from Meyer International Holdings Limited (Meyer Holdings), the direct parent company of the plaintiff, the Thai producer, Meyer Macau, Meyer Hong Kong, and the indirect parent of the PRC producer.

After trial, the parties submitted competing findings of fact and conclusions of law. After considering them, this Court concluded that *GSP* treatment was not available for Thai cookware manufactured from steel discs obtained from the PRC because no double substantial transformation of the discs had occurred by the Thai manufacturing process. *Meyer II* at *50.

This Court further held that, "[b]ased on the applicable law and the evidence adduced at trial, the plaintiff has also failed to establish that it should be entitled to use the transaction value between the China producer and Meyer Hong Kong or the Thai producer and Meyer Macau ('first sale') for the appraisement of the imported cookware." *Id*. This Court noted that, for the "all costs plus profit" test, costs are critical and that the costs of the inputs from the PRC are suspect. It also found that "no CBP regulation requires that the 'firm' mentioned in 19 C.F.R. §152.103(l)(1)(iii) be the 'parent' of the importing party." *Id*.

Regardless, even if the costs of inputs were not suspect, this Court observed that the parent company "Meyer Holding[s] presumptively had the ability to influence the price paid or payable for them." *Id*. at *51. Moreover, "[w]ithout financial statements, th[is] Court has no concept of the extent to which the finances of the Meyer group units are truly independent 'silos' of one another, or the extent to which there might have been state influence or assistance to some degree." *Id*. For whatever reason, in vacating and remanding *Meyer II*, the CAFC [in *Meyer III*] does not address these observations.

II.

Facts drive the law. It is not the other way around. Even ignoring the fact that the claimed transaction values involve inputs from a non-market-economy country in the merchandise at issue, this Court still cannot ignore plaintiff's non-responsiveness to defendant's request for information during discovery. The fact that the government herein was not provided with the financial information pertinent to plaintiff's parent company hampered its ability to discern whether or not the parent of the plaintiff provided any form of assistance to reduce costs. As this Court previously observed (here excising any inference of "nonmarket consideration" in accordance with the CAFC opinion):

> Even if "true" costs of such inputs could be determined, Meyer Holding[s] presumptively has had the ability to influence the price paid or payable for them, for example by providing its subsidiaries access to credit and capital on terms that are not available to competitors without the same level of bargaining power with creditors, or even at "below market" rates. Without financial statements, the Court has no concept of the extent to which the finances of the Meyer group units are truly independent "silos" of one another….
>
> The most that plaintiffs' witnesses could testify to was that they were unaware of any such assistance…. At trial, the defendant only lightly explored the extent to which such considerations might be considered [ ] distortive. But then again, the defendant never had the ability to probe deeper, in part because it was never provided the financial information it requested in discovery in order to be able to ask or answer probing questions.
>
> The Court understands that the Meyer parent is not subject to this litigation and that the plaintiff, as its "independent" subsidiary, can claim an inability to obtain such information from it. However, given that the parent has an interest in seeing these types of matters resolved favorably, it is therefore

> presumed to be forthcoming, even unprompted, to provide whatever CBP deems necessary to assist in their resolution, and the fact that in that regard there has apparently been considerable "resistance" throughout this case to that not unreasonable discovery request and the "assistance" that the parent could have provided its subsidiary to address necessary questions …, speaks volumes.
>
> …[T]he foregoing leads the Court to doubt that accurate ascertainment of the "true" value of the "price paid or payable" at the first sale level in the customs duty sense has been demonstrated in this case.

Meyer II at *50-51.

As the defendant points out, the prior analysis shows that plaintiff's failure to provide the financial information requested by it during discovery provided an independent reason as to why Meyer could not demonstrate a true first-sale value absent of influence – not from a nonmarket-economy country *per se* – but the relationships of the related parties. And the plaintiff had been forewarned by the Court's *Meyer I* decision as to the importance of that financial information but chose not to supplement its discovery responses.

Furthermore, "[a]lthough this Court may exercise such discretion to rectify a significant flaw in the conduct of the original proceeding, [t]he purpose of a rehearing is not to relitigate the case." *Tianjin Magnesium Int'l Co. v. United States*, 36 CIT 1698, 1699 (2012)…. As discussed above, an extensive record was developed before this Court. It is more than sufficient for conducting reconsideration now.

Finally, this Court considers that the CAFC's holding of *Nissho Iwai's* "nonmarket influences" as simply referring to influences growing out of the relationship of buyer and seller that distort the price paid or payable, coupled with its "remand for th[is] Court to reconsider whether Meyer may rely on the first-sale price," negates any need for further proceedings now. The plaintiff had more-than-adequate opportunity to make its case for first-sale treatment, and any suggestion now for a retrial is inconsistent with Rule 1 of the USCIT rules to "secure the just, speedy, and inexpensive determination of every action and proceeding."

III.

In view of the foregoing, and given the precision of the CAFC remand quoted above, mandating Customs and Border Protection to acquiesce in plaintiff's plea for liquidation of its merchandise on the basis of its first sale is not warranted, and this Court's judgment entered in *Meyer II* is therefore hereby affirmed.

Part Five

SPECIAL CUSTOMS LAW OPPORTUNITIES

Chapter 14

DRAWBACK[158]

I. Definition

U.S. CUSTOMS AND BORDER PROTECTION, *IMPORTING INTO THE UNITED STATES, A GUIDE FOR COMMERCIAL EXPORTERS* 80-81 (NOVEMBER 2006)

Drawback is a refund of monies – customs duties, certain internal revenue taxes and other fees – that were lawfully collected at the time of importation. [That is, drawback is a refund of a tariff, fee, or tax that was paid on imported merchandise, when that merchandise is used in a product that is exported.] Generally, the amount refundable is 99 percent of the duties or taxes collected on imported merchandise. The Continental Congress established drawback in 1789 [under the first tariff act] to create jobs in the new United States and to encourage manufacturing and exporting.

[Since 1789, drawback has been a mainstay of U.S. Customs Law. However, what is the value of drawback if MFN rates fall through MTNs? Query, too, what effect FTAs and developing country preference schemes have on drawback, if the FTA or *GSP*-type preference establishes DFQF treatment upon importation of merchandise satisfying the pertinent ROO.]

For drawback to be paid, the imported merchandise must be exported or destroyed under CBP supervision after importation.

II. Types

U.S. CUSTOMS AND BORDER PROTECTION, *IMPORTING INTO THE UNITED STATES, A GUIDE FOR COMMERCIAL EXPORTERS* 80-81 (NOVEMBER 2006)

Although Section 1313, Title 19, of the United States Code provides for several types of drawback, there are three primary types of drawback of interest to most importers:

- Manufacturing drawback,
- Unused-merchandise drawback, or
- Rejected-merchandise drawback.

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[158] Documents References:
(1) *Havana (ITO) Charter* Articles 33, 35-37
(2) GATT Article VII
(3) WTO *Customs Valuation Agreement*
(4) *NAFTA* 1.0 Chapter 5, *USMCA* Chapter 7
(5) Relevant provisions in other FTAs

Manufacturing drawback is a refund of duties paid on imported merchandise specifically designated for use in manufacturing articles that are subsequently exported or destroyed. For example: two-inch speakers are imported and are incorporated into a certain model clock radio. The speakers themselves are not altered, just used in the production of a new and different article.

Manufacturing operations to produce the new and different article must take place within three years receipt by the manufacturer or producer of the merchandise. The drawback product must be exported or destroyed within five years from the date of importation. Drawback can be paid on merchandise used to manufacture or produce a different article if it was not the merchandise imported but is commercially interchangeable, *i.e.,* of the same kind and quality, or if it falls under the same eight-digit Harmonized Tariff Schedule number as the merchandise to which it is compared, and the party claiming drawback has had possession of it for three years. This is called "substitution."

Unused-merchandise drawback is a refund of any duty, tax, or eligible fees paid on imported merchandise that is exported or destroyed without undergoing any manufacturing operations and that is never used in the United States. The imported merchandise must be exported within three years of the date it was imported.

Rejected-merchandise drawback is refund of duties on imported merchandise that is exported or destroyed because it:

- Did not conform to sample or specifications,
- Was shipped without the consignee's consent, or
- Was defective at time of importation.

To qualify for rejected-merchandise drawback, the merchandise in question must be returned to CBP custody within three years of the date it was originally released from CBP custody. [Thus, the importer must not have used the merchandise.]

…

… Rejected merchandise drawback was amended in 2004 to permit limited substitution of imported merchandise. The import merchandise on which drawback is claimed must be classified under the same 8-digit HTSUS subheading and have the same specific product indicator (such as a part number, product code or sku) as the merchandise that is exported or destroyed and must have been imported within one year of the export or destruction.

[Must imported merchandise be used in the manufacturing process in the U.S., *i.e.*, incorporated into a finished product that is exported, to support a drawback claim? Obviously, the answer is "no." Congress authorized unused merchandise drawback, also known as *same condition drawback*, in 1980, thereby removing a constraint that had existed in the *Tariff Act of 1930*. Same condition drawback allows for drawback on imported merchandise that is subsequently exported, even though the merchandise was not manufactured into another article. Must exactly the same merchandise, on which an import duty was paid, be exported in order to support a drawback claim? Again, the answer is "no." Section 202 of *Trade and Tariff Act of 1984*, 19 U.S.C. Section 1313(j)(2), essentially allows for *substitution, same condition drawback*, *i.e.*, a refund on merchandise of the same kind or quality as imported merchandise, in effect, fungible articles. However, must a claimant for drawback on substitution, same condition merchandise be the exporter of that merchandise? In other words, must the claimant be in possession of this merchandise? For a case answering "no," see *Central Soya Co., Inc. v. United States*, 761 F. Supp. 133, *aff'd* 953 F.2d 630 (Fed. Cir. 1992).[159]]

III. Commercial Interchangeability, and 2014 *BP Oil Supply* Case

The April 2014 CIT decision in *BP Oil Supply Co. v. United States* illustrates what a producer-importer-exporter must prove to drawback 99% of the duties it paid on imported merchandise where it subsequently exports a domestically-made substitute.[160] From 1994 through 1996, BP Oil Supply imported 41,980,559 barrels of crude oil from Angola, Colombia, Gabon, Nigeria, Venezuela, and Zaire. It paid duties totaling $4,408,000, based on a duty rate of 10.5 cents per barrel of oil. In 1997 and 1998, BP exported exactly the same quantity of crude oil overseas from the Alaskan North Slope. After CBP denied all 27 requests BP filed with it for substitution, same condition drawback of the import duties (as well as merchandise processing fees and environmental taxes), the oil giant sued.

CBP agreed ANS crude oil was "commercially interchangeable" with all Colombian, and some Venezuelan, oil – but not with oil from any other country from which BP had imported. BP pointed to the density of ANS and imported oil using the "API [American Petroleum Institute] gravity" metric: ANS and imported oil from all of the countries were in the same API gravity class. But, the CIT said being in the same density class is not enough to prove commercial interchangeability, even less so given that some refineries could not process ANS crude oil.

The CIT found a second weakness in the BP claim, namely, BP failed to prove the substitute merchandise – ANS oil – was "not used." When BP transported ANS crude oil through the Trans Alaskan Pipeline System, refineries on the route extracted 4%-6% of that oil. They refined it in a distillation tower, thereby extracting diesel oil and jet fuel, and then put the residual product back into TAPS. In TAPS, the residual product commingles with the oil in therein, and the output is exported. So, a small amount of ANS oil is used to make diesel and jet fuel before the output from TAPS is exported as substitute merchandise.

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159 For another case involving substitution drawback, see *Spirit AeroSystems, Inc. v. U.S.,* Court Number 20-00094 (Slip Op. 24-10, 30 January 2024), www.cit.uscourts.gov/sites/cit/files/24-10.pdf. The CIT rejected the statutory construction arguments of the importer concerning the correct interpretation of the basket "Other" provision of HSTUS 8803.30.00.30, and thus denied the importer's claim for unused merchandise substitution drawback with respect to aircraft parts classified in that Sub-Heading.

160 *See* Number 04-00321 (Slip Opinion 14-48, 29 April 2014); Brian Flood, *Trade Court Rejects BP's Motion For Crude Oil Import Duty Refund*, 31 International Trade Reporter (BNA) 799 (1 May 2014).

Chapter 15

PRE-SHIPMENT INSPECTION[161]

I. False Invoicing and Other Incentives for PSI

Closely related to the topics of Customs Classification and Valuation, and to SPS and TBT measures, is the matter of Pre-Shipment Inspection. PSI is:

> an examination, on behalf of a foreign government or other contracting principal, of the quality and quantity of goods exported to that country or principal and an evaluation of whether or not the transaction value of the goods corresponds, within acceptable limits, to the export market price generally prevailing in the country of origin of the goods. The examination is conducted by private inspection companies [known as pre-shipment inspection, or PSI, companies] retained for that purpose by the governments of many developing countries to perform quantity and quality inspections and price comparisons on their imports. These inspections are generally conducted within the country of export [*e.g.*, at a seaport or airport].[162]

Typically, a developing or least developed country employs pre-shipment inspection to check the value of merchandise to be imported into its country to ensure this value corresponds with the value the exporter lists on the invoice to the importer.

A government, and particularly a central bank, of a poor country is especially likely to care about accurate valuation if the country lacks hard currency and the imported merchandise must be paid for in such currency. To obtain hard currency to pay an exporter, an importer in a poor country may be required to apply to the central bank. Because hard currency reserves are precious, the central bank wants to be sure that it does not give the importer any more than necessary to pay for the imports. Pakistan, shortly after testing nuclear devices in May 1998, saw its hard currency reserves at the dangerously low level of two weeks worth of imports.

However, not infrequently in developing countries, the central bank maintains an official exchange rate. The official rate deliberately over-values the local currency relative to the hard currency, to make imports cheap and avoid spending precious hard currency

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161 Documents References:

(1) *Havana (ITO) Charter* Articles 33, 35-37
(2) GATT Articles V, VII-VIII, X
(3) WTO *Agreement on Pre-Shipment Inspection* (*PSI Agreement*)
(4) WTO *Bali Decision on Trade Facilitation*
(5) *NAFTA* 1.0 Chapter 5, *USMCA* Chapter 7
(6) Relevant provisions in other FTAs

162 TERENCE P. STEWART ED., THE GATT URUGUAY ROUND: A NEGOTIATING HISTORY (1986-1992) vol. I, 738-739 (1993).

reserves. Hence, there is a *de facto* dual exchange rate, a higher official rate and a lower unofficial or "black market" rate. This duality creates an arbitrage possibility for importers.

Importers can – and some do, despite the illegality and immorality of the behavior – submit a false invoice to their central bank, *i.e.*, an invoice showing a price for the imported merchandise higher than its true transaction value. If a central bank acts on the false invoice, then it enables the importer to get more hard currency than is needed to pay the exporter. In turn, the importer can sell the hard currency on the black market for its own local currency, and profit from the difference (or spread) between the official and black market rates.

A simple example illustrates the point. Suppose a Pakistani furniture company wants to import small coffee tables from the U.S. The true transaction value of each coffee table is $100, and the official Indian *rupee*-U.S. dollar exchange rate administered by the National Bank of Pakistan (NBP) is 30 *rupees* to the dollar. However, the black market rate is 40 *rupees* to the dollar, thus the NBP rate clearly overvalues the *rupee* by 10 *rupees* per dollar. The Indian importer submits a false invoice to the NBP stating a unit transaction value is $125. Assume the NBP acts on this false invoice.

Accordingly, based on the official exchange rate of 30 *rupees* to the dollar, the importer buys $125 from the NBP at a cost of 3,750 Indian *rupees* for each coffee table it plans to import. The importer then uses $100 of the $125 to pay the American exporter for each table. The importer sells the remaining $25 on the black market at the rate of 40 *rupees* per dollar. The black-market sale garners 1,000 *rupees* for the importer. (If the importer colludes with the exporter to persuade the exporter to provide a false invoice, then possibly the importer will split the 1,000 *rupees* with the exporter.) Thus, the importer bought more dollars from the NBP than needed to pay for the coffee tables using *rupees* at an overvalued rate of 30 *rupees* per dollar, and then sold the excess dollars in the black market for 40 rupees per dollar, pocketing the spread of 10 *rupees* per dollar. Put simply, it bought hard currency from the NBP at a cheap price (in *rupee* terms), and sold hard currency at a higher price (in *rupee* terms) on the black market.[163]

It is precisely this arbitrage that creates an incentive for a developing country government to conduct a PSI. In the above example, inspectors from the government of Pakistan, or a private company it hires, would check the shipment of coffee tables in the U.S., before that shipment leaves for Pakistan, to see if the transaction value really is $125. To be sure, it may be hard for the inspectors to foil a well-planned, well-executed scheme

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[163] Over-invoicing also could be achieved in a slightly different manner. The importer might import merchandise of inferior quality, *i.e.*, the falsity in its invoice might not be the transaction value, but rather the description of the goods being imported. For example, the Pakistani importer might submit an invoice for $125 for small cherry wood coffee tables, which is the correct transaction value for such tables, but in fact intend to import small pine coffee tables at a price of $100. Still another way to over-invoice is to import a smaller quantity of merchandise than is set forth in the invoice. For instance, the Pakistani importer might submit an invoice for $125 for 100 coffee tables, but intend to import only 90 tables. In both of these alternatives, if the NBP accepts the false invoice, the Indian importer will obtain an allocation of U.S. dollars from the NBP in excess of the correct amount due for payment of the shipment to be received from the American exporter.

concocted by the Pakistani importer and American exporter. Nonetheless, given the importance of hard currency to many the treasuries of developing and least developed countries, the PSI effort may be worthwhile.

No doubt the real culprit is the lack of free convertibility of the developing country currency, *i.e.*, the poor country creates the incentive to submit false invoices by its exchange controls. However, the 1997-1999 Asian Economic Crisis illustrates that developing country governments often are resistant to devaluing their currency and, ironically, will spend billions of dollars worth of hard currency reserves to maintain an over-valued peg. The responses of the Thai, Malaysian, Philippine, and Indonesian governments illustrate the point. Thus, until developing countries accept realities in the foreign exchange market with respect to the true value of their currency, pre-shipment inspection is likely to continue.

Significantly, as President Pervez Musharraf (1943-, President, 2001-2008) recounts in his autobiography, *In the Line of Fire – A Memoir* (2006),[164] Pakistan accepted these realities in the late 1990s and early 2000s, liberalizing foreign currency restrictions. Yet, given the overhang of their sovereign debt-servicing obligations initially incurred in the 1970s and 1980s, and denominated in hard currencies, and given their need to import capital equipment, pharmaceuticals, and other items necessary to develop economically and raise living standards, many Third World governments are reluctant to undergo "shock therapy" and let their currencies float freely on the world market.

Certain developing countries may create an incentive for their importers to under-invoice. This incentive arises from very high tariffs owed on imported merchandise. By submitting an invoice with an erroneously low transaction value, the importer may save on its tariff bill. Another way to circumvent the high tariff is to manipulate not the transaction value of imported merchandise, but rather its customs classification. The importer can mis-classify the merchandise in a lower-tariff category. An importer in a developing country with both high tariffs and currency controls undoubtedly will weigh the benefits from over-invoicing (in terms of currency gains) against the benefits from under-invoicing (in terms of duties saved) – and choose the appropriate strategy. Under-invoicing could, of course, trigger a dumping investigation that might result in the imposition of AD duties.

In any event, the incentive to under-invoice and consequent loss of tariff revenue is another reason why a developing country may engage in PSI. Once again, the source of the problem may be government international economic policy. A protectionist tariff regime, coupled with heavy reliance on tariffs for revenue, may create an incentive for non-compliance. (To be sure, as Alfred E. Eckes, Jr., ably points out in *Opening America's Market – U.S. Foreign Trade Policy Since 1776* (1995),[165] the U.S. pursued protectionist policies for much of its early history.)

II. PSI as a Potential NTB

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[164] (New York, New York: Free Press, 2006.)

[165] (Chapel Hill, North Carolina: The University of North Carolina Press, 1995).

Unfortunately for exporters from developed countries, PSI is not necessarily an innocuous matter. Depending on the nature of the inspection procedures, the process can amount to a NTB to trade:

(1) The inspection process may impose administrative costs on developed country exporters. Their personnel need to respond to information requests from the inspectors.

(2) The inspection process may cause delays in shipments. An August 1987 study of pre-shipment inspection programs by the ITC found 40% of shipments subject to PSI were delayed an average of 20 days.[166]

(3) Inspectors may demand confidential or sensitive business information, such as pricing data (*e.g.*, price relationships with suppliers of intermediate products), cost data (*e.g.*, the cost of manufacturing the merchandise to be shipped), or intellectual property material (*e.g.*, documents pertaining to an application for a patent, trademark, or copyright). The inspectors may not be careful with such information.

(4) The methods used by the pre-shipment inspectors may not be transparent. For example, they may reject a claimed transaction value simply because it falls outside of a certain range, but not explain how that range is determined.

(5) The exporter may have no right to appeal a decision of the inspector. If a transaction value is rejected, then it simply may have to live with the rejection.

In an effort to deal with the problem of pre-shipment inspection as a non-tariff barrier to trade, Uruguay Round negotiators reached an *Agreement on Pre-shipment Inspection*.

III. WTO *PSI Agreement*

The *PSI Agreement* is suitably broad in scope. It covers "pre-shipment inspection activities," which Article 1:3 defines as "*all* activities relating to the verification of the *quality*, the *quantity*, the *price*, including currency exchange rate and financial terms, and/or the customs *classification* of goods to be exported to the territory of the user Member [*i.e.*, the WTO Member mandating or contracting for the use of pre-shipment inspection] [Emphasis added.]." The *Agreement* is designed to ensure PSI is reasonable and not an undue interference on legitimate trade. No changes to U.S. law were necessary to implement the *Agreement*. There are five aspects of the *Agreement* worth highlighting.

First, Articles 2:1-8, 3, 5, and 9 are "fairness" provisions. They require, *inter alia*, WTO Members using PSI to employ objective, transparent procedures, and apply these procedures in a non-discriminatory manner with respect to all affected exporters. For

[166] *See* U.S. International Trade Commission, *Pre-shipment Inspection Programs and Their Effects on U.S. Commerce*, ITC Inv. No. TA-332-242, U.S. ITC Pub. 2003 (1987).

instance, exporters must be provided with all information necessary to comply with pre-shipment inspection requirements, relevant laws and regulations must be published before they take effect, and absent an emergency, additional requirements should not be applied unless an exporter is given advance notice. Members engaging in PSI activities must notify the WTO of their laws and regulations immediately after they are published.

Second, Article 2:15-19 seeks to minimize unreasonable delays. In general, the inspection process should be complete within five working days. By the end of this period, the inspector is required to issue either a clean report of its findings, or an explanation as to why it cannot issue such a report. Upon request of the exporter, the inspector must undertake a preliminary verification, and promptly inform the exporter of the results, with respect to the price of the merchandise and applicable exchange rate.

Third, Article 2:9-13 attempts to ensure confidential exporter information is protected. Inspectors are supposed to treat non-public information they receive as confidential, and governments employing private inspection firms must safeguard the information they receive from the firms. Additionally, inspectors should not request an exporter to provide information about manufacturing data, unpublished technical data, internal pricing, manufacturing costs, profits, or (unless required to conduct an inspection) information about contract terms between the exporter and its supplier.

Fourth, Article 2:20 requires inspectors to use a uniform price verification methodology. For example, inspectors must base their price comparisons on the price of identical or similar merchandise offered for export from the same country of exportation under comparable conditions of sale. These comparisons must conform to customary commercial practices, and include any standard discounts or other factors affecting price. It is not permissible for an inspector to base a price comparison on the selling price of merchandise produced in the country of importation, the price of merchandise from a country other than the actual country of exportation, or an arbitrary or fictitious value.

Finally, exporters are given a chance to appeal in writing decisions of pre-shipment inspectors under Article 2:21. The inspectors must establish procedures and designate a local representative to receive, consider, and render prompt decisions on any written appeal or grievance, lodged by an exporter. Under Article 4, grievances that cannot be resolved through the appeals process are to be dealt with through binding arbitration administered jointly by the Independent Entity (created by the WTO in 1996 as a subsidiary body of the Council for Trade in Goods), ICC and International Association of Pre-shipment Inspection Companies. In brief, a three-member arbitral panel is used, with one panelist selected by each side, plus an independent trade expert. Panel decisions must be rendered within eight working days of the request for arbitration, unless the parties agree to extend this deadline.

Chapter 16

TRADE FACILITATION[167]

I. Defining "Trade Facilitation"

● One of Only Three Successful Doha Round Outcomes

GATT Articles V, VIII, and X deal with trade facilitation, covering, respectively, disciplines on traffic in transit, fees and formalities on importation and exportation, and transparency. So, trade facilitation has been squarely within the ambit of the multilateral trade regime since 30 October 1947 when the original contracting parties signed GATT. But, when they did, they left unspecified answers to questions about customs procedures, documentation, information sharing, confidentiality, and penalties.

In the ensuing decades, GATT contracting parties provided their own idiosyncratic responses. Yet, differences across them, coupled with producers exporting to multiple countries and multinational corporations operating global production chains, caused frustration among business constituencies. They sought harmonious, user-friendly, and efficient rules on customs clearance matters.[168] IT that was non-existent in 1947 now put their goal within reach. And, they and their governmental champions pointed out that removing administrative barriers to trade in developing and least developed countries would cut costs and boost shipments among those countries, thereby helping their economies grow.

By April 2009, it appeared a Doha Round deal on trade facilitation might be within reach. The reach proved to be a distant one, as none was struck through 2012. In 2013, WTO Members sought to achieve one, as part of a "deliverables package," for the December 2013 Ministerial Conference in Bali.[169] They almost failed.

The Bali *TFA* is one of just three successful substantive outcomes from the entire Doha Round, the other two being the decision, also reached in Bali, on public stockholding of food for food security purposes, and the amendment to *TRIPs* Article 31 on compulsory licensing, finalized at the December 2005 WTO Ministerial Conference in Hong Kong.

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[167] Documents References:
(1) *Havana (ITO) Charter* Articles 33, 35-37
(2) GATT Articles V, VII-VIII, X
(3) WTO *Agreement on Pre-Shipment Inspection* (*PSI Agreement*)
(4) WTO *Bali Decision on Trade Facilitation*
(5) *NAFTA* 1.0 Chapter 5, *USMCA* Chapter 7
(6) Relevant provisions in other FTAs

[168] *See* World Trade Organization, 9th Ministerial Conference, *Bali, Briefing Note: Trade Facilitation – Cutting "Red Tape" at the Border*, November 2013, www.wto.org.

[169] *See* Daniel Pruzin, *WTO Bali Ministerial Conference Shaping Up as Failure, U.S., Others Warn*, 30 International Trade Reporter (BNA) 554 (18 April 2013); Daniel Pruzin, *U.S. Envoy Says Preparations for Bali Ministerial Conference Slipping*, 30 International Trade Reporter (BNA) 296 (28 February 2013).

- **Definition and Examples**

"Trade facilitation" means simplifying and making more transparent and predictable customs procedures, which can be an NTB to trade, so as to reduce the transactions costs of trade and thereby increase trade flows by speeding up procedures for the clearance and release of merchandise. As with special rules for LDCs, trade facilitation is not an idea emanating from the Doha Round. Rather, at the first WTO Ministerial Conference in 1996, held in Singapore, WTO Members committed themselves to work on trade facilitation.[170]

Examples of such simplification include harmonizing and simplifying documents, generally reducing documentary burdens, cutting fees and charges, allowing electronic submission of documents and payments, setting up a mechanism for advanced rulings on customs matters, designating authorized traders, establishing expedited shipment procedures, and creating single windows. All such improvements aim to make customs clearance more efficient, and customs services more productive. Those aims, if realized, boost competitiveness, trade, and output, and attract FDI. To be sure, some sectors – those directly involved in customs clearance – would benefit greatly. Not surprisingly, for instance, express delivery companies like FedEx champion trade facilitation.[171] But, the potential gains are widespread: all producers seeking market access, and all consumers wanting more choices at cheaper prices, benefit.

II. Why Trade Facilitation Matters

A June 2010 study by the Peterson Institute for International Economics stated that reducing the costs of moving goods across international borders could boost global GDP by over U.S. $100 billion.[172] Additionally, the WTO Director General, Pascal Lamy (1947-), rightly explained in June 2011:

> … implementation of the Trade Facilitation measures discussed in Geneva [*i.e.*, in the Doha Round] could reduce total trade costs by almost 10 percent.
> …
>
> … For OECD countries, it currently takes on average about four separate

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170 *See* World Trade Organization, *Renato Ruggiero, Former Director-General, Dies in Milan*, 5 August 2013, www.wto.org.

171 *See* Daniel Pruzin, *WTO Chief, Chairmen, Cite Progress in Bali Preparatory Talks but Time Running Short*, 30 International Trade Reporter (BNA) 1667 (31 October 2013).

172 *See* Susan C. Schwab, *After Doha – Why the Negotiations Are Doomed and What We Should Do About It*, 90 FOREIGN AFFAIRS 104, 115 (May/June 2011). Ms. Schwab served as USTR from 2006-2009.

The Peterson Institute for International Economics (PIIE) followed up with a June 2013 report, Payoff from the World Trade Agenda 2013. This report said a Doha Round deal covering trade facilitation – along with services, agricultural subsidies, digital trade, DFQF market access for merchandise from LDCs, environmental goods (and services), food export controls – would boost total world GDP by $2 trillion, create export gains of over $2 trillion, and generate 34.1 million export-related jobs around the globe. *See* Rebecca Helm, *Report Outlines Goals for Doha Talks, Cites Payoffs for WTO, World Economy*, 30 International Trade Reporter (BNA) 922 (20 June 2013). By its own admission, the report was optimistic.

> documents and clearing the goods in an average of ten days at an average cost of about $1,100 per container. By contrast, in Sub-Saharan Africa, almost double the number of documents are [*sic*] required and goods take from 32 days (for exports) to 38 days (for imports) to clear at an average cost per container of between $2,000 (for exports) and $2,500 (for imports). The overall world champion at trade facilitation is Singapore, where four documents are required and goods are cleared in, at most, five days at an average cost of around $456 per container. At the other end of the scale are many of the low-income developing countries, in particular the landlocked developing countries, whose trade-processing costs can mushroom as a result of the effort required to move goods in transit by road or rail through their neighbors to their nearest international port. According to recent research, every extra day required to ready goods for import or export decreases trade by around 4%.
>
> Handicapping the world's least competitive producers and poorest consumers with additional transaction costs of $1,000 or more for each container of goods that they manage to export or import is clearly absurd.[173]

Even a 1% improvement in cutting "red tape" and streamlining customs procedures, as measured by an index of indicators for transparency and predictability, can increase trade in industrial goods by 0.7%.[174] The OECD itself chimed in with a May 2013 study showing

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[173] *WTO Trade Facilitation Deal to Reduce Trade Costs and Boost Trade – Lamy*, World Trade Organization, 24 June 2011, www.wto.org (speech of WTO Director General Pascal Lamy to the World Customs Organization, Brussels, Belgium, 24 June 2011).

For a discussion of the lack of trade facilitation to facilitate the movement, clearance, and release of merchandise (*e.g.,* by accelerated transit, final determination of duties, taxes, fees, and charges, pre-arrival processing, post-clearance audits, reduction of duplication of cross-border procedures, risk management, and separation of release) among the 54 *AFCTA* signatory countries, highlighting:

(1) the persistence of NTBs across much of the African continent (noting average tariff protection affecting intra-African trade is 8.7%, but when NTBs, which include complex customs procedures and regulations, corruption, poor transport systems and technology, lack of infrastructure, are accounted for, the effective rate jumps to 283%),

(2) examining the multilateral commitments of these countries under the WTO *TFA* (observing that of the 44 African countries that joined the *TFA*, 26 are developing and 18 are least developed, thus implicating the S&D treatment provisions in the *TFA*, as well as *AFCTA* Article 6 and *AFCTA* Annex 4 Article 29);

(3) comparing the *TFA* commitments to those made in *AFCTA* Annex 4 to the *Protocol on Trade in Goods*; and

(5) concluding *AFCTA* countries need to implement and enforce their existing commitments, particularly those under Annex 4;

see Ismaelline Eba Nguema, *Africa and Trade Facilitation: Overview, Challenges, and Perspectives*, 28 INTERNATIONAL TRADE LAW AND REGULATION issue 1, 1-27 (2022).

[174] *See* World Trade Organization, *Red Tape at Port Costlier than Shipping between Ports: Economists Mull Doha's Value*, 2 November 2010, www.wto.org.

Other studies also evince the particular benefit of trade facilitation to poor countries. The OECD said harmonizing and simplifying documentation would cut trade costs by 3% and 2.7% for low-income and lower-middle income countries, respectively. Comprehensive trade facilitation would cut them for these countries, respectively, by 14.5 and 15.5%. *See* Daniel Pruzin, *Chair Warns WTO Members Will Not Secure Bali Trade Deal if Talks Continue to Drag*, 30 International Trade Reporter (BNA) 406 (21 March 2013).

that a comprehensive, fully-implemented WTO agreement on trade facilitation would cut total trade costs by 10%, and 13-15.5%, in developed and developing countries, respectively.[175] Three moves, in particular, would cause the bulk of these gains: harmonizing trade documents (*e.g.*, manifests); streamlining customs procedures (*e.g.*, pre-processing documents); and issuing advanced rulings on applied tariffs.[176]

In a February 2013 speech to the Chittagong Chamber of Commerce, the WTO Director General updated the statistics on potential gains from a trade facilitation deal.[177] Cutting the cost of trading across borders could save $2 trillion, and doing so by half (*i.e.*, cutting red tape costs by half) could stimulate global GDP by $22 trillion. Further, if the nature of trade barriers is disaggregated, then it becomes apparent that in respect of 15% of the cost of trading across borders, just 5% is from tariffs, and 10% is accounted for by border and customs procedures. Thus (according to a 2013 World Economic Forum study released in connection with the 2013 Davos Summit), reducing barriers to trade in global supply chains would increase world GDP by 6 times more than cutting tariffs alone: focusing on just removing tariffs would boost world GDP by 0.7%, but a 4.7% gain would occur if barriers from customs were eliminated. In turn, focusing only on tariff removal would yield a 10% gain in global trade, but after facilitating trade, the gain would be 14%. Speaking in Chittagong was a good venue to make these points. That Port handles over 90% of the seaborne export and import traffic for Bangladesh, yet is infamous for inefficiency and corruption.

Perhaps the most memorable and persuasive statistics on the importance of trade facilitation came from a 2015 WTO study:

> Trade costs in developing countries are equivalent to applying a 219 per cent *ad valorem* tariff on international trade. Even in high-income countries, the same product would face an *ad valorem* equivalent of 134 per cent in trade cost.[178]

Simply put, red tape and other inefficiencies sum up to worldwide prohibitive tariffs.

Under the April 2009 Doha Round proposed agreement, developing countries would be able to implement immediately between 30 and 50% of the obligations, with no technical assistance required to do so. Implementation of the deal, however, would be part of a single undertaking, meaning the deal was contingent on resolving the agriculture, NAMA, services, and rules issues.[179] The agreement would deal with three articles of GATT that cover transit, fees, and formalities (*i.e.*, paperwork and documentation), and

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175 *See* Daniel Pruzin, *OECD Touts Benefits of WTO Trade Facilitation Agreement*, 30 International Trade Reporter (BNA) 672 (9 May 2013). [Hereinafter, *OECD Touts*.]

176 *See OECD Touts*.

177 *See A Trade Facilitation Deal Could Give a $1 Trillion Boost to World Economy – Lamy, World Trade Organization*, 1 February 203, www.wto.org.

178 World Trade Organization, WTO Trade Report 2015, at 7, www.wto.org/english/res_e/publications_e/wtr15_e.htm. [Hereinafter, 2015 WTO Trade Report.]

179 *See* Amy Tsui, *Trade Facilitation Agreement Bright Spot in Doha, May be Finished in Few Months*, 26 International Trade Reporter (BNA) 507-508 (16 April 2009).

transparency of regulations – Articles V, VIII, and X, respectively.

Most if not all WTO Members appreciated their shared interest in trade facilitation.[180] But, developing countries were keen to avoid having heavy obligations imposed on them, and insisted on technical and financial assistance from developed countries to meet the burdens of implementing any trade facilitation obligations.[181] For example, developed countries pressured them to establish a single window, *i.e.*, a sole point of entry to which all traders submit documentation and data concerning the import, export, or transit of goods. That is a logical move, involving both consolidation of government offices, and automation of customs procedures.[182] But, it is expensive to implement.

The U.S. retorted that (as of March 2013) since 2001, it had spent \$2.6 billion on trade facilitation, and \$13 billion on trade capacity building.[183] And, since 2005, financial assistance and aid for trade for trade facilitation purposes had increased by 365%.[184] Such funding apparently led the EU to warn poor countries not to accept a "blank check."[185] Nevertheless, insistence of poor countries on tangible help proved to be a key sticking point to securing a deal.

III. Overview of Doha Round December 2013 Bali *TFA*

At the Ninth WTO Ministerial Conference in Bali, Indonesia, held from 3-6 December 2013, WTO Members reached consensus on a *TFA*.[186] Technically, it was a draft accord, subject to checks and correction, to be approved by the WTO General Council by 31 July 2015 as an Annex to the Uruguay Round *WTO Agreement* reached in Marrakesh, Morocco. It did not enter into force until 22 February 2017, when two-thirds of the then-

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180 They frequently express this common bond, as at the August 2013 ASEAN Summit, in a meeting with USTR Ambassador Michael Froman (1962-). The 10 ASEAN countries, plus the United States, expressed their desire to achieve an accord on trade facilitation, as well as some agriculture and development issues, for the Ninth WTO Ministerial Conference in Bali in December. *See ASEAN Ministers, Froman Meet in Brunei; State Aim to Reach Agreement in Bali*, 30 International Trade Reporter (BNA) 1374 (5 September 2013). It was a political platitude bereft of concrete ideas.

181 *See* Daniel Pruzin, *Concerns Grow on Slow Progress In WTO Trade Facilitation Talks*, 30 International Trade Reporter (BNA) 1580 (17 October 2013); Daniel Pruzin, *U.S. Envoy Says Preparations for Bali Ministerial Conference Slipping*, 30 International Trade Reporter (BNA) 296 (28 February 2013).; Daniel Pruzin, *Hopes Fading for WTO "Deliverables" Deal as Delegations Take Hard Line on LDC-Plus*, 28 International Trade Reporter (BNA) 1164 (14 July 2011); World Trade Organization, *Briefing Notes – Trade Facilitation*, www.wto.org. These Notes were posted in connection with the Seventh Ministerial Conference held in Geneva from 30 November-2 December 2009.

182 *See* Daniel Pruzin, *OECD Touts Benefits of WTO Trade Facilitation Agreement*, 30 International Trade Reporter (BNA) 672 (9 May 2013).

183 *See* Daniel Pruzin, *Chair Warns WTO Members Will Not Secure Bali Trade Deal if Talks Continue to Drag*, 30 International Trade Reporter (BNA) 406 (21 March 2013) (*quoting* Virginia Brown, Director, United States Agency for International Development, Office of Trade and Regulatory Reform).

184 *See* Daniel Pruzin, *OECD Touts Benefits of WTO Trade Facilitation Agreement*, 30 International Trade Reporter (BNA) 672 (9 May 2013).

185 Daniel Pruzin, *Concerns Grow on Slow Progress In WTO Trade Facilitation Talks*, 30 International Trade Reporter (BNA) 1580 (17 October 2013) (*quoting* an unnamed official).

186 *See* World Trade Organization, *Agreement on Trade Facilitation, Ministerial Decision of 7 December 2013*, WT/MIN(13)/36, WT/L/911, www.wto.org; WT/MIN(13)/W/8 (6 December 2013), www.wto.org. [Hereinafter, December 2013 *Trade Facilitation Agreement*.]

164 Members ratified it, beating the projections that the ratification process would take at least two years.[187] The *TFA* thus became the first major multilateral agreement in the 21-year history of the WTO.

The Bali *Agreement* looked like the April 2011 Doha Round *Draft Trade Facilitation Text*, with changes made to reflect proposals incorporated and compromises made by the Members since then. Its goals, of course, were the same as always:

> The trade facilitation decision is a multilateral deal to simplify customs procedures by reducing costs and improving their speed and efficiency. It will be a legally binding agreement and is one of the biggest reforms of the WTO since its establishment in 1995 – other agreements struck since then are on financial services and telecommunications, and among a subset of WTO Members, and agreement on free trade in information technology products.
>
> The objectives are: to speed up customs procedures; make trade easier, faster, and cheaper; provide clarity, efficiency, and transparency; reduce bureaucracy and corruption, and use technological advances. It also has provisions on goods in transit, an issue particularly of interest to landlocked countries seeking to trade through ports in neighboring countries.
>
> Part of the deal involves assistance for developing and least developed countries to update their infrastructure, train customs officials, or for any other cost associated with implementing the agreement.
>
> The benefits to the world economy are calculated to be between [U.S.] $400 billion and $1 trillion by reducing costs of trade by between 10% and 15%, increasing trade flows and revenue collection, creating a stable business environment, and attracting foreign investment.[188]

That these objectives were relevant was not in doubt. Customs delays plague developing countries, especially in Africa. As the BBC explained:

> Bureaucratic barriers to commerce can be a big problem.
>
> Africa, for example, has the longest customs delays in the world. The

[187] *See* Daniel Pruzin, *WTO Members Secure Bali "Package," Hope to Revive Languishing Doha Round*, 30 International Trade Reporter (BNA) 1920 (12 December 2013).

The U.S. forecast a two-to-five-year *TFA* ratification period, which initially seemed optimistic. The amendments to the public health and compulsory licensing provisions in Article 31 of the WTO *TRIPs Agreement*, first agreed in August 2003 and later at the December 2005 Hong Kong Ministerial Conference, had not entered into force by January 2014, as a further 30 Members still were needed to ratify the changes. *See* Daniel Pruzin, *Bali Deal Reinvigorates WTO Efforts To Revive Moribund Doha Round of Talks*, 31 International Trade Reporter (BNA) 136 (16 January 2014).

[188] World Trade Organization, Ninth WTO Ministerial Conference, *Days 3, 4, and 5: Round-the-Clock Consultations Produce "Bali Package,"* 5-7 December 2013, www.wto.org.

> African Development Bank says it can take 36 hours to get goods through the customs post at the Victoria Falls crossing from Zambia into Zimbabwe.
>
> And there are often more barriers to negotiate once goods are over the border. The highway between Lagos and Abuja in Nigeria has 69 official checkpoints.
>
> It takes time and costs money dealing with these delays. It can be disastrous for a cargo of perishable goods. These are exactly the kind of barriers that the WTO deal is intended to tackle.
>
> Dealing with them would certainly make it cheaper for business to move goods across borders. And if it's cheaper, they will do more of it.[189]

A 2015 study by WTO economists offered similar positive estimates:

> Full implementation of the *TFA* is forecast to slash members' trade costs by an average of 14.3 per cent, with developing countries having the most to gain…. The *TFA* is also likely to reduce the time needed to import goods by over a day and a half and to export goods by almost two days, representing a reduction of 47 per cent and 91 per cent respectively over the current average.[190]

Further, by opening up opportunities for new firms, the *TFA* helps developing countries and LDCs increase their exports of new products, by 20% and 35%, respectively.

Special note of the plight LLDCs is worth making. Trade facilitation improvements had cut shipping costs by 50%, and reduced shipping times, from 18 to 4 days, with respect to trade from Mombasa, Kenya to Uganda.[191] But, there was much room for improvement. An October 2008 World Bank study indicated that overall among LLDCs, it cost over $3,000 to export a standard container from an LLDC, whereas it cost slightly less than $1,300 to export a cargo container from a coastal country.[192]

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[189] Andrew Walker, *WTO Agrees Global Deal Worth $1tn*, BBC NEWS, 7 December 2013, www.bbc.co.uk/news/business-25274889.

[190] World Trade Organization, *WTO's Trade Facilitation Agreement Enters into Force*, 22 February 2017, www.wto.org/english/news_e/news17_e/fac_31jan17_e.htm. [Hereinafter, *WTO's Trade Facilitation Agreement*.] *See also* 2015 WTO TRADE REPORT at 7 (estimating "[t]he range of trade cost reduction will be between 9.6 per cent and 23.1 per cent. African countries and LDCs are expected to see the biggest average reduction in trade costs (in excess of 16 per cent) from full implementation of the *TFA*. Full implementation will reduce trade costs of manufactured goods by 18 per cent and of agricultural goods by 10.4 per cent").

[191] *See* Bryce Baschuk, *WTO Chief Urges TFA Implementation On Behalf of Landlocked Countries*, 31 International Trade Reporter (BNA) 1968 (6 November 2014).

[192] *See* WORLD BANK, IMPROVING TRADE AND TRANSPORT FOR LANDLOCKED DEVELOPING COUNTRIES (October 2008), http://siteresources.worldbank.org/INTRANETTRADE/Resources/Improving_Trade_Transport_for_Landlocked_Countries.pdf; World Trade Organization, *Azevêdo Welcomes Call to Implement Trade Facilitation to Benefit Poorest Landlocked Nations*, 5 November 2014, www.wto.org.

IV. Key Rules in Doha Round December 2013 Bali *TFA*

To advance the above-quoted goals, the 29-page December 2013 *Trade Facilitation Agreement* (compared to and contrasted with the 37-page April 2011 Draft Text) focused on the following key points.

● Rules Relating to GATT Article X on Transparency of Trade Measures

These provisions covered publication and availability of information, in Article 1, prior publication and consultation, in Article 2, advance rulings, in Article 3, appeal (*i.e.*, review) procedures, in Article 4, and other measures to enhance impartiality, non-discrimination, and transparency, in Article 5.[193]

Article 1, Paragraph 1, mandated publication of trade measures. Article 1, Paragraph 1:1 explained such publication should be "prompt," and "in a non-discriminatory and easily accessible manner" that enables all governments, traders, and interested parties to become acquainted with the relevant measures. The measures at issue concern (*inter alia*) import, export, and transit procedures, applied duty rates, fees and charges, rules on customs classification and valuation, ROOs, penalties, appeal procedures, and TRQs. Article 1, Paragraphs 2 and 3 required establishment of an official website and inquiry points. Publication need only be in the vernacular of the country at issue, but if practicable, should be in at least one WTO language (English, French, or Spanish). Interestingly, at the Bali Ministerial Conference, Kuwait tried unsuccessfully to have Arabic included as a WTO language.

Article 2 required an interval between publication and entry into force, and

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[193] In an August 2018 document, the U.S. argued to WTO Members that its system for obtaining advanced customs decisions exceeds WTO standards. *See The Role of Advance Rulings and Administrative Procedures in TFA Implementation – Communication from the United States*, 6 August 2018, www.wto.org. The U.S. specifically argued its Advance Ruling System, which CBP is in charge of, is:

> - **Simple to obtain**. Exporters or importers can easily file a written ruling request, rulings are free to obtain, and Customs usually responds within 30 days.
> - **Legally binding**. Exporters and importers can be sure that the decision will be applied at the border.
> - **Published and transparent**. Rulings are published on the Customs Rulings Online Search System and can be accessed free of charge. This lets businesses know how similar shipments were treated in the past. ... [R]ecent rulings on goods as varied as nuts from Mozambique, women's garments from China, and citrus fruits from South Africa. Major companies like Walmart, Apple Inc., and Macy's have used the system in recent years.
> - **Protective of confidential information**. Customs will withhold privileged or classified information, like trade secrets.
> - **Uniform.** While advance ruling letters technically only apply to the transaction at issue, Customs will apply them to future imports if it finds the merchandise is the same in all material aspects. Most rulings also remain in effect indefinitely.

Brian Flood, *U.S. Touts Its Customs System at WTO*, 35 International Trade Reporter (BNA) 1095 (16 August 2018). (Emphasis original.)

opportunities for interested parties to comment on trade measures. Publication must be "as early as possible" before entry into force, and the comment period must be "appropriate." The April 2011 *Draft Text* used the term "reasonable," but neither it nor the December 2013 *Agreement* defined the precise amount of time. Also unspecified was what constituted an "opportunity" to comment. Indeed, the commitment itself was vague, because it said a Member "shall" afford the opportunity to comment, but only "to the extent practicable and in a manner consistent with its domestic law and legal system."[194]

Article 3 mandated issuance by governmental authorities of advance rulings, with clear procedures as to how an applicant may obtain one, and what a Member must do if it declines to issue one. Unlike the April 2011 *Text*, the December 2013 *Agreement* did not indicate the possibility of a maximum period of 150 days (which itself was a drop from 180 days from the December 2009 Text); rather, the *Agreement* used the term "reasonable, time bound manner" as the time in which a Member had to issue an advance ruling.[195] In other words, there was no hard deadline.

An applicant could seek an advance ruling on matters of tariff classification (and, therefore, the applied duty rate to be imposed), customs valuation, duty drawback, TRQs, ROOs, and fees and charges.[196] Any such ruling must be valid for a "reasonable" (albeit unspecified) period of time.[197] However, no advance ruling would be required if an adjudicatory decision on the issue were rendered, or the matter was pending before an adjudicatory or administrative body. Advance rulings would not be precedential, but binding only on the applicant that sought the ruling and the relevant customs agency.

Article 4 obligated each WTO Member allows for administrative and judicial appeals of customs decisions.[198] Appeal procedures had to be non-discriminatory, and decisions had to contain supporting reasoning. But, to what body could an appeal be lodged, and would that body have to be independent of the customs official or agency rendering the controversial decision? These crucial questions were unresolved in both the April 2011 and December 2013 documents.

Article 5 prescribed disciplines on the issuance of import alerts (or rapid alerts) concerning food safety, possible risks to animal or plant health, and the monitoring of the quality of imported foods. Such alerts would have to be based on positive evidence that food failed to meet uniform, objective standards, possibly based on international references. With multiple alternatives in bracketed text in the April 2011 document, there was no consensus among Members as to the precise criteria to trigger issuance of an

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194 December 2013 *Trade Facilitation Agreement*, Article 2, ¶ 1:1; April 2011 *Draft Trade Facilitation Text*, Article 2, ¶ 1:1-1:2.

195 December 2013 *Trade Facilitation Agreement*, Article 3, ¶ 1; April 2011 Draft Trade Facilitation Text, Article 3, ¶ 1.

196 *See* December 2013 *Trade Facilitation Agreement*, Article 3, ¶ 1:9; April 2011 Draft Trade Facilitation Text, Article 3, ¶ 1:7.

197 December 2013 *Trade Facilitation Agreement*, Article 3, ¶ 3; April 2011 Draft Trade Facilitation Text, Article 3, ¶ 3.

198 *See* December 2013 *Trade Facilitation Agreement*, Article 4, ¶¶ 1:1-1:2; April 2011 Draft Trade Facilitation Text, Article 4:1.

alert.[199] The December 2013 *Agreement* removed the brackets and said a Member could issue a notification subject to four disciplines: the notification needed to be (1) based on risk, (2) applied uniformly at the relevant ports of importation, (3) terminated when no longer needed (or replaced by a less restrictive measure); and (4) published (both as to the announcement and termination or modification).[200] As before, Article 5 also discussed detention and test procedures with respect to problematic imported goods.[201]

- **Rules Relating to GATT Article VIII on Fees and Formalities Connected with Importation and Exportation**

Disciplines on fees and charges imposed on imports and exports were covered in Article 6, and requirements for the release and clearance of goods in Article 7. The scope of Article 6 was ODCs, but not import or export duties, nor taxes governed by GATT Article III.[202] Article 6 required fees and charges be imposed only for services rendered in connection with importation or exportation, and be limited to the amount of the services rendered, and not be calculated on an *ad valorem* basis. Article 6 also required a WTO Member to publish its fee schedule, and not enforce it until an adequate time period after publication. And, it set out limitations on the imposition of penalties, including that they be proportionate to the infraction, there be no conflicts of interests associated with their assessment and collection, that a written decision accompanies any imposition of a penalty. But, whereas the April 2011 *Draft Text* contemplated the possibility of waiver of a penalty if the infraction is disclosed voluntarily by the breaching party, the December 2013 *Agreement* spoke of such disclosure as a "potential mitigating factor."[203]

Article 7 concerned clearance and release of merchandise, including perishable goods. It obligated Members to maintain procedures on pre-arrival processing, *i.e.*, administrative procedures of a customs authority to examine import documentation submitted by traders prior to the arrival of goods so as to expedite the clearance and release of goods upon their arrival, and allow for immediate release.[204] In the April 2011 *Draft Text*, Members could not agree on whether such processing would be an entitlement for all traders, or a privilege only for traders with good compliance records.[205]

Article 7 also required Members to allow for electronic payment of customs duties. And, this Article authorized Members to separate release from final determination and payment of customs duties and fees, *i.e.*, to allow an importer to obtain its goods before final decisions about the tariff liability have been made, and before the importer has paid

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[199] *See* April 2011 Draft Trade Facilitation Text, Article 5 Paragraph 1.
[200] *See* December 2013 *Trade Facilitation Agreement*, Article 5, ¶ 1(a)-(d).
[201] *See* December 2013 *Trade Facilitation Agreement*, Article 5, ¶¶ 2-3; April 2011 Draft Trade Facilitation Text, Article 5, ¶¶ 2-3.
[202] *See* December 2013 *Trade Facilitation Agreement*, Article 6, ¶ 1:1.
[203] December 2013 *Trade Facilitation Agreement*, Article 6, ¶ 3:6; April 2011 Draft Trade Facilitation Text, Article 6, ¶¶ 2:2-5.
[204] *See* December 2013 *Trade Facilitation Agreement*, Article 7, ¶ 1-2; April 2011 Draft Trade Facilitation Text, Article 7, ¶¶ 1-2.
[205] *See* April 2011 Draft Trade Facilitation Text, Article 7, ¶ 1.

the tariff.[206] Allowing merchandise to be released before a final determination of customs duty liability, coupled with these other provisions helped expedite clearance of perishable products, and were important to the U.S. and EU.[207]

Article 7:4 discussed risk assessment and analysis in respect of the potential for non-compliance with customs laws, and the need to use risk management techniques in a way that reduced the number of physical inspections of goods. India, of course, disputed this provision.[208] As before, Article 7 further dealt with post-clearance audits (PCA), the establishment and publication of average release and clearance times, and criteria for obtaining the status of an authorized trader.[209]

Finally, Article 7:8 covered the controversial topic of expedited shipments, requiring – not, as in the April Draft Text, simply encouraging – Members to allow for the expedited release of goods, at least for merchandise entered through air cargo facilities (while maintaining customs control), for any entity that applies for such treatment.[210] Such language delighted the U.S. and EU. Applicants would have to provide "adequate infrastructure and payment of customs expenses" for the expedited processing of their shipments.

But, Members could not agree on what "expedited" means – release within 3, 6, 24, or 48 hours, or a reasonable period of time? So, they simply omitted any fixed time frame.[211] For the benefit of its express delivery companies, America was successful in getting removed from the Draft Text any reference to a restriction based on the weight or value of a shipment that would circumscribe the scope of shipments that could benefit from expedited release.[212] Still, there existed broad language to allow a Member to set (and publish) criteria for eligibility.

Perhaps to accommodate post 9/11 American customs reforms, Article 7, Paragraph 8:3, in the December 2013 *Agreement* omitted the April 2011 *Draft Text* language suggesting risk management, in the form of border controls, should concentrate on high-risk shipments. U.S. law required that by 2012, 100% of all maritime containers bound for America be scanned overseas. That target, however, was not met.

- **Additional Rules Relating to GATT Article VIII**

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[206] *See* December 2013 *Trade Facilitation Agreement*, Article 7, ¶ 3; April 2011 Draft Trade Facilitation Text, Article 7, ¶ 2.

[207] *See* Daniel Pruzin, *WTO Members Secure Bali "Package," Hope to Revive Languishing Doha Round*, 30 International Trade Reporter (BNA) 1920 (12 December 2013).

[208] *See* Daniel Pruzin, *WTO Members Progress Slowly on Draft Of Trade Facilitation Deal for Bali Ministerial*, 30 International Trade Reporter (BNA) 1760 (14 November 2013).

[209] *See* December 2013 *Trade Facilitation Agreement*, Article 7, ¶¶ 5-7; April 2011 Draft Trade Facilitation Text, Article 7, ¶¶ 4-6.

[210] *See* December 2013 *Trade Facilitation Agreement*, Article 7, ¶ 8; April 2011 Draft Trade Facilitation Text, Article 7, ¶ 7:1.

[211] *See* December 2013 *Trade Facilitation Agreement*, Article 7, ¶ 8; April 2011 Draft Trade Facilitation Text, Article 7, ¶ 7:2.

[212] *See* December 2013 *Trade Facilitation Agreement*, Article 7, ¶ 8.

As in the April 2011 Draft Text, Articles 8-10 of the December 2013 *Agreement* dealt with formalities relating to importation and exportation. Article 8 called for border agency cooperation, that is, coordination of activities and requirements among customs authorities.[213] Article 8:1 of the December 2013 *Agreement* referenced cooperation on customs controls and procedures for goods in transit, whereas Article 9:1 *bis* of the April 2011 Draft Text, which Members had set in brackets, required Members to allow goods in transit (*i.e.*, transshipped goods) to be declared as such.

In the April 2011 *Draft Text*, Article 10 called for periodic review of formalities, and obligated Members to minimize them and the attendant documentation requirements so they are not "an unnecessary obstacle to trade."[214] That version of Article 10 also called on Members to accept commercially available information and copies, but whether they must or ought to do so was not agreed.[215] Likewise, Members could not agree on whether they must consider whether there are "reasonably available" alternative requirements that fulfill their "legitimate objectives" that are "significantly less trade restrictive" than their existing rules.[216] Nor could they agree on whether to rely on, or merely ought to rely on, best practices and international standards (*e.g.*, as set by the WCO). Article 10 also called on Members to establish a single window for the one-time submission of customs documentation. Article 10 forbade Members, to the extent possible, from mandating the use of PS) for tariff classification and valuation, and from requiring the use of a customs broker. Those prohibitions carried through to the December 2013 *Agreement*, to the satisfaction of Argentina, Egypt, and other developing countries.[217]

The April 2011 *Draft Text* of Article 10 required Members in a CU to use the same border procedures throughout their CU.[218] Article 10 obligated Members to allow for temporary admission of goods, inward processing (*i.e.*, importing merchandise temporarily into a customs territory without payment of duty, for manufacturing, processing, or repair, and then subsequent exportation of finished merchandise under a different customs regime), and outward processing (*i.e.*, exporting merchandise temporarily from a customs territory for manufacturing, processing, or repair abroad, and then re-importation of finished merchandise, but with a full or partial exemption from duties).[219]

Overall, the December 2013 version of Article 10 looked to be a watered-down version of its predecessor. It had many of the same technical provisions. Yet, it lacked some of the tougher disciplines quoted above, and contained language perhaps too flexible to result in significant cuts in "red tape." For instance, WTO Members were "encouraged," but not obligated, to use international standards, and they were told to "endeavor" to maintain a single window.[220]

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213 *See* April 2011 Draft Trade Facilitation Text, Article 9, ¶ 1.
214 April 2011 Draft Trade Facilitation Text, Article 10, ¶¶ 1-2.
215 *See* April 2011 Draft Trade Facilitation Text, Article 10, ¶ 2:4.
216 April 2011 Draft Trade Facilitation Text, Article 10, ¶ 2:1.
217 *See* Daniel Pruzin, *WTO Members Secure Bali "Package," Hope to Revive Languishing Doha Round*, 30 International Trade Reporter (BNA) 1920 (12 December 2013).
218 *See* April 2011 Draft Trade Facilitation Text, Article 10, ¶ 8.
219 *See* April 2011 Draft Trade Facilitation Text, Article 10, ¶ 10.
220 *See* December 2013 *Trade Facilitation Agreement*, Article 10, ¶¶ 3:1-2, 4:1.

Equally noteworthy was the contrast between the two versions on consular fees. In the April 2011 *Draft Text*, Article 8 forbade a WTO Member from requiring a consular transaction, *i.e.*, requiring from a consul of the importing Member in the territory of the exporting Member a consular invoice or consular visas for a commercial invoice, certificate of origin, or other shopping document in connection with importation of a good.[221] The December 2013 *Agreement* contained no such provision. That omission seemed to embody the views of developing country WTO Members that earn sizeable sums from consular transaction fees.

- **Rules Relating to GATT Article V on Freedom of Transit**

As in the April 2011 *Draft Text*, in the December 2013 *Agreement*, Article 11 provisions covered freedom of transit. The *Draft Text*, but not the *Agreement*, provided a definition of "traffic in transit."[222] Both set out a basic freedom of transit rule.[223] It obligated WTO Members to provide non-discriminatory treatment (that is, both national and MFN treatment) to traffic in transit and ensure they do not apply restrictions on freedom of transit that would be "a disguised restriction" on transited traffic[224]

Article 11 also clarified GATT Article V does not obligate a WTO Member to build infrastructure to facilitate the transit of goods, or to provide access to such infrastructure that it does have unless it opens those facilities for general use by third parties.[225] The December 2013 *Agreement* simply "encouraged" Members to provide physically separate infrastructure, like berths or lanes, for traffic in transit.[226]

Pursuant to GATT Article V, any regulations, formalities, or charges affecting traffic in transit must not be "more restrictive … than necessary," with the possible additional caveat that they must "fulfill a legitimate objective.[227] Consideration must be given to "less restrictive" alternative measures, and existing measures must not be "a disguised restriction on transit traffic."[228] So, Article 11 set disciplines on fees, formalities, and documentation requirements imposed in respect of traffic in transit, including exemptions from customs duties imposed on imported merchandise, as well as exemptions from compliance with technical standards.[229] It also obligated Members to provide for advance filing and processing of transit documentation, prior to arrival and trans-shipment.

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221 *See* December 2013 *Trade Facilitation Agreement*, Article 8, ¶¶ 1-2; April 2011 Draft Trade Facilitation Text, Article 8, ¶ 1.
222 April 2011 Draft Trade Facilitation Text, Article 11, ¶ 1.
223 *See* December 2013 *Trade Facilitation Agreement*, Article 11, ¶¶ 1, 4; April 2011 Draft Trade Facilitation Text, Article 11, ¶ 1.
224 April 2011 Draft Trade Facilitation Text, Article 11, ¶¶ 4-6.
225 *See* April 2011 Draft Trade Facilitation Text, Article 11, ¶ 1.
226 December 2013 *Trade Facilitation Agreement*, Article 11, ¶¶ 5.
227 April 2011 Draft Trade Facilitation Text, Article 11, ¶¶ 3(a), 9.
228 April 2011 Draft Trade Facilitation Text, Article 11, ¶ 3(b)-(c).
229 *See* December 2013 *Trade Facilitation Agreement*, Article 11, ¶¶ 2, 6-9, 11; April 2011 Draft Trade Facilitation Text, Article 11, ¶¶ 7, 10.

Finally, Article 11 also ensured that once transited goods have undergone the relevant procedures, they must be allowed to exit the relevant customs territory without delay.[230] It authorized use of customs convoys for high-risk goods. And, it contained disciplines on bonded transport regimes and guarantees, to avoid inland diversion of goods in transit.

- **Final Rules**

In both the April 2011 and December 2013 documents, Article 12 concerned customs cooperation among WTO Members.[231] It called for (*inter alia*) exchange of information and assistance on imported and exported merchandise, and traffic in transit, and on verification of declarations made by traders. But, in the April 2011 *Draft Text*, Members did not reach consensus on the extent to which some of the proposed rules would be mandatory versus exhortative.[232] The December 2013 *Agreement* generally used obligatory language, meaning India (concerned about under-reporting by Chinese exporters of the dutiable value of their merchandise) succeeded in obtaining binding language obligating Members to exchange information to verify an import declaration in a case in which there are "reasonable grounds" to doubt the veracity of the declaration.[233] But, the language contained a key limitation: a Member from which information is requested could postpone or refuse any or all of a request for a variety of reasons, such as compliance would be contrary to its public interest, or to its laws.

In both the April 2011 and December 2013 documents, Article 13 discussed institutional arrangements, including the establishment of a WTO Committee on Trade Facilitation.[234] Article 13 required Members to establish a National Committee on Trade Facilitation, or designate an existing body with the responsibilities of one. That entity was to facilitate coordination and implementation of the December 2013 *Agreement*.

In the April 2011 *Draft Text*, Article 15 contained special provisions for SVEs that are members of a CU or FTA. They could adopt regional approaches to implementing their trade facilitation obligations.[235] Also, all of the obligations in the *Draft Text* were to be subject to the exceptions in GATT Articles XX and XXI. No such provision existed in the December 2013 *Agreement*.

- **Synopsis of Final December 2013 *TFA* Text**

By way of summary, the final text of December 2013 contained the following key

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[230] *See* December 2013 *Trade Facilitation Agreement*, Article 11, ¶ 10, 11:2; April 2011 Draft Trade Facilitation Text, Article 11, ¶¶ 12-14, 17.

[231] *See* December 2013 *Trade Facilitation Agreement*, Article 12, ¶¶ 1-3; April 2011 Draft Trade Facilitation Text, Article 12, ¶ 1.

[232] *See* April 2011 Draft Trade Facilitation Text, Article 12, ¶¶ 1, 4.

[233] Daniel Pruzin, *WTO Members Secure Bali "Package," Hope to Revive Languishing Doha Round*, 30 International Trade Reporter (BNA) 1920 (12 December 2013).

[234] *See* December 2013 *Trade Facilitation Agreement*, Article 13, ¶ 1; April 2011 Draft Trade Facilitation Text, Article 13, ¶ 1:1.

[235] *See* April 2011 Draft Trade Facilitation Text, Article 15, ¶ 1:1.

provisions:

> Spread out over 12 articles, the *TFA* prescribes many measures to improve transparency and predictability of trading across borders and to create a less discriminatory business environment. The *TFA's* provisions include improvements to the availability and publication of information about cross-border procedures and practices, improved appeal rights for traders, reduced fees and formalities connected with the import/export of goods, faster clearance procedures and enhanced conditions for freedom of transit for goods**.** The *Agreement* also contains measures for effective cooperation between customs and other authorities on trade facilitation and customs compliance issues.
>
> Developing countries, in comparison, will immediately apply only the *TFA* provisions they have designated as "Category A" commitments. For the other provisions of the *Agreement*, they must indicate when these will be implemented and what capacity building support is needed to help them implement these provisions, known as Category B and C commitments. These can be implemented at a later date with least developed countries given more time to notify these commitments. So far [as of 22 February 2017, when the *TFA* took effect], notifications of Category A commitments have already been provided by 90 WTO Members.[236]

The *TFA* covers all three areas emphasized in GATT concerning trade facilitation, namely, freedom of transit, fees and formalities, and transparency. Among its most notable requirements are that Members must:

(1) Try to establish a single window through which any trader may submit documents to import or export goods.

(2) Issue advanced rulings to an applicant seeking to import goods, and give the applicant the chance to appeal those rulings.

(3) Publish electronically customs rules such as fees, penalties, prohibitions, port procedures, and TRQs.

(4) Apply the *TFA* on an MFN basis.

However, the Category system proved controversial.

V. Poor Countries and Category A, B, and C Obligations in Doha Round December 2013 Bali *TFA*

● S & D Treatment

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236 *WTO's Trade Facilitation Agreement.*

Part II of the April 2011 *Draft Text* and December 2013 *Agreement* contained transitional provisions for developing countries and LDCs. Paragraph 1 in each document explicitly acknowledged the differences among these countries, and stated S&D treatment "should extend beyond the granting of traditional transition periods for implementing commitments," and relate the "extent and the timing of entering commitments" to "the implementation capacities of developing and least developed country Members."[237] None of them would be compelled to make infrastructure investments beyond their means, and least developed countries would have only to undertake commitments commensurate with their specific development, financial, and trade needs, "or their administrative and institutional capabilities."[238]

The April 2011 *Draft Text* had stated developed countries "shall ensure to provide support and assistance" to poor countries so they could implement their obligations.[239] Absent such funding, or absent the requisite capacity, poor countries would not have to fulfill their duties. But, commitment of support and assistance from rich countries would not be "not open ended."[240]

The December 2013 *Agreement* contained no such language. Instead, like Article 9:3 in the April 2011 *Draft Text*, it said:

> Donor Members agree to facilitate the provision of assistance and support for capacity building to developing country and least developed country Members, on mutually agreed terms and either bilaterally or through appropriate international organizations. The objective is to assist developing country and least developed country Members to implement the provisions of Section I [*i.e.*, Articles 1-14] of this *Agreement*.[241]

What exactly "facilitate the provision of" aid meant was not clear. But, it hardly seemed to mandate a specific amount or type of financial or technical help.

As with the April 2011 *Draft Text*, the December 2013 *Agreement* relied principally on implementation periods as the mode of S & D treatment. Paragraphs 2 through 7 of the *Draft Text*. They grouped legally binding commitments for developing countries and LDCs on trade facilitation into three Categories – A, B, and C – with different implementation periods for the duties in each group:[242]

(1) Category A commitments were ones a developing country or LDC could

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237 December 2013 *Trade Facilitation Agreement*, Section II, ¶ 1:2; April 2011 Draft Trade Facilitation Text, Section II, ¶ 1:2.

238 December 2013 *Trade Facilitation Agreement*, Section II, ¶ 1:2; April 2011 Draft Trade Facilitation Text, Section II, ¶ 1:3.

239 April 2011 Draft Trade Facilitation Text, Section II, ¶ 1:4.

240 April 2011 Draft Trade Facilitation Text, Section II, ¶ 1:5.

241 December 2013 *Trade Facilitation Agreement*, Section II, ¶ 9:1.

242 *See* December 2013 *Trade Facilitation Agreement*, Section II, ¶ 2; April 2011 Draft Trade Facilitation Text, Section II, ¶ 2:1-3; Len Bracken, *USTR's Shackleford Sets Out Next Steps For WTO Agreement on Trade Facilitation*, 31 International Trade Reporter (BNA) 263 (6 February 2014).

fulfill in a fairly straightforward manner. So, they designated these commitments for implementation upon the entry into force of the *Agreement*, or for an LDC, within 1 year of its entry into force.[243]

(2) Provisions needing some time to fulfill were Category B commitments. So, a developing or least developed country designated slated them for implementation after a transitional period, with the country setting the period and giving notice thereof to the Committee on Trade Facilitation.[244] Implicitly, by way of distinction from Category C, Category B commitments did not require technical assistance or capacity building to fulfill.

(3) Fulfillment of Category C commitments required technical assistance or capacity building (such as from the World Bank or regional development banks). Therefore, a developing country or LDC designated them for implementation only after a transitional period that it established, and of which it gave notice to the Committee on Trade Facilitation.[245]

What if a developing country or LDC faced difficulties implementing obligations in a timely fashion?

Like the April 2011 *Draft Text*, the *Agreement* contained an Early Warning Mechanism if a developing or least developed country felt it could not meet its implementation timetable, with an 18 month automatic extension for developing countries and an automatic three year extension for least developed countries.[246] The prior *Text* suggested an extension of up to a year would be provided automatically upon notice.[247] But, unlike that *Text*, the *Agreement* did not impose on developed countries an obligation to help out developing countries or LDCs to overcome their implementation difficulties. The *Agreement*, like its predecessor, allowed the countries to shift commitments between Categories B and C.[248]

Exactly which rules would be in which categories? That was for the Committee on Trade Facilitation to decide, with the WTO General Council to formalize the Committee decision decide by 31 July 2014.[249] The *Agreement* charged the Council with adopting an Annex to the *Agreement* that the Committee would draw up. The Annex would indicate

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243 *See* December 2013 *Trade Facilitation Agreement*, Section II, ¶ 2:1(a), 3; April 2011 Draft Trade Facilitation Text, Section II, ¶ 2:1.

244 *See* December 2013 *Trade Facilitation Agreement*, Section II, ¶ 2:1(b), 4; April 2011 Draft Trade Facilitation Text, Section II, ¶ 2:2.

245 *See* December 2013 *Trade Facilitation Agreement*, Section II, ¶ 2:1(c), 4; April 2011 Draft Trade Facilitation Text, Section II, ¶¶ 2:2, 5:3; Daniel Pruzin, *Chair Warns WTO Members Will Not Secure Bali Trade Deal if Talks Continue to Drag*, 30 International Trade Reporter (BNA) 406 (21 March 2013).

246 December 2013 *Trade Facilitation Agreement*, Section II, ¶ 5:1-3, 6; April 2011 Draft Trade Facilitation Text, Section II, ¶ 4:3, 6 *bis*; April 2011 Draft Trade Facilitation Text, Section II, ¶ 4:2(c), 6.

247 *See* April 2011 Draft Trade Facilitation Text, Section II, ¶ 6:2.

248 December 2013 *Trade Facilitation Agreement*, Section II, ¶ 7.

249 *See* Daniel Pruzin, *WTO Members Secure Bali "Package," Hope to Revive Languishing Doha Round*, 30 International Trade Reporter (BNA) 1920 (12 December 2013).

the commitments developing and least developed countries would implement immediately (*i.e.*, upon entry into force of the *Agreement*).

- **A Farce?**

The Category system was somewhat of a farce, though in April 2014 WTO Staff published a Working Paper claiming the contrary:

> [T]he deal allowed developing and least-developed countries to tailor how they would implement it [via the Category system]. This was a break from the tradition of giving them little more than extra time to implement the deal and some easier conditions. This *Agreement* allows developing and least-developed countries to choose which parts to implement immediately, which to delay (until an announced date), and which to delay because the countries need technical assistance.[250]

Similarly, WTO Director General Roberto Azevêdo lauded the deal because it:

> broke new ground for developing countries in the way it will be implemented. It puts the power in their hands.
>
> For the first time, implementation of the *Agreement* will be directly linked to the capacity of the country to do so. The level of capacity will be *self-determined* by the country concerned. And, they will receive support to build that capacity.[251]

Likewise, when the *TFA* took effect, the WTO proclaimed:

> The *Agreement* is unique in that it allows developing and least-developed countries to set their own timetables for implementing the *TFA* depending on their capacities to do so. A Trade Facilitation Agreement Facility (TFAF) was created at the request of developing and least developed countries to help ensure they receive the assistance needed to reap the full benefits of the *TFA* and to support the ultimate goal of full implementation of the new agreement by all members. Further information on TFAF is available at www.TFAFacility.org.
>
> Developed countries have committed to immediately implement the *Agreement*, which sets out a broad series of trade facilitation reforms.[252]

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[250] World Trade Organization, *Bali Trade Facilitation Deal Challenged Conventional WTO Wisdom, New Paper Says*, 8 April 2014, www.wto.org, referring to Nora Neufeld, Counselor, Trade Policy Review Division, *The Long and Winding Road: How WTO Members Finally Reached a Trade Facilitation Agreement*, Staff Working Paper, ERSD-2014-06, www.wto.org.

[251] World Trade Organization, *Azevêdo Underlines Leadership Role of Bangladesh in Post-Bali Work*, 3 June 2014, www.wto.org (speech to Bangladesh textile manufacturers and exporters, Dhaka, 3 June 2014). (Emphasis added.)

[252] *WTO's Trade Facilitation Agreement*.

These assertions were "spin:" there was no conventional S & D treatment, in the form of lighter obligations or longer phase in and phase out periods based on the categories of "developing" or "least developed" country, but no worries, poor countries could tailor-make their own such treatment, within parameters set by rich countries.

The fact was the Category system indicated WTO Members failed to resolve their clash over a fundamental question cutting across all *Trade Facilitation Agreement* obligations: to what extent should they be binding on poor countries? The result lacked rigor, analogous to an open-book law school exam in which each student picks whatever questions the student would like to answer, determines how long to take in completing the exam.

A pro-development outcome in keeping with the original purposes of the Doha Round would have allowed poor countries to do more than select which obligations they would (1) accept immediately (Category A), (2) implement over a transition period (Category B), or (3) implement across a transition period on the condition they received financial or technical assistance (Category C).[253] It also would have identified which commitments fell into the Categories. That is because if most key obligations are in the first Category A, then there is little S & D treatment by way of Categories B and C. But, if a poor country can avail itself of too many flexibilities, with most of them in B and C, then the force and effect of any trade facilitation deal are blunted.

In brief, the *Agreement* failed to give certainty and predictability as to the right balance between Category A versus Categories B and C. Expressed differently, the Members failed to reach a consensus on the common good or a preferential option for the poor. So, they abandoned themselves to a rather *laissez-faire* approach: let poor Members do what they want, within 3 playgrounds set by rich countries.

The April 2014 WTO Working Paper claimed the *Trade Facilitation Agreement* "broke new ground and could be a model for work in some other subjects" because of:

> the way the negotiations were conducted. Going against conventional wisdom, the trade facilitation negotiations were predominantly carried out in an open-ended, inclusive setting – and this despite an increase in WTO Membership, even during the course of the decade-long discussions.
>
> Novel philosophies were also applied to the way the negotiations were led. Delegations remained in the driving seat throughout the entire process.
>
> Work was carried out in a bottom-up, Member driven manner with the chair functioning primarily as a facilitator, there to broker a compromise based

[253] *See* Daniel Pruzin, *WTO Chairman Upbeat on Prospects for Trade Facilitation Accord in Bali*, 30 International Trade Reporter (BNA) 1086 (18 July 2013).

on delegations' wishes.[254]

This claim was astonishing: it was tantamount to an admission by the WTO that most, if not all, prior Doha Round negotiations were non-transparent, non-participatory, and top-down. It also intimated the WTO was disingenuous in previous communications during the Round trumpeting its transparent, inclusive, Member-driven negotiating procedures.

- **Peace Clauses**

An additional noteworthy feature of the December 2013 *Trade Facilitation Agreement* was it contained three "*Peace Clauses*," in Paragraph 8:1. The first one, concerning Category A, ensured WTO Members do not bring legal claims under GATT Article XXIII or WTO dispute settlement procedures against developing countries for a grace period of two years following the entry into force of the *Agreement*.[255] The second one, in Article 8:2, also covered Category A, but was for six years for LDCs. Therein lay a compromise between the U.S., which opposed any grace period for developing countries, and developing countries, which wanted one: they got a two-year grace period, but only for Category A commitments.

A similar compromise occurred in respect of Category B and C obligations. The April 2011 Draft Text immunized both developing and least developing countries from suit in respect of a Category B or C commitment for two years following implementation of that commitment.[256] The third *Clause* in the December 2013 *Agreement* was different: it immunized only LDCs, but for eight years, as to their Category B or C commitments.[257] In all instances, under the so-called "Due Restraint Mechanism" or "*Peace Clause*," developed countries were obliged to "exercise due restraint" in bringing up a matter for consultations, or adjudication, with a developing country or LDC.[258]

Significantly, the December 2013 *Agreement* did not include a dimension of S&D treatment, one going beyond deferral of implementation periods, which the April 2011 Draft Text contained. Article 9 of that Text said:

> [9.1 The provision of technical assistance [, financial assistance] and capacity building by developed country Members and relevant international organizations and other agencies of cooperation, including the IMF [International Monetary Fund], OECD, UNCTAD [United Nations Commission on Trade and

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[254] *Quoted in* World Trade Organization, *Bali Trade Facilitation Deal Challenged Conventional WTO Wisdom, New Paper Says*, 8 April 2014, www.wto.org, referring to Nora Neufeld, Counselor, Trade Policy Review Division, *The Long and Winding Road: How WTO Members Finally Reached a Trade Facilitation Agreement*, Staff Working Paper, ERSD-2014-06, www.wto.org.

[255] *Compare* April 2011 Draft Trade Facilitation Text, Section II, ¶ 7:1 (containing a general two-year immunity for developing and least developed countries).

[256] *Compare* April 2011 Draft Trade Facilitation Text, Section II, ¶ 7:2.

[257] *See* December 2013 *Trade Facilitation Agreement*, Section II, ¶ 8:3.

[258] *See* December 2013 *Trade Facilitation Agreement*, Section II, ¶ 8:4; April 2011 Draft Trade Facilitation Text, Section II, ¶ 7:8.

Development], WCO and the World Bank, is a *precondition* for the acquisition of implementation capacity by developing country and least-developed country Members in respect of provisions requiring assistance.]

[9.2 In cases where technical assistance and capacity building *is not provided or lacks the requisite effectiveness*, developing country and least-developed country Members *are not bound* to implement the provisions notified under Category C.][259]

The *Agreement* failed to make legal obligations of poor countries explicitly contingent on rich countries helping them with the means to fulfill those obligations.

VI. Post-Bali *TFA* Implementation Problems and Linkage by India to Public Food Stockpiling

● Section 2 Troubles

Hardly six months after the Bali Ministerial Conference, the *Trade Facilitation Agreement* looked to be in trouble. In June 2014, WTO Director General Roberto Azevêdo (1957-) warned WTO Members:

> implications of revisiting what was agreed in Bali. It would not only compromise the *Trade Facilitation Agreement* – including the technical assistance element. All of the Bali decisions – every single one of them – would be compromised. Everything we worked together to achieve in Bali would potentially be lost.
>
> …
>
> Revisiting the Bali agreements would not improve our chances of getting the DDA done. In fact, it would have precisely the opposite effect.[260]

What was the problem, *i.e.*, why were some Members looking to defer implementation of, and renegotiate, the *Agreement*?

The answer pertained to Section 2. Apparently, no donors were coming forward to help developing and least developed countries implement the deal. The poor countries were concerned about obtaining the technical assistance and capacity building support they thought they would get under the *Agreement*, and the Director General was scrambling to find the necessary money. Not surprisingly, they responded sluggishly in notifying the WTO as which obligations under the Agreement they would treat as Category A commitments. Indeed, as late as October 2014, slightly less than 50 of the then 160 WTO

[259] April 2011 *Draft Trade Facilitation Text*, Section II Paragraph 9:1-2. (Footnote omitted, emphasis added.)

[260] World Trade Organization, *Azevêdo Warns Against Revisiting Bali Decision*, 25 June 2014, www.wto.org/english/news_e/news14_e/tnc_infstat_25jun14_e.htm.

Members had delivered their notifications.[261]

Unsurprisingly, hours before the midnight deadline of 31 July 2014 to reach agreement on the Annex (also referred to as the "Protocol of Amendment"), the WTO admitted failure – and once again, the blame was pinned on India.[262] Developing countries and LDCs were unsatisfied with the lack of "hard" commitments on assistance from developed countries to implement any obligations they might pick.

As the BBC rightly stated, the failure to finalize the Annex and thereby move forward on the *Agreement*:

> raised questions about whether the WTO has a future as the forum for international trade negotiations. Many countries are seeking deals on a bilateral basis outside the WTO. It will only reinforce the doubts about the WTO if the Members can't press ahead in the one area where they previously seemed to have made a genuine breakthrough.[263]

The *TPP* was one of several such sub-multilateral deals Members were pursuing. Even India, which historically had skewed its trade policy toward multilateralism, was exploring FTAs. If this trend continued, then one of the three functions of the GATT-WTO system – a negotiating forum – would be further eroded. Monitoring and adjudication would be left, yet the prospect was one of downward spiral: as negotiations moved to other fora, and deals were struck there, the new deals would have their own monitoring and adjudicatory mechanisms, rendering those in Geneva less relevant.

- **Blaming India**

As for targeting India for blame, the basis was India linked its assent to the Annex with progress on agricultural negotiations, specifically, reform of the Green Box to accommodate farm subsidies and public stockpiles for food security. India viewed language in the December 2013 Bali *Decision on Public Stockholding for Food Security Purposes* as vague. The essence of the *Decision* was to (1) exempt for four years, to 2017, expenditures on food security by India and other developing countries from WTO

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[261] *See* World Trade Organization, *WTO Members Debate Future Work on Trade Facilitation as Deadlock on Protocol Remains*, 29 September 2014, www.wto.org.

[262] *See* World Trade Organization, *Azevêdo: Members Unable to Bridge the Gap on Trade Facilitation*, 31 July 2014, www.wto.org; Unni Krishnan, Kartikay Mehrotra & Andrew MacAskill, *Fight Over Comma Sank Deal As India Seeks to Protect Food Stocks*, 31 International Trade Reporter (BNA) 1416 (7 August 2014); Kartikay Mehrotra & Brian Wingfield, *WTO Trade Talks Fail Over India's Protection of Food Subsidies*, 31 International Trade Reporter (BNA) 1414 (7 August 2014); Brian Flood, *Trade Officials, Industry Groups Lament Failure of Trade Facilitation Agreement*, 31 International Trade Reporter (BNA) 1415 (7 August 2014); Brian Flood, *India to Rally WTO Support on Food Security, New Delhi's Trade Minister Tells Parliament*, 31 International Trade Reporter (BNA) 1434 (7 August 2014); Tom Miles, *WTO Failure Points to Fragmented Future for Global Trade*, REUTERS, 4 August 2014, http://mobile.reuters.com; Manoj Kumar & Tom Miles, *India Says WTO Deal Not Dead, Can Sign in September if Concerns Addressed*, REUTERS, 1 August 2014, http://mobile.reuters.com; *WTO Members Fail to Agree Global Trade Deal*, BBC NEWS, 1 August 2014, www.bbc.com [hereinafter, Kumar & Miles].

[263] *WTO Members Fail to Agree Global Trade Deal*, BBC NEWS, 1 August 2014, www.bbc.com.

challenge as illegal subsidies, even if that spending breached agreed limits and distorted trade, and (2) set a work plan by 2017 to fashion a permanent solution. India said the *Decision* did not explicitly state the exemption would extend beyond the 2017 deadline. So, reminding WTO Members its acquiescence in Bali to the *Trade Facilitation Agreement* was linked to progress on the food stockpiling issue, India demanded the replacement of a comma in the text with the word "or." That demand led to a schism among WTO Members: those that thought the Bali *Decision* could not be re-opened, and those that thought its wording could be changed.

Never mind that horizontal negotiations had a long and acceptable history in GATT-WTO relations, or that the U.S., Australia, and other developed countries had used the tactic of linkage to promote a package they felt was ambitious and balanced to their liking. When India deployed the method, western media accounts castigated it for its "intransigence," exercising a "veto" that "torpedoed" the *Agreement*, thereby dealing "a potentially fatal blow" to the WTO efforts to "moderniz[e] the rules of global commerce" and "remain[] the central forum for multilateral trade deals." American Secretary of State John Kerry said India had undermined its world image.[264]

India noted its repeated concern for greater policy space on food subsidies to stockpile grains, but perhaps with renewed vigor given the resounding general election victory of Prime Minister Narendra Modi and his opposition BJP in May. India said:

> It is ridiculous to say the Bali deal is dead. We are totally committed to the *TFA* [*Trade Facilitation Agreement*], and only asking for an agreement on food security.[265]

Speaking in September in New Delhi with the FAO Director General, José Graziano da Silva (1949-), the new Prime Minister called on the FAO to defend the interests of the poor and farmers across the developing world, as manifest in strategic stocks to help eradicate hunger. The FAO response was clear: "Food security comes first," hence trade policies "should be customized to guarantee it."[266]

Likewise, Indian Minister of Trade Nirmala Sitharaman (1959-) explained to the *Lok Sabha* (India's lower house of Parliament) that the fixed, but outdated reference prices of 1986-1988 in the WTO *Agreement on Agriculture* impeded the ability of poor countries to subsidize food for security purposes without breaching the Uruguay Round limits:

> Developing countries are finding themselves hamstrung by the existing rules in running their food stockholding and domestic food aid programs. The developed world too had market price support programs and was able to move away from such support – though not fully even now – because of their [*sic*] deep pockets.

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264 Kumar & Miles.
265 Kumar & Miles.
266 Brian Flood, *India's Modi Seeks Food Security Support At Meeting With U.N. Organization Director*, 31 International Trade Reporter (BNA) 1684 (18 September 2014) (*quoting* Mr. da Silva).

> This is not possible for developing countries. It is important for developing countries to be able to guarantee some minimum returns to their poor famers so that they are able to produce enough for themselves and for domestic food security.[267]

Finding the WTO Membership since the December 2013 Bali Ministerial Conference had focused excessively on trade facilitation, India wanted Members to pay more attention to food security. Trade facilitation helps rich and poor countries alike; food security is of pressing importance to poor countries.

Thus, India could sign the *Agreement* in parallel with progress on food security, especially given the target date set in Bali for a final agreement on public stockholding was later – 2017. Whether India would get that chance depended on whether the America Australia, EU, Japan, and Norway, along with other Members, advanced an idea to exclude India entirely from the *Agreement* and turn it into a plurilateral deal. As Australia said: "Some see it as a final trigger for ending Doha and pressing ahead with plurilateral reform, leav[ing] behind those that don't want to come along."[268]

Level-headedness came from New Zealand, which observed there was "too much drama" surrounding the negotiations and excluding India would be "naïve:"[269]

> India is the second biggest country by population, a vital part of the world economy, and will become even more important. The idea of excluding India is ridiculous. I don't want to be too critical of the Indians. We have to try and pull this together and at the end of the day putting India into a box would not be productive.[270]

As for acting in bad faith, a charge leveled at India, India defended itself.[271] Other Members were guilty of bad faith, as they had cast doubt on the feasibility of implementing the December 2008 Draft Modalities Text on Agriculture. That Text was the only proposed accord on farm trade on the table, and was based on the August 2004 *Framework Agreement* and the November 2001 DDA mandate.

- **Flaws in India's Position**

While true, there were four central flaws in the Indian position. First, as America, Australia, and other WTO Members pointed out with exasperation, it was not clear what

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267 *Quoted in* Brian Flood, *India to Rally WTO Support on Food Security, New Delhi's Trade Minister Tells Parliament*, 31 International Trade Reporter (BNA) 1434 (7 August 2014).
268 Kumar & Miles, (*quoting* an unnamed Australian trade official).
269 Kumar & Miles, (*quoting* Tim Groser, Minister of Overseas Trade, New Zealand).
270 Kumar & Miles, (*quoting* Tim Groser, Minister of Overseas Trade, New Zealand).
271 *See* World Trade Organization, *No Consensus on How to Take Negotiations Forward, Farm Talks' Chair Concludes*, 23 September 2014, www.wto.org.

the Indian position was.[272] Was the Indian argument that permanent solutions to the controversies over public stockholding and the *Trade Facilitation Agreement* must be found by the end of 2014? That is, was India linking progress on each Bali deal to the other, demanding final resolution on both of them before the end of that year? Or, was the Indian argument about clarification of the duration of the Due Restraint Mechanism, possibly beyond 2017 when the 11th Ministerial Conference was scheduled, if no resolution of the public stockholding problem was found by then? That is, did India want assurance that developed countries would not take legal action against its public stockholding policies that might violate extant GATT-WTO commitments (especially under the *Agriculture Agreement*) until Members found a permanent solution to the public stockholding issue, however long that might take?

When confronted at the WTO, India failed to clarify which of the two positions it was taking, saying Members had shown in Bali they could come to quick resolution on a complex text within weeks, so, surely, they could resolve problems with both texts by the end of 2014. That retort was not persuasive. In fact, Members had not resolved all matters in Bali – hence the contentiousness after the Ministerial Conference. It also was counter-productive. The U.S. and other Members offered to clarify the duration of the Due Restraint Mechanism to placate India. By not pursuing this offer, India appeared to the world it was holding hostage the *Trade Facilitation Agreement*, and undermining the credibility of the WTO as an effective negotiating forum.

Second, India remained very much to blame for its food security woes. It is the second largest producer of fruits and vegetables in the world. Yet, 40% of this output spoils because of poor transportation, communication, and storage infrastructure, and outright corruption. The CRS faulted India in an October 2014 study, saying the Indian insistence on concessions for food stockpiling "would appear to represent serious erosion on domestic support commitments that already have been achieved during previous negotiating rounds," *i.e.*, they would undermine Uruguay Round Amber Box and *De Minimis* support limits.[273] Surely self-inflicted Indian agricultural problems should not be allowed to jeopardize those commitments.

Third, India missed an opportunity to make progress on a key economic goal: narrowing its budget deficit from 4.5% (in 2013) to 3% of GDP by 2017. Its WTO position intimated it was not cutting food or fuel subsidies in the first budget of the Modi government. Instead, in preserving the over $20 billion (in 2013) allocated for public food distribution, the BJP was playing to its political base. Why could India not put into the Green Box more of its subsidies, as had the EU and U.S. since the Uruguay Round?

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[272] *See* World Trade Organization, *Members Fail to Agree on Post-Bali Work on Agriculture*, 16 September 2014, www.wto.org; Brian Flood, *U.S. Willing to Clarify Stockholding Stance As WTO Re-Engages on Trade Facilitation*, 31 International Trade Reporter (BNA)1652 (18 September 2014); Brian Flood, *India's Modi Seeks Food Security Support At Meeting With U.N. Organization Director*, 31 International Trade Reporter (BNA) 1684 (18 September 2014).

[273] Randy Schnepf, *Agriculture in the WTO Bali Ministerial Agreement*, Congressional Research Service 7-500, R43592 at 12 (6 October 2014), http://fas.org/sgp/crs/misc/R43592.pdf. *See also* Stephanie Cohen, *India's Insistence on Food Stockpiling Plan Represents "Serious Erosion," CRS Reports*, 31 International Trade Reporter (BNA) 1850 (16 October 2014) (discussing this Report).

Fourth, trade facilitation can only help India and other poor countries boost their exports. For instance, with streamlined customs procedures, India is a more attractive part to include in a global value-added chain for processed agricultural goods or manufactured products. Linkage is an understandable negotiating tactic, but if the resulting trade offs to India result in a net welfare loss, then invoking it is self-defeating.[274] Indeed, SMEs in India and across the globe would benefit from trade facilitation, and their support, and that of the business community generally, could help get the deal "unstuck."

If there was one point on which all WTO Members could agree, then it was that made by the Director General in August 2014: "as things stand, the future of the [multilateral trading] system is full of uncertainties."[275] Likewise, in September 2014, after exhaustive consultations with Members, the Chair of the Agriculture Negotiations, Ambassador John Adank of New Zealand, declared his "general conclusion" that "in the absence of a solution to the current impasse, there is no consensus on how the negotiations mandated for this Committee [on Agriculture] can be taken forward."[276] After all, the WTO had examined four major proposals to deal with public stockholding through purchases of farm goods at supported prices:

(1) **Putting the support in the Green Box**, *i.e.*, not counting it as trade-distorting domestic support (aggregate measurement of support or AMS, sometimes called "Amber Box" support). This was the main proposal up to 2013. Several countries oppose this on the grounds that price support distorts trade and does not conform to Green Box criteria.

(2) **Revising the limits on trade-distorting support** that developing countries agreed under the present *Agriculture Agreement*, particularly for this kind of program. Some countries had reservations and in any case the proponents preferred the "Green

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[274] The characterization in one media account that linking issues was a "ghost" was flat wrong:

> But the genie is out of the bottle. India's tactics reawakened *a ghost from the WTO's past that many diplomats hoped to have put behind them: the idea of "linkages."*
>
> *Linking unconnected negotiations was a major reason why the Doha round of trade talks that began in 2001 collapsed*. As more and more states parlayed a concession here into a pledge there, the weight of interwoven bargains eventually caused paralysis.

Tom Miles, *WTO Failure Points to Fragmented Future for Global Trade*, REUTERS, 4 August 2014, http://mobile.reuters.com. In truth, horizontal negotiations are an inherent part of any proposed trade agreement that covers issues involving more than one economic sector. As for ascribing the Doha Round collapse to linkage, if anything, the problem in the Round had been not enough linkage in pursuit of its founding purpose to alleviate poverty and thereby help drain the recruiting pool of violent extremist organizations (VEOs).

[275] Brian Flood, *WTO Director-General Seeks Public Sector Support in Wake of Trade Facilitation Failure*, 31 International Trade Reporter (BNA) 1514 (21 August 2014) (*quoting* Roberto Azevêdo).

[276] *Quoted in* World Trade Organization, *No Consensus on How to Take Negotiations Forward, Farm Talks' Chair Concludes*, 23 September 2014, www.wto.org.

Box" route.

(3) **Adjusting the base-period reference prices** that are used to calculate trade-distorting domestic support to take inflation into account. This first appeared publicly in 2013 in the agriculture negotiations Chairperson's oral report on his consultations, and in a G-33 document [a fall 2013 proposal for the Bali Ministerial Conference]. Countries opposing this said it would alter the "architecture" of agricultural trade reform under the present agreement. That architecture was designed to prevent all WTO members from citing inflation as a reason to increase the amount of trade-distorting support they are entitled to.

(4) **A "*Peace Clause*"** shielding these programs from legal challenge (the interim solution agreed in Bali). With the *Peace Clause* in place, limits on trade-distorting support and the methods of calculation (including reference period prices) do not come into play for these programs.[277]

Across all the years of the Doha Round, the WTO still had not agreed on a solution to this most basic matter of food security.

The October 2014 Report to the Trade Negotiations Committee by WTO Director General Roberto Azevêdo intoned candidly:

As I see it, the situation is clear as day:

(1) First, we have not found a solution for the impasse. The deadline on the *Trade Facilitation Agreement* passed more than two months ago. We are on borrowed time.
(2) Second, as I feared, this situation has had a major impact on several areas of our negotiations. It appears to me that there is now a growing distrust, which is having a paralyzing effect on our work across the board.

This is the situation. And I am not in a position to tell you that a solution for our impasse is in the making.

…

Once again, the negotiating track is stuck. Of course, this is not new to us – deadlock has unfortunately become a familiar position. But, that doesn't make it any more acceptable. And, it is not often that we have been able to overcome situations like this. We did so in Bali – and that gave us hope for a new WTO. Yet, now, we are here again. The lack of ability to find full convergence quickly leads to deadlock, and deadlock leads to paralysis. We have seen this

[277] World Trade Organization, *Members Fail to Agree on Post-Bali Work on Agriculture*, 16 September 2014, www.wto.org. (Emphasis original.)

situation too many times. So, we can't continue in such an inefficient and ineffective way that is so prone to paralysis.

…

So, we have to think about the consequences of the situation we're in – and consider how this organization can work. Again, this is something you have to talk about.

…

This could be the most serious situation that this organization has ever faced.

…

I suggest that we try to answer the questions that are before us. Specifically:

(1) What should we do with the decisions on Trade Facilitation and public stockholding?
(2) What should we do with the other Bali decisions, including the LDC package?
(3) How should we respond to the Ministerial mandate to develop a work program on the post-Bali agenda?
(4) And how do we see the future of the negotiating pillar of the WTO?[278]

Reports from the Chairmen of each of the major Doha Round negotiating groups – agriculture, NAMA services, TRIPs, AD-CVD rules, development, environment, and dispute settlement – backed this truthful assessment. They lamented the deadlock, a lack of consensus among Members as to whether to move forward on these other topics before a final resolution of the trade facilitation and public food stockpiling issues. Indeed, in the two-hour TNC meeting, not a single WTO Member spoke on how the Indian concern about permitting domestic food supply stockpiling could be reconciled with progress on the *Trade Facilitation Agreement*.[279] And, not a single Member could "persuade India to drop its demands that the Organization bless its domestic food security programs as a condition for moving forward with the *TFA* Protocol of Amendment."[280]

Shortly thereafter, the Director General identified three scenarios for the future: (1) quickly find a solution to the deadlock; (2) continue to search for a solution to the deadlock; or (3) implement the *Trade Facilitation Agreement* as a plurilateral accord outside WTO auspices, or implement the *Agreement* (particularly Section (2)) within the WTO among Members willing to do so on an MFN basis.[281] Members knew scenario (1) was unlikely. Scenario (2) seemed doomed: they had been working since July, to no avail. As for scenario (3), they preferred making operational the *Agreement* inside the WTO to taking the deal outside the multilateral system, if for no other reason than the *Agreement* would be covered by the *DSU*. If they did so among only a coalition of the willing, then they would undermine

[278] *See* World Trade Organization, *Azevêdo Says Bali Impasse Paralyzing WTO Work, Chairs Report No Progress in Consultations*, 16 October 2014, www.wto.org.
[279] *See* Bryce Baschuk, *Observors Say Trade Facilitation Doomed, Coalition May Pursue Plurilateral Talks*, 31 International Trade Reporter (BNA) 1872 (23 October 2014).
[280] Bryce Baschuk, *WTO Members Mulling Best Path For Trade Facilitation Without India*, 31 International Trade Reporter (BNA) 1955 (6 November 2014).
[281] *See* World Trade Organization, *Azevêdo Urges Members to Continue Talking about Ways to Move Forward beyond Bali Impasse*, 31 October 2014, www.wto.org.

the single-undertaking approach that is the hallmark of multilateralism.

- **November 2014 Indo-American Deal**

What occurred was a combination of Scenarios (1) and (2). Following a September 2014 visit by Prime Minister Narendra Modi to America, India put forth new proposals in November 2014.[282] Apparently, America accepted one of them. The U.S. pledged not to take legal action in the WTO against Indian food stockpiling programs.[283] Their deal stated:

> 1. Paragraph 2 of the Bali *Decision* shall be read as follows: Until a permanent solution is agreed and adopted [for all developing Members, as per Footnote 1], and provided that the conditions set out in Paragraphs 3 to 6 of the Bali *Decision* are met, Members *shall not* challenge through the WTO Dispute Settlement Mechanism, compliance of a developing Member with its obligations under Articles 6:3 and 7:2(b) of the *Agreement on Agriculture* (*AoA*) in relation to support provided for traditional stable food crops [*i.e.*, as per Footnote 1, "primary agricultural products that are predominant staples in the traditional diet of a developing Member"] in pursuance of public stockholding programs for food security purposes existing as of the date of the Bali *Decision* that are consistent with the criteria of Paragraph 3, Footnote 5, and Footnote 5 and 6 of Annex 2 to the *AoA*. [As per Footnote 3, a developing Member may introduce a new public stockholding program for food security purposes, if that scheme complies with the *AoA*.]
>
> 2. If a permanent solution for the issue of public stockholding for food security purposes is not agreed and adopted by the 11th Ministerial Conference, the mechanism referred to in Paragraph 1 of the Bali *Decision*, as set out in Paragraph 1 of this *Decision*, shall continue to be in place until a permanent solution is agreed and adopted. [284]

This language – essentially barring a lawsuit against the domestic food grain purchasing programs of a Member that met the listed criteria – was tighter than the language in the *Decision*, which exhorted Members to "*refrain* from challenge through the WTO Dispute

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[282] *See* Bryce Baschuk, *India Proposes New Solutions To WTO Trade Facilitation Impasse*, 31 International Trade Reporter (BNA) 1993 (13 November 2014).

[283] *See* World Trade Organization, *Azevêdo Applauds India-U.S. Agreement on Key Bali Issues*, 13 November 2014, www.wto.org [hereinafter, *Azevêdo Applauds*]; *India and U.S. Reach WTO Breakthrough Over Food*, BBC NEWS, 13 November 2014, www.bbc.com/news/business-30033130 [hereinafter, *India and U.S.*]

[284] World Trade Organization, General Council: Decision of 27 November 2014, *Decision on Public Stockholding for Food Security Purposes*, WT/GC/W/688, ¶ 127 November 2014, www.wto.org. (Footnotes omitted, emphasis added.); *also quoted in* Bryce Baschuk, *TFA, Food Security Agreements Circulate Ahead of WTO General Council Meeting*, 31 International Trade Reporter (BNA) 2056 (27 November 2014) [hereinafter, *TFA, Food Security*].

Settlement Mechanism."[285] India had long felt that without updating the 1986-1988 pricing benchmark used under the Uruguay Round *Agreement on Agriculture* to compute whether support is trade distorting, America would sue it.

So, America agreed to extend the *Peace Clause* beyond 2017, until a final solution was found in respect of implementing the Bali *Decision on Public Stockholding for Food Security Purposes* and *Trade Facilitation Agreement*. The target date for resolving permanently the controversies around the *Decision* was 31 December 2015 (which actually was an advance on the original target ate of the 11th WTO Ministerial Conference in 2017), but that date was uncertain, and the outcome was not prejudged. So, until the indefinite date when the *Decision* was implemented, Indian spending on its food security would not be at legal risk from limits to spending on farm subsidies. As of November 2014, that spending amounted to $12 billion, as India bought rice and wheat from its farmers at above-market prices, provided a portion of those grains to the poor, and stockpiled the balance to ensure the country would not run short of food.

The two countries, and the WTO Director General, trumpeted the bilateral deal as a "breakthrough." To be sure, the result was India lifted the objection it had since July, so the WTO General Council could approve the *Trade Facilitation Agreement*, which it did in December 2014. Technically, the General Council formally approved a *Decision* to adopt a *Protocol of Amendment* to the *Marrakesh Agreement* by which the WTO was established, thereby inserting the *Agreement* into the corpus of GATT-WTO law (specifically, Annex 1A to the *WTO Agreement*), and clarified the Bali *Decision on Public Stockholding for Food Security Purposes*.[286] For entry into force, as per Article X:3 of the WTO Agreement, 2/3 of the WTO Members had to ratify the changes by July 2015 (with acceptance by the EU counting in number as the number of EU states) .

But, in reality, the deal was not a "breakthrough," nor did it put the WTO "back on track," or put to rest criticisms that the Organization was too large in size and too wide in diversity to operate efficiently under the consensus rule as Mr. Azevêdo claimed.[287] Consider the simple fact that by end-November 2015, the WTO had received only 50 Category A notifications, just 1 of which was from a least developed country, from among all of its developing and least developed country Members. By January 2015, the number increased to 56, with Egypt and Gabon making Category A pledges. (Developed countries,

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285 *Quoted in TFA, Food Security*. (Emphasis added.)

286 *See* World Trade Organization, *Azevêdo: "We Are Very Close to Overcoming Impasse on Bali Implementation*," 26 November 2014, www.wto.org.

The specific documents were (1) *Decision on the Protocol Amending the Marrakesh Agreement Establishing the World Trade Organization (to Insert the Trade Facilitation Agreement into Annex 1A of the WTO Agreement)*, WT/PCTF/W/28, 24 November 2014, and (2) *Decision on Public Stockholding for Food Security Purposes*, WT/GC/W/688, 27 November 2014. Both are www.wto.org. The Category A notifications received from developing and least developed country Members were deemed annexed to the *Trade Facilitation Agreement* (WT/l/931), *i.e.*, the notifications were an annex to the *Agreement*, which itself was in Annex 1A of the *WTO Agreement* – an annex to an Annex, as it were. The General Council also approved a *Decision on Post-Bali Work*, WT/GC/W/690. *See* World Trade Organization, *Statement by the Chairman of the General Council*, 27 November 2014, www.wto.org.

287 World Trade Organization, *WTO Work is "Back on Track," Says Azevêdo*, 27 November 2014, www.wto.org.

of course, were not eligible to submit Category A notifications, but they accounted for just 20% of the 160 Members.)

What the bilateral deal was, in truth, first, was a climb down by the U.S., though India compromised by agreeing to a temporary *Peace Clause* in lieu of a permanent solution to the mess. Second, there still was no permanent solution on food security: the deal was a decision to "kick the can down the road." Third, the fact India could drive the deal was further evidence of the shift in the balance of power in the WTO away form America and Europe. The American effort to isolate India had failed. The Indian Commerce and Industry Minister, Nirmala Sitharaman (1959-) said:

> Many countries saw merit in what we were asking for. India was not alone or isolated. Others were simply not speaking up.[288]

Fourth, the Americans obviously did not like that shift in the balance of power. In the wake of the deal, the CRS blamed India for the mess:

> India's insistence on new concessions on food stockpiling – the Green Box already allows for unlimited food stockpiling for food security purposes, provided the food is purchased at market prices (not above-market prices as India proposes) – would appear to represent serious erosion on domestic support commitments that have already been achieved during previous negotiating rounds.[289]

That was ironic. The CRS study came out just before Thanksgiving 2014, when many Americans lacked adequate food. Food insecurity was an American problem, not just an Indian one. Not seeing the shared interests in solving that problem meant the future of the WTO, at least as a negotiating forum, remained in peril.

Also ironic was a warning from the OIE issued in January 2015: a rush to trade facilitation could undermine SPS standards designed to limit the spread of pathogens transmitted through animal products or live animals. Perishable products, such has butter, eggs, honey, meat, and milk were especially risky, and there was no sense in facilitating trade to the detriment of public health. Defenders of the *Trade Facilitation Agreement*, including the WTO – which was eager to advance the deal after the Indo-American spat – fought back. They pointed to Article 7 of the *Agreement*. It makes clear all exceptions, exemptions, and waivers under GATT, including Article XX(b) for "measures necessary to protect human, animal, or plant life or health," apply to the *Agreement*.

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[288] *Quoted in* Bryce Baschuk, *India, U.S. Agreement Clears Path For Trillion-Dollar WTO Trade Deal*, 31 International Trade Reporter (BNA) 2044 (20 November 2014).

[289] Randy Schnepf, *Agriculture in the WTO Bali Ministerial Agreement*, CONGRESSIONAL RESEARCH SERVICE, R43592, 13 November 2014, http://fas.org/sgp/crs/misc/R43592.pdf; Brian Flood, *CRS Presents Pessimistic Outlook On Future WTO Agriculture Deals*, 31 International Trade Reporter (BNA) 2056 (27 November 2014).