

# U.S. Customs and Border Protection

Slip Op. 11–122

ADVANCED TECHNOLOGY & MATERIALS CO., LTD., BEIJING GANG YAN DIAMOND PRODUCTS COMPANY, AND GANG YAN DIAMOND PRODUCTS, INC., Plaintiffs, BOSUN TOOLS GROUP CO. LTD, Plaintiff-Intervenor, v. UNITED STATES, Defendant, and DIAMOND SAWBLADES MANUFACTURERS COALITION, WEIHAI XIANGGUANG MECHANICAL INDUSTRIAL CO., LTD., AND QINGDAO SHINHAN DIAMOND INDUSTRIAL CO., LTD., Defendant-Intervenors.

Before: R. Kenton Musgrave, Senior Judge

Consol. Court No. 09–00511

**PUBLIC VERSION**

[Remanding for further explanation on the question of separate rates and granting defendant’s consent motion for remand to reconsider surrogate steel values.]

Dated: October 12, 2011

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## **OPINION AND ORDER**

### **Musgrave, Senior Judge:**

This consolidated action concerns the final less than fair value (“LTFV”) determination issued by the International Trade Administration, United States Department of Commerce (“Commerce” or “the Department”) in the antidumping investigation of diamond sawblades imported from the People’s Republic of China. *See Diamond Sawblades and Parts Thereof From the People’s Republic of China*, 71 Fed. Reg. 29303 (May 22, 2006) (final LTFV determination) (“*Final Determination*”), *as amended*, 71 Fed. Reg. 35864 (June 22, 2006). Plaintiffs Advanced Technology & Materials Co. Ltd., Beijing Gang Yan Diamond Products Company, and Gang Yan Diamond Products,

Inc. (“ATM”) challenge several aspects of the *Final Determination* including (1) the Department’s use of zeroing to calculate the weighted-average dumping margin; (2) the selection of Carborundum financial data to calculate surrogate financial ratios; and (3) the Department’s valuation of certain steel inputs. *See* ATM’s Mot. at 1–2. Defendant-Intervenor Diamond Sawblade Manufacturers Coalition (“DSMC”) challenges the Department’s country of origin determination and its decision to award ATM a separate rate. ATM and DSMC move for judgment on the agency record, and the Department also moves for voluntary remand to reconsider aspects of its selection of surrogate values for steel used to produce diamond sawblade cores, which moots ATM’s third cause of action.<sup>1</sup>

The court exercises jurisdiction pursuant to 28 U.S.C. § 1581(c), under which the Court of International Trade is granted exclusive jurisdiction of any civil action commenced under 19 U.S.C. § 1516a. The court reviews the *Final Determination* on the basis of the agency record. *See* 28 U.S.C. § 2640(b); 19 U.S.C. § 1516a(b)(1)(B)(i). Upon such review, the court must “hold unlawful any determination, finding, or conclusion found . . . to be unsupported by substantial evidence on the record, or otherwise not in accordance with law.” 19 U.S.C. § 1516a(b)(1)(B)(i). “Substantial evidence is more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.” *Consol. Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938). As requested by the Department and for the reasons set forth below, this matter will be remanded for further consideration.

### ***Discussion***

#### **I. Surrogate Financial Data**

An accurate calculation of normal value necessarily includes selling, general and administrative expenses (“SG&A”), overhead, and profit. For non-market economy producers, Commerce estimates these items by using the financial ratios of a surrogate producer, *i.e.*, a “producer[] of identical or comparable merchandise in the surrogate country.” 19 C.F.R. § 351.409. Commerce chose India as an appropriate surrogate country for the investigation of PRC producers, but industry-specific information was apparently unavailable at the time of the preliminary determination, and therefore Commerce used financial ratios taken from the *Reserve Bank of India Bulletin* (August 2005) (“RBI data”). The RBI data “include[] the experience of 2,201

<sup>1</sup> Further, the court also need not address ATM’s first contention because argument thereon was addressed in Slip Op. 11–105. To the extent any arguments remain, past precedent of this Court has shown them to be without merit.

public limited companies in India, including Tea plantations, Mining & Quarrying, Food Products & Beverages, Sugar, Edible Oils, Cotton, Paper Products, Chemical Products, Paint, and Medicines.” Issues and Decision Memorandum (“Decision Mem.”) at 8.

After issuance of the preliminary determination, DSMC placed on the record specific financial reports of two Indian producers of grinding wheels and abrasive products, namely Grindwell Norton, Ltd., (“Norton”) and Carborundum Universal Limited (“Carborundum”). After examination of these financial reports, Commerce determined that the Carborundum data were the best choice of the three available data sets (RBI data, Norton, Carborundum), and, accordingly, recalculated the SG&A expenses using Carborundum’s financial ratios. Commerce declined to use the Norton financials because that data predated the period of investigation by more than three years.

ATM argues Commerce’s choice to use Carborundum’s financial data is erroneous because (1) substantial evidence does not support the conclusion that grinding wheels are comparable to diamond sawblades; (2) the record contains no clear indication that Carborundum produced grinding wheels during the financial statement period; and (3) the RBI data are less likely to be distortive and therefore represent the “best available information” required by 19 U.S.C. § 1677b(c)(1) (the Department’s valuation “shall be based on the best available information regarding the value of such factors in a market economy country or countries considered to be appropriate”). However, in reviewing the *Final Determination* the question before the court is not “whether the information Commerce used was the best available, but rather whether a reasonable mind could conclude that Commerce chose the best available information.” *Goldlink Indus. Co. v. United States*, 30 CIT 616, 619, 431 F. Supp. 2d 1323, 1327 (2006). For the reasons discussed below, the court finds the Department’s selection of the Carborundum data was reasonable and is supported by substantial evidence.

To determine whether two products are comparable, Commerce typically considers whether they had similar physical characteristics, end uses, and production processes. *See, e.g.*, ATM’s Mot. at 25–33. Contrary to ATM’s allegations, however, Commerce did not ignore these factors. The Department observed that diamond sawblades and grinding wheels both physically function as abrasives, that is, “by abrading the materials against which they are placed in a grinding process” instead of cutting the material. Decision Mem. at 8 (referring to description set forth in the original Petition). The Department also recognized differences in the products, *i.e.*, that diamond sawblades use a different abrading component (diamonds) than grinding wheels,

and it also observed that all of the respondents produced grinding wheels that use a diamond abrasive. The Department noted that both products are used in the construction and infrastructure industry but disagreed that comparable products necessarily must have identical end users. *Id.* at 8.

ATM contends that the Department should have considered that the production of diamond sawblades requires expensive raw materials not used in grinding wheels and that these differences would distort the SG&A ratio. While this is a colorable argument, ATM does not point to record evidence to support it. Diamonds or diamond powders may or may not be an expensive material, but all record indications are that they are apparently used in extremely small quantities. The court cannot assume the existence of such distortions when none are immediately apparent. Moreover, it is not necessary for Commerce to “duplicate the exact production experience” of non-market economy manufacturers, or “undergo an item-by-item accounting” when determining production costs. *Nation Ford Chem. Co. v. United States*, 166 F.3d 1373, 1377 (Fed. Cir. 1999).

Next, ATM contends that even assuming grinding wheels are comparable, nothing in the record indicates Carborundum produced grinding wheels during the financial statement period. According to ATM, Carborundum’s statement noting its efforts “resulted in . . . the development of new products such as thread grinding wheels” should only support the conclusion that Carborundum was developing the capability to produce such grinding wheels, not that it actually produced them. ATM’s Mot. at 34–35. The government asserts that the court should reject this argument because it was never presented at the agency level, and that even if the court were to consider it, the Department’s interpretation of the financial statement language was reasonable. Def’s Mot. in Opp’n at 32.

The court agrees with the government. The comment in the financial statement is ambiguous at best, and the Department’s interpretation of it is not unreasonable. More importantly, ATM should have raised this question when the matter was before Commerce. The doctrine of administrative exhaustion of remedies is “appropriate in the antidumping context because it allows the agency to apply its expertise, rectify administrative mistakes,” and advances “the twin purposes of protecting administrative agency authority and promoting judicial efficiency.” *Carpenter Tech. Corp. v. United States*, 30 CIT 1373, 1374–75, 452 F. Supp. 2d 1344, 1346 (2006). The Court has, of course, found exceptions when requiring exhaustion would be futile, a useless formality, or in the face of a manifestly inadequate remedy,

see, e.g., *Alhambra Foundry Co., Ltd. v. United States*, 12 CIT 343, 685 F. Supp. 1252, 1256 (1988), but this is not one of those. The contention ATM attempts to press is a simple factual matter that could have been resolved with relative ease when the matter was before Commerce, but now that it has moved here, resolution would require far more involvement and undercut Commerce's factual determination process. The court will therefore not consider it further.

Finally, the court must reject the contention that the RBI data present the least distortive financial ratios. Where Commerce is faced with the choice of selecting from among imperfect alternatives, it has discretion to select the best available information for a surrogate value so long as its decision is reasonable. ATM does not persuade that Commerce's selection of Carborundum data over the RBI data was unreasonable, and the court cannot substitute its judgment for that of Commerce.

## II. Country of Origin

DSMC challenges the Department's conclusion that the country of origin for diamond sawblades was the country in which the diamond segments were joined to the core, and it specifically challenges the conclusion that assembly of this nature constituted a "substantial transformation." DSMC contends the Department erred in this regard because (1) "substantial transformation" could not have occurred where the end product (finished sawblades) is in the same class or kind of merchandise as the cores and segments; (2) the Department "did not employ its normal analysis" for substantial transformation and failed to explain the reasons for doing so; and (3) such a conclusion seriously undermines the relief afforded by the order "by permitting the subject merchandise to become non-subject" simply by joining the components in a third country. DSMC's Mot. at 14, 19, 31. For the reasons that follow, the court does not agree.

The scope of an antidumping duty order is "defined by the *type of merchandise* and the *country of origin* (e.g., widgets from Ruritania)" and therefore the determination of where the merchandise is produced or manufactured is a fundamental step in the administration of the antidumping laws. *Ugine and Alz Belgium, N.V., v. United States*, 31 CIT 1536, 1550–51, 517 F. Supp. 2d 1333, 1345 (2007) (quoting and italicizing *Certain Cold Rolled Carbon Steel Flat Products from Argentina*, 58 Fed. Reg. 37062, 37065 (Jul. 9, 1993) (final LTFV determination)). The Department's "'substantial transformation' rule provides a yardstick for determining whether the processes performed on merchandise in a country are of such significance as to require that the resulting merchandise be considered the product of the country in

which the transformation occurred.” *E.I. DuPont de Nemours & Co., v. United States*, 22 CIT 370, 373–74, 8 F. Supp.2d 854, 858 (1998).

The factors used to determine whether “substantial transformation” has taken place include: (1) whether the processed downstream product falls into a different class or kind of merchandise from the upstream product; (2) whether the essential component of the merchandise is substantially transformed in the exporting country; and (3) the extent of processing in the exporting country. Def’s. Resp. in Opp’n. at 40 (citing *Erasable Programmable Read Only Memories (EPROMs) From Japan*, 51 Fed. Reg. 39680 (Oct. 30, 1986) (final LTFV determination)) (“EPROMs”).

In addressing DSMC’s arguments, the Department acknowledged that in certain determinations it has placed greater emphasis on whether the downstream product falls into a different class or kind of merchandise, but it asserts that this factor is not controlling because the determination is essentially made “on a case-by-case basis.” Decision Mem. at 18. By way of illustration, the Department discussed two investigations where the difference in “class or kind of merchandise” was not a point of focus. Cf. *EPROMs (above) with 3.5” Microdisks and Coated Media Thereof From Japan*, 54 Fed. Reg. 6433 (Feb. 10, 1989) (final LTFV determination) (“Microdisks”).

In both of the referenced investigations the subject merchandise was defined to include a finished product as well as components of the finished product. In *EPROMs*, the subject merchandise included the EPROM itself (“a type of memory integrated circuit”) as well as the main components of the *EPROM*, referred to as “processed wafers [and] dice.” In spite of the fact that EPROMs are in a different class or kind of merchandise from the component wafers and dice, the Department found that assembly of the wafers and dice did not constitute a substantial transformation. The Department reasoned that (1) the processed wafer is not only a major component of the finished device, it is *the* essential active component that defines the merchandise, (2) assembly does not add to its essential characteristics, and (3) assembly is fairly unsophisticated process that could be accomplished with relative ease in a third country. *EPROMs*, 51 Fed. Reg. at 39692.

In *Microdisks* the subject merchandise was defined as “microdisks and coated media thereof,” which again concerns a finished product (microdisks), and a component of the product (coated media) described as “the flexible recording material used in the finished microdisk.” 54 Fed. Reg. at 6434. Although microdisks and coated media are in the same class or kind of merchandise, Commerce concluded that the process of turning coated media into a finished microdisk

was a substantial transformation. According to the Department, the finishing process (1) was “extremely important to the technical performance levels” of the end product, (2) required “substantial capital outlay and an extremely high degree of technical precision,” and (3) entailed the use of “state of the art equipment and highly trained technical personnel.” The Department noted further that although the coated media comprised “only a small fraction” of the finished microdisk, the finishing process was not “the type of operation that can be set up and undertaken easily in any country.” 54 Fed. Reg. at 6434.

The Department’s decision in the matter at bar essentially turned on whether the process of assembling diamond segments to cores is more like the process described in *EPRoMs* or more like the one in *Microdisks*. Commerce concluded they were more like the latter. In so finding, Commerce noted the expense and technical expertise required for welding or brazing the cores to the segments, the importance of that process in relation to the ultimate performance of the sawblade, and the capital investment that would be needed to undertake such an operation. Of additional weight was its determination that assembly imparted the “essential quality” of the sawblade because the sawblade could not be used until that process occurred.

Although DSMC points to factors supporting the opposite conclusion for each of the findings, it is not the role of the court to reweigh evidence, and “the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency’s finding from being supported by substantial evidence.” *Consolo v. Federal Maritime Comm’n*, 383 U.S. 607, 619–20 (1966). See *Matsushita Elec. Indus. Co. v. United States*, 750 F.2d 927, 933 (Fed. Cir. 1984). Accordingly, the Department’s country of origin determination is sustained.

### III. Separate Rates

DSMC contends that the Department’s separate rates analysis is inadequate and requires remand because the Department failed to consider important aspects of the problem. Specifically, DSMC contends that the Department erred in refusing to consider evidence showing that ATM’s majority shareholder, the Central Iron and Steel Institute (“CISRI”), is a state owned enterprise that is wholly owned and controlled by the State Asset Supervision and Administration Commission (“SASAC”), a PRC government agency.

DSMC states that during the investigation it placed on the record evidence indicating, among other things,(1) CISRI controls ATM via its position as majority stockholder and through the sharing of man-

agement and directors, (2) CISRI, in turn, is wholly owned by the PRC government agency known as SASAC, (3) CISRI is controlled by SASAC, and (4) Decree No. 378 of the State Council of the PRC<sup>2</sup> that demonstrates the central government's intent to reassert control through SASAC, which is charged with "exercising full 'ownership' rights with regard to companies under its supervision." DSMC's Mot. at 8. DSMC alleges that, in spite of the relevance of this information to the question of the ultimate holder of *de jure* and *de facto* control, Commerce simply rejected it on the ground that it was not the Department's practice to consider whether "parent" companies are government controlled.

The defendant states that Commerce "properly limited its analysis to the activities of [ATM] rather than CISRI and SASAC" because it is the Department's practice to "to examine controls over the investment, pricing, and output decision-making process at the individual firm level," Def's. Resp. in Opp'n. at 40, and that DSMC is essentially asking Commerce to change its longstanding policy. The government argues further that the Issues and Decision Memorandum shows that Commerce fully considered the evidence presented by DSMC, pointing out, for example, the Department's observation that CISRI representatives "were a minority on [ATM]'s board of directors, of which others included representatives of [ATM] and members independently appointed by the stock exchange committee." *Id.* at 41.

In support of the government, ATM contends that the Department's analysis was rational and supported by past practice, noting that "[e]xporters have not been required to show the total absence of any governmental involvement . . . [the Department] has, quite logically, focused on the control over exports since it is this pricing that it believes could be influenced by governmental interference." ATM points to several determinations where the Department granted separate rates to companies in similar or identical situations.

ATM also contends that CISRI is not a state-owned enterprise, but an enterprise "owned by all the people," which does not require a finding of government control. In that regard, ATM argues that DSMC has pointed to only one piece of evidence on the record that would otherwise connect the central government with the ATM entity: Decree No. 378 of the State Council. According to ATM, DSMC failed to "show why the decree on its face" compels a finding of state control over ATM," and provides its own analysis of the decree to demonstrate that it does not evince the type of control that would be relevant to a separate-rates analysis. ATM's Resp. in Opp'n. at 8.

In reviewing the *Final Determination*, the Court must consider,

<sup>2</sup> DSMC refers to this decree as "Interim Regulations."



*inter alia*, whether the Department has “examine[d] the relevant data and articulate[d] a satisfactory explanation for its action including a rational connection between the facts found and the choice made.” *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (internal quotation marks omitted). The agency must offer an explanation of the decision that is clear enough to enable judicial review, and cannot “leave vital questions, raised by comments which are of cogent materiality, completely unanswered.” *United States v. Nova Scotia Food Prods.*, 568 F.2d 240, 252 (2d Cir.1977). For the reasons set forth below, the *Final Determination* must be remanded to the Department for further explanation.

For a non-market economy (“NME”), “the Department presumes that all companies within the NME country are subject to government control” unless they can demonstrate an absence of both *de jure* and *de facto* government control. *Import Administration Policy Bulletin 05.1*. Under this scheme, exporters found to be under government control are assigned the “PRC-wide” rate because they are assumed to comprise a single exporter under common government control, the “NME entity.” *Certain Cut to Length Carbon Steel Plate from Ukraine*, 62 Fed. Reg. 61754, 61758 (Nov. 19, 1997) (final LTFV determination). Commerce explained that the purpose of applying one countrywide rate in this context is to prevent an NME government from later circumventing an antidumping order by controlling the flow of subject merchandise through exporters with the lowest dumping margin, *id.*, and that the policy is purportedly “analogous to [its] practice in market-economy cases of calculating individual dumping rates for affiliated parties unless [it] determine[s] that there is a significant potential for manipulation of pricing or production decisions.” *Tapered Roller Bearings and Parts Thereof, Finished and Unfinished, From the People’s Republic of China*, 62 Fed. Reg. 6173, 6175 (Feb. 11, 1997) (final administrative review results).

Commerce, thus, determines the potential for government control or manipulation of NME firms via the *de jure* and *de facto* test set forth in *Silicon Carbide from the People’s Republic of China*, 59 Fed. Reg. 22585 (May 2, 1994) (final LTFV determination). That test is an amplification of the test announced in *Sparklers from the People’s Republic of China*, 56 Fed. Reg. 20588 (May 6, 1991) (final LTFV determination) (“*Sparklers*”), in which the Department determined that it will assign separate rates only if the applicant can demonstrate the absence of both *de jure* and *de facto* governmental control over export activities. The presumption of *de jure* control may be rebutted with a showing of (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. See *Sparklers*, 56 Fed. Reg. at 20589. Regarding *de facto* government control, in accordance with *Silicon Carbide* (which added (3) and (4) of the following), the current presumption may be rebutted if an exporter demonstrates that it (1) sets its own export prices independent of the government and without the approval of a government authority, (2) has the authority to negotiate and sign contracts and other agreements, (3) retains the proceeds from its sales and makes independent decisions regarding the disposition of profits or financing of losses, and (4) has autonomy from the government regarding the selection of management. See *Silicon Carbide*, 59 Fed. Reg. at 22587.

It is now well established that “government ownership by itself is not dispositive” of government control. *Qingdao Taifa Group Co., Ltd., v. United States*, 33 CIT \_\_\_, \_\_\_, 637 F. Supp. 2d 1231, 1242 (2009). Firms that are wholly owned by the PRC government are not barred, *per se*, from a separate rate, but this was not always the case. Prior to the *Silicon Carbide* determination, the Department did not allow state-owned companies to receive a separate rate on the ground that “ownership by the central government enables the government to manipulate prices, whether or not it takes advantage of its opportunity to do so during the [period of investigation].” *Certain Compact Ductile Iron Waterworks Fittings and Accessories Thereof from the People’s Republic of China*, 58 Fed. Reg. 37908 (July 14, 1993) (final LTFV determination); *Sebacic Acid From the People’s Republic of China*, 59 Fed. Reg. 565 (Jan. 5, 1994) (preliminary LTFV determination).

Less than a year later, however, with issuance of *Silicon Carbide* the Department changed its position. In that determination, the Department found, in light of new information concerning Chinese economic reforms, that PRC-owned companies designated as “owned by all the people” were sufficiently independent from government control to be eligible for a separate rate. The Department explained that “‘owned by all the people’ is not synonymous with government control . . . [i]nstead, ownership by the people signifies that no individual can take the company; . . . [t]he company belongs to the community[,] and the company’s employees are entrusted with the management of the company.” *Silicon Carbide*, 59 Fed. Reg. at 22586–87 (citations and internal quotes omitted). The court notes that the respondents in that case were ultimately awarded separate rates premised upon the version of the *Sparklers* test that added the

above third and fourth factors to the *de facto* analysis.<sup>3</sup>

Of course, companies “owned by all the people” are but one of several ownership structures in the PRC. The separate rate application provides for six different types of ownership that apparently have been considered by the Department at one time or another. In this matter, the court’s concern is with the ownership structure of ATM and BGY, which are both “limited liability companies.”

Pursuant to the Company Law of the People’s Republic of China, limited liability companies (“LLC’s”) are owned by shareholders, and control is allocated within a corporate structure similar to that used in market economies. *See, e.g., Company Law of the Peoples Republic of China* (1999 amended) (“Company Law”), Art. 4 (providing that the shareholders of a company “have the right to . . . make major decisions, choose managers, *etc.*, in accordance with the amount of capital they have invested in the company”) (reproduced at ATM’s Resp. In Opp’n., Appx, Ex. SA-4). The Department has determined that under the Company Law, control is devolved from the central government and “rests with the enterprise itself.” *Freshwater Crawfish Tail Meat From the People’s Republic of China*, 64 Fed. Reg. 8543 (Feb. 12, 1999) (new shipper preliminary review). Commerce has consistently found that governance by the Company Law establishes *de jure* independence from government control.<sup>4</sup>

<sup>3</sup> It is also appropriate here to note that the “legislative enactments” providing the basis for Commerce’s finding of *de jure* independence in that investigation reflect the PRC government’s devolution of control. These include the “Law of the People’s Republic of China on industrial Enterprises Owned by the Whole People,” (“1988 Law”) and the “Regulations for Transformation of Operational Mechanism of State-Owned Industrial Enterprises” (“1992 Regulations”). Commerce found that these provisions shifted control of enterprises owned by all the people from the government to the enterprises themselves. According to the 1988 Law, enterprises owned “by the whole people” shall make their own management decisions, be responsible for their own profits and losses, choose their own suppliers, and purchase their own goods and materials. Other provisions in the 1988 Law also indicate that this type of enterprise in theory manages itself independently of the government. The 1992 Regulations provide that these same enterprises can set their own prices (Article IX); make their own production decisions (Article XI); use their own retained foreign exchange (Article XII); allocate profits (Article II); sell their own products without government interference (Article X); make their own investment decisions (Article XIII); dispose of their own assets (Article XV); and hire and fire their employees without government approval (Article XVII). *See Certain Partial-Extension Steel Drawer Slides With Rollers From the People’s Republic of China*, 60 Fed. Reg. 29571, 29573 (June 5, 1995) (preliminary LTFV determination).

<sup>4</sup> It is unclear when, or in which investigation, Commerce first analyzed the Company Law. The Company Law was not discussed or mentioned in either the preliminary or final determinations in *Certain Partial-Extension Steel Drawer Slides With Rollers From the People’s Republic of China*, 60 Fed. Reg. 54472 (final LTFV determination), which is cited in at least 20 determinations as an example of the Department’s “analysis” of that provision.

And yet, under the Company Law, shareholders appear to hold substantial power. For example, Article 38 provides that shareholders vote (1) to decide on the business policy and investment plan of the company, (2) to elect and recall members of the board of directors and to decide on matters concerning the remuneration of directors, (3) to elect and recall supervisors appointed from among the shareholders' representatives, and to decide on matters concerning the remuneration of supervisors, (4) to examine and approve reports of the board of directors, (5) to examine and approve reports of the supervisory board or supervisors, (6) to examine and approve the annual financial budget plan and final accounts plan of the company, (7) to examine and approve plans for profit distribution of the company and plans for making up losses, (8) to adopt resolutions on the increase or reduction of the registered capital of the company, (9) to adopt resolutions on the issuance of company bonds, (10) to adopt resolutions on the assignment of capital contribution by a shareholder to a person other than the shareholders, (11) to adopt resolutions on matters such as the merger, division, transformation, dissolution and liquidation of the company, and (12) to amend the articles of association of the company. Company Law, Art. 38. *See also John D. Osgathorpe, A Critical Survey of the People's Republic of China's New Company Law*, 6 Ind. Int'l & Comp. L. 493 (1996); *Joaquin F. Matias, From Work-Units to Corporations: The Role of Chinese Corporate Governance in a Traditional Market Economy*, 12 N.Y. Int'l L. Rev. 1 (1999).

Although the Company Law delegates no control to the government as a matter of law, it does not preclude the government from being a shareholder, or even a 100 percent shareholder. The potential for shareholder control is recognized in 19 U.S.C. § 1677(33)(E), which defines "affiliated parties" as including "[a]ny person directly or indirectly owning, controlling, or holding with the power to vote, 5 percent or more of the outstanding voting stock . . ." of another organization. 19 U.S.C. § 1677(33)(E). In *Tapered Roller Bearings, supra*, the Department expressly rejected the affiliated parties analysis as an inappropriate measure of government control. That decision, however, was premised, in part, upon recognition that "ownership by 'all of the people' is not the type of 'ownership' addressed by section 771(33)." *Tapered Roller Bearings*, 62 Fed. Reg. at 6175 (parentheses omitted). Here, in contrast, the type of ownership involved in an LLC would seem to be precisely the type of ownership addressed by section 771(33). Common ownership is also a factor in the Department's collapsing analysis. *See* 19 C.F.R. § 351.401(f)(2). And as the Department noted in *Tapered Roller Bearings*, "[o]wnership by all of the people signifies . . . that 'no individual can take the company . . . it

belongs to the community.’” *Id.* (referencing *Silicon Carbide*, 59 Fed. Reg. at 22586). But logic would seem to dictate that when the PRC government is the majority shareholder, much of the governmental control that supposedly “devolved” by virtue of the Company Law was actually *re-allocated* (if it ever left) to the government by virtue of shareholding on behalf of “all of the people.”

The Department has addressed the government-as-shareholder problem in relatively few investigations. Two cases decided shortly after the Company Law went into effect are *Certain Paper Clips From the People’s Republic of China*, 54 Fed. Reg. 51168 (Oct. 7, 1994) (final determination) and *Certain Cased Pencils From the People’s Republic of China*, 59 Fed. Reg. 55625 (Nov. 8, 1994) (final determination). In these investigations, the Department’s control analysis focused on the “significant” fact that the government did not vote its shares. *See, e.g., Cased Pencils*, 54 Fed. Reg. at 55627. This was either because the shares themselves were non-voting shares (*Cased Pencils*), or because the government entrusted its voting rights to management or the workers (*Paper Clips*). *See also Disposable Pocket Lighters From the People’s Republic of China*, 60 Fed. Reg. 22359, 22360 (May 5, 1995) (final LTFV determination). The Department explained its reasoning as follows:

When these companies were owned by all the “people,” the central government devolved control of them. Hence, we focused our examination on whether the change in ownership form to shareholding companies altered that devolution of control. We found that it did not. Significantly we found that the government (whether the central government or the Government of Shanghai) did not vote the shares. Although the government held its shares on behalf of the people, in one case those shares were voted by the company’s former general manager (Mr. Lan-sheng), and in the other by the workers (China First).

*Cased Pencils*, 54 Fed. Reg. at 55627.

The foregoing, albeit lengthy, background is necessary as context for proper consideration of DSMC’s contentions concerning the instant *Diamond Sawblades* investigation. Therein, the Department addressed shareholder control in the context of its decision to collapse BGY, ATM, and HXF into a single entity. In that analysis, the Department observed that ATM owns [[ ]] percent of BGY and [[ ]] percent of HXF, and that:

There is significant potential for manipulation due to the common control of [ATM] over BGY and HXF. BGY, [ATM], and HXF have overlapping managers and directors. As stated in the Af-

filiation section above, in addition to serving as a President and Vice Chairman of the Board of Directors of AT &M, [[ ]] is also the Chairman of the Board and Legal Representative of BGY. Further, two Vice Presidents of [ATM] are also Directors of HXF.

*December 20, 2005 Memorandum from Senior Case Analyst to Director, Affiliation and Treatment as a Single Entity of BGY et. al, C. R. Doc. 241 (“Affiliation Memo”) at 8–9.*

With the finding that ATM has control over BGY, DSMC presented evidence indicating that ATM, in turn, is controlled by CISRI through the latter’s [[ ]] percent majority shareholding of ATM, that the shares are voting shares, that after CISRI the next-largest shareholder holds a [[ ]] percent interest, that [[ ]] of CISRI’s board members sit on ATM’s nine-member board of directors, and that [[ ]], ATM’s President and Vice Chairman of the Board (who is also the Chairman of the Board and legal representative of BGY) also sits on the board of directors at CISRI. Further, the court notes Article 99 of ATM’s Articles of Association provides that only shareholders with a minimum [[ ]] percent stake in the company may nominate candidates for the board of directors, and only CISRI meets this requirement. *See C. R. Doc. 226 at Ex. 1.*

In turn, CISRI is 100 percent owned by a PRC government agency, and DSMC contends that CISRI is thus directly controlled by that government agency.

DSMC is not arguing that CISRI itself is an exporter or that it should have been considered in the collapsing analysis. It is asserting that, through CISRI, the chain of shareholder control can be traced to the PRC government, and that the Department should *at least* investigate this possibility and, if true, come to a rational consideration of its implications.

Considering the argument, the court notes that although evidence seems to suggest that CISRI is “owned by the people,” the Department has made no finding on the question. In fact, the Department found the entire issue irrelevant to the analysis, stating:

It is the Department’s practice to examine controls over the investment, pricing, and output decision-making process at the individual firm level (*see, e.g., Certain Cut to- Length Carbon Steel Plate from Ukraine: Final Determination of Sales at Less than Fair Value*, 62 FR 61754, 61758 (November 19, 1997); *Tapered Roller Bearings and Parts Thereof, Finished and Unfinished, from the People’s Republic of China: Final Results of Antidumping Duty Administrative Review*, 62 FR 61276, 61279 (November 17, 1997)), and not the activities of its owner, or its

owner's parent company. Therefore, for this analysis, we will limit our analysis to the activities of the AT&M single entity, rather than CISRI and SASAC.

With respect to the *de jure* criteria listed above, Petitioner has placed on the record interim regulations, which allegedly undermine the independence of BGY and HXF under the Company Law of the PRC. However, we note that the Department has consistently found an absence of *de jure* control when a company's operations were governed by the Company Law of the PRC, and when it supplied business licenses and export licenses, each of which have been found to demonstrate an absence of restrictive stipulations and decentralization of control of the company. See *Honey From the People's Republic of China: Preliminary Results, Partial Rescission, and Extension of Final Results of Second Antidumping Duty Administrative Review*, 69 FR 77184, 77186–87 (December 27, 2004), and unchanged in *Honey from the People's Republic of China: Final Results and Final Rescission, In Part, of Antidumping Duty Administrative Review*, 70 FR 38873 (July 6, 2005).

The information submitted by Petitioner addresses a theoretical control by SASAC over CISRI, rather than any control of the PRC government at any level over the numerous individual export decisions of the AT&M single entity that took place during the POI. In addition, the Department conducted a detailed verification of the operational management and control of the AT&M single entity, including an examination of the AT&M single entity's companies' respective business licenses, export licenses, the Securities Law of the PRC, the Company Law of the PRC, and the Code of Corporate Governance, and found no evidence of any legislative or other restrictions on any of the export activities of the AT&M single entity. Therefore, we find for this final determination that the AT&M single entity has demonstrated a *de jure* absence of government control with respect to its export activities.

Decision Mem at 56–57.

Concerning *de facto* control, the Department found that BGY's questionnaire responses indicated that “it negotiated prices, selected management, and distributed profit independently of the government of the PRC,” which were confirmed at verification with, *inter alia*, “board meeting minutes demonstrating that management is selected

by the Board of Directors.” *Id.* at 56. In conclusion, the Department explained that

because the Department examines companies’ independence from government control with respect to their export decisions in a separate rates analysis (*see Silicon Carbide*, 59 FR at 22586–87 and *Sigma* 117 F. 3d at 1405–06), the Department has examined the *de facto* criteria with respect to the AT&M single entity based on the components of the single entity which exported subject merchandise to the United States during the POI. The Department confirmed at verification that the AT&M single entity made no exports of subject merchandise to the United States other than those of BGY and HXF. *See BGY Verification Report*, at 6–7.

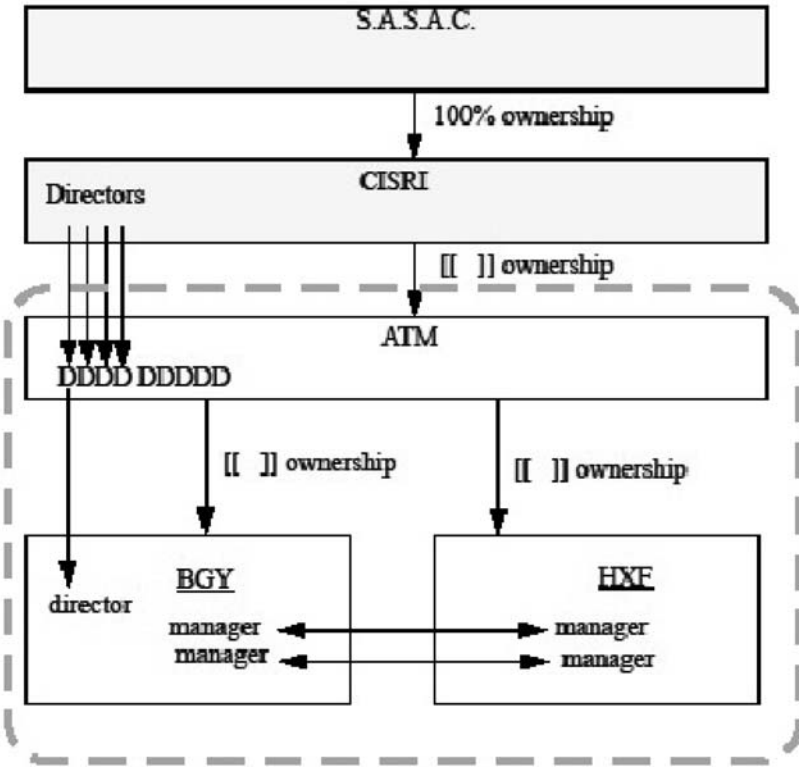
Because AT&M is a single entity including BGY and HXF, and BGY and HXF have demonstrated a *de facto* independence from government control, we find that the AT&M single entity has demonstrated a *de facto* independence from government control with respect to its export activities.

Decision Mem. at 57.

In the first paragraph quoted above, the Department describes its policy of examining “controls over the investment, pricing, and output decision-making process at the individual firm level . . . and not the activities of its owner, or its owner’s parent company.” The court can agree that the “activities” of a parent company with no bearing on such individual firm matters may not be relevant, but the parent company’s *control* or influence would seem entirely relevant. More to the point, an exporter’s attempted showing of *de facto* independence from government *qua* “government” is of dubious value if that exporter is not “*de facto*” independent from the influence of its 100 percent PRC-government-owned parent company. Yet the Department completely ignores this possibility, instead concluding that DSMC’s evidence is immaterial because it does not concern “control [by] the PRC government at any level over the numerous individual export decisions of the AT&M single entity.” Decision Mem. at 56.

As shown in the chart below, the Department’s government control analysis is strictly limited to entities within the dotted line:





See *Affiliation Memo* at 6–9.

The court is mystified by this approach. First, the Department’s refusal to make findings on the parent company, or for that matter, any PRC company, leaves unrebutted the presumption that “all companies within the NME entity,” including parent companies, “are subject to government control.”

Second, the Department’s position is inconsistent with its recognition even in this case that controlling shareholders present a significant potential for manipulation. Although controlling shareholders may be too remote to actually influence the first two questions in the *de facto* analysis, the last two factors are not easy questions. Can a subsidiary show independence from a majority shareholder on matters concerning management selection and the disposition of profits and assets? Evidence in this matter would seem to compel an answer in the negative. Article 38 of the Company Law requires shareholder approval of most major board decisions, including the allocation of

profits. If it were determined that CISRI is the *only* ATM shareholder that may nominate candidates for the board of directors and holds [ ] percent of the voting shares, it would seem difficult to avoid the conclusion that CISRI controls the board as well as the shareholder vote.

The Department justifies its determination as comporting with its “long established” methodology. This is good news for the court, because long established methodologies typically generate a plethora of decisions applying and explaining that methodology, and greatly enhance the court’s understanding of the questions involved. Unfortunately, the court’s research reveals a paucity of separate rate determinations involving parent-subsidiary relationships, and in spite of the notation “*see e.g.*,” in the first paragraph noted above, the cited decisions (*Cut to Length Steel Plate* and *Tapered Roller Bearings*) do not involve companies with parent-subsidiary relationships. The first part of the Department’s stated investigational practice, which concerns firm-level decision making, is stated in scores of decisions. The second part, *i.e.*, “and not the activities of its owner or its owners’ parent company,” which is the focus here, is not.

Moreover, even where the “practice” is found, it is neither explained nor acknowledged as a practice. In the one case cited by ATM that does involve a parent-subsidiary relationship analogous to the situation at bar, *Foundry Coke From the People’s Republic of China*, 66 Fed. Reg. 13885 (Mar. 8, 2001) (preliminary LTFV determination) (awarding separate rate to an exporter “majority owned by a company which is in turn owned by the government”), the Department therein never addresses shareholder control or offers any explanation for its decision beyond a boilerplate recitation of the *Silicon Carbide* test. This is also the case in *Structural Steel Beams From the People’s Republic of China*, 66 Fed. Reg. 67197, 67199 (Dec. 28, 2001) (preliminary LTFV determination) (awarding separate rate to a company that was 63 percent owned by a holding company wholly owned by a provincial governments because there was no evidence of *de facto* control) and *Synthetic Indigo from the People’s Republic of China*, 65 Fed. Reg. 25706 (May 3, 2000) (final LTFV determination) (awarding separate rate when a state-owned enterprise held a minority interest in the company and appointed five of thirteen directors). And in the final analysis, the decisions that truly “take the cake” in terms of reasoning and support are the more recent determinations that cite *this case* as evidence of prior practice. *See, e.g., Certain New Pneumatic Off-the-Road Tires from the People’s Republic of China*, 73 Fed. Reg. 40485 (July 15, 2008) (final LTFV determination; stating in Issues and Decisions Memorandum at Comment 25 that “the mere

existence of government-owned shares in the producer is not a basis for denying separate rate status . . . [t]he Department has previously granted separate rate status to . . . producers, like GTC, whose stock was partially owned by a government state assets management company”); *Certain Cut-to-Length Carbon Steel Plate from the People’s Republic of China*, 73 Fed. Reg. 67124 (Nov. 13, 2008) (new shipper preliminary review).

*Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), requires deference to an agency’s reasonable interpretation of an ambiguous statute it is charged with administering, and such deference has previously applied to methodologies developed by Commerce in antidumping duty contexts where no formal regulation was in place. *Pesquera Mares Australes Ltda. v. United States*, 266 F.3d 1372, 1382 (Fed. Cir. 2001). The court, however, cannot decide reasonableness without the Department’s full explanation of its practice, which is not evident from this determination (or any other, for that matter). Accordingly, the court finds that DSMC is entitled to relief in its challenge to the Department’s separate rates determination.

### **Conclusion**

Upon consideration of the arguments presented herein, it is hereby **ORDERED** that ATM’s USCIT Rule 56.2 Motion for Judgment upon the Agency record challenging *Diamond Sawblades and Parts Thereof from the People’s Republic of China*, 71 Fed. Reg. 29303 (May 22, 2006) (“*Final Determination*”), as amended, 71 Fed. Reg. 35864 (June 22, 2006) be, and it hereby is, **DENIED** in part with respect to its challenges to Commerce’s zeroing methodology and choice of surrogate financial data, and it is further

**ORDERED** that DSMC’s 56.2 Motion for Judgment upon the Agency Record challenging the *Final Determination*, be, and hereby is **GRANTED** in part with respect to Commerce’s separate rates analysis and **DENIED** in part with respect to Commerce’s determination on the country of origin of certain subject merchandise; it is further

**ORDERED** that the defendant’s consent motion for reconsideration of the valuation of steel inputs be, and hereby is **GRANTED**; it is further

**ORDERED** that the *Final Determination* (as amended) be, and hereby is, remanded to the International Trade Administration, U.S. Department of Commerce (“Commerce”) for reconsideration and further explanation in accordance with this Opinion and Order and all applicable laws; it is further

**ORDERED** that, on remand, Commerce must further explain why its analysis of government control does not consider shareholder control, and why it deviated from its original test set forth in *Cased Pencils*; it is further

**ORDERED** that the parties provide comment (or indication of none) on the sufficiency of the information to be redacted from the confidential version of this Opinion (above indicated by double bracketing) to the Clerk of the Court within seven (7) days, and it is further

**ORDERED** that Commerce shall file the results of its remand redetermination with the court within sixty (60) days from the date of this Opinion and Order, plaintiffs and defendant-intervenor shall file any comments thereon within thirty (30) days thereafter, and defendant shall file any response thereto within fifteen (15) days thereafter.

Dated: October 12, 2011  
New York, New York

*/s/ R. Kenton Musgrave*  
R. KENTON MUSGRAVE, SENIOR JUDGE

Slip Op. 11–135

THE CONTAINER STORE, Plaintiff, v. UNITED STATES, Defendant.

Court No. 05–00385

[Plaintiff’s motion for summary judgment is granted; Defendant’s cross-motion is denied.]

Dated: October 26, 2011

*Frances P. Hadfield, Alan R. Klestadt, and Robert B. Silverman*, Grunfeld Desiderio Lebowitz Silverman & Klestadt LLP, of New York, NY, for plaintiff.

*Marcella Powell*, International Trade Field Office, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of New York, NY, for defendant. With her on the brief were *Tony West*, Assistant Attorney General, *Michael F. Hertz*, Deputy Assistant Attorney General, and *Barbara S. Williams*, Attorney in Charge. Of counsel on the brief was *Paula S. Smith*, Office of the Assistant Chief Counsel, International Trade Litigation, Bureau of Customs and Border Protection, U.S. Department of Homeland Security, of New York, NY.

## OPINION

### **RIDGWAY, Judge:**

In this action, Plaintiff The Container Store (“Container Store”) challenges the decisions of the Bureau of Customs and Border Pro-

tection<sup>1</sup> denying Container Store’s protests of Customs’ classification of two items – specifically, “top tracks” and “hanging standards” – which are components of Container Store’s elfa® modular organization and storage system.

Container Store contends that elfa® top tracks and hanging standards are classifiable as “[o]ther furniture and parts thereof,” under heading 9403 of the Harmonized Tariff Schedule of the United States (“HTSUS”) (and, more specifically, under subheading 9403.90.80), and are therefore duty-free. *See generally* Subheading 9403.90.80, HTSUS;<sup>2</sup> Memorandum of Law in Support of Plaintiff’s Motion for Summary Judgment at 1, 3, 7–11, 21 (“Pl.’s Brief”); Memorandum of Law in Support of Plaintiff’s Response in Opposition to Defendant’s Cross-Motion for Summary Judgment at 1, 5–8, 22 (“Pl.’s Reply Brief”); Sur-Reply Memorandum of Law in Support of Plaintiff’s Motion for Summary Judgment at 3–5, 12–13 (“Pl.’s Sur-Reply Brief”). In contrast, the Government maintains that the top tracks and hanging standards are properly classified under heading 8302, which covers “[b]ase metal mountings, fittings and similar articles” – and, more specifically, under subheading 8302.41.60, dutiable at the rate of 3.9% *ad valorem*. *See generally* Subheading 8302.41.60, HTSUS; Memorandum in Opposition to Plaintiff’s Motion for Summary Judgment and in Support of Defendant’s Cross-Motion for Summary Judgment at 3, 12–22 (“Def.’s Brief”); Reply Memorandum in Further Support of Defendant’s Cross Motion for Summary Judgment at 1–2, 13–19 (Def.’s Reply Brief”).

Cross-motions for summary judgment are pending. Jurisdiction lies under 28 U.S.C. § 1581(a) (2000).<sup>3</sup> Pursuant to the Court of Appeals’ recent decision in *storeWALL*, elfa® “top tracks” and “hanging standards” are properly classified under heading 9403, “[o]ther furniture and parts thereof,” and, more specifically, as “parts” under subheading 9403.90.80. *See generally storeWALL, LLC v. United States*, 644 F.3d 1358 (Fed. Cir. 2011); Subheading 9403.90.80, HTSUS. Container Store’s motion for summary judgment therefore must be granted, and the Government’s cross-motion denied.<sup>4</sup>

<sup>1</sup> The Bureau of Customs and Border Protection – part of the U.S. Department of Homeland Security – is commonly known as U.S. Customs and Border Protection. The agency is referred to as “Customs” herein.

<sup>2</sup> All citations to the HTSUS herein are to the 2002 edition.

<sup>3</sup> All statutory citations herein (other than citations to the HTSUS) are to the 2000 edition of the United States Code.

<sup>4</sup> Container Store has voluntarily dismissed Protest Number 5501–04–150010. *See* Pl.’s Brief at 1 n.1; Agreed Statement of Facts [as] to Which No Genuine Issue Exists ¶ 3.

## **I. Background**

The two products at issue in this matter – top tracks and hanging standards – are components of Container Store’s elfa® system, which were manufactured in Sweden and imported into the United States between 2002 and 2004.<sup>5</sup> Much like the system at issue in *storeWALL*, the elfa® system is a customizable, modular system of components that can be combined in a wide range of configurations to meet the organization and storage needs of individual consumers in their homes and offices. *See generally storeWALL*, 644 F.3d at 1360 (describing *storeWALL* system); *storeWALL, LLC v. United States*, 33 CIT \_\_\_, \_\_\_, 675 F. Supp. 2d 1200, 1202 (2009), *rev’d*, 644 F.3d 1358 (Fed. Cir. 2011) (same).

Top tracks and hanging standards are the core components of the elfa® system, and are made of epoxy-bonded steel. The top track has a flat back and is designed to be fastened horizontally to a perpendicular surface (typically a wall or a door), using anchors and screws. The top and bottom edges of the top track protrude and bend downward and upward, respectively, to form the top track’s “upper lip” and “lower lip.” Hanging standards are specifically designed to be suspended from a top track – without the use of any hardware – by means of a groove that hooks onto the top track’s “lower lip.” Before a hanging standard can be hooked onto the “lower lip” of a top track, however, the hanging standard must be inserted through notches in the top track’s “upper lip” (which are also the sole means of removing a hanging standard from a top track). Those notches, together with the overhanging design of the “upper lip” of the top track, prevent hanging standards from inadvertently slipping off a top track. Hanging standards must be used with a top track, and cannot be mounted directly onto a wall or door.

Top tracks and hanging standards serve as the “backbone” of the elfa® system, and are designed to be used exclusively with other elfa® system components. Top tracks and hanging standards alone do not constitute a complete elfa® system, and, unless accessorized with other elfa® components, cannot be used to organize or store anything. However, depending on the needs of the individual consumer, elfa® components that are not at issue here – including drawers, baskets,

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<sup>5</sup> All material facts set forth herein concerning the elfa® system are uncontested, and are drawn from the parties’ Agreed Statement of Facts [as] to Which No Genuine Issue Exists, from Plaintiff’s Separate Statement of Material Facts as to Which No Genuine Issue Exists and Defendant’s Response thereto, from Defendant’s Statement of Undisputed Material Facts and Plaintiff’s Response thereto, and from the samples of the merchandise at issue (which were filed with the Government’s cross-motion).

and shelves – can be attached to hanging standards, in customized configurations. Other elfa® components, such as utility hooks, can be attached directly to a top track.

Top tracks and hanging standards may or may not be imported together, and may or may not be imported with other elfa® components. Components of the elfa® system are sold both separately and in various combinations, to meet the needs of individual consumers.

Customs liquidated the elfa® top tracks and hanging standards at issue here under HTSUS subheadings 8302.41.60<sup>6</sup> and 8302.42.30<sup>7</sup> (which cover “[b]ase metal mountings, fittings and similar articles,” suitable for “buildings” or “furniture,” respectively), as well as subheading 7326.90.85 (which covers “[o]ther articles of iron or steel”),<sup>8</sup> assessing duties at rates ranging from 2.9% to 3.9% *ad valorem*. Container Store filed several protests, arguing that elfa® top tracks and hanging standards are properly classifiable as “[o]ther furniture and parts thereof,” under HTSUS subheading 9403.90.80.<sup>9</sup> Customs denied Container Store’s protests, and issued two ruling letters addressing the classification of the merchandise. Headquarters Ruling (“HQ”) 966458 classified the top tracks and hanging standards as “mountings” under subheading 8302.41.60. *See* HQ 966458 (June 19, 2003). After Container Store requested reconsideration of HQ 966458, Customs issued a “clarified” ruling, reaffirming the agency’s classification of top tracks and hanging standards under subheading 8302.41.60, but revising the agency’s legal rationale. *See* HQ 967149 (Nov. 2, 2004).

This action followed.

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<sup>6</sup> Subheading 8302.41.60 covers “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 thereof: . . . Other mountings, fittings and similar articles, and parts thereof: Suitable for buildings: . . . Other: Of iron or steel, of aluminum or of zinc.” *See* Subheading 8302.41.60, HTSUS.

<sup>7</sup> Subheading 8302.42.30 covers “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 thereof: . . . Other mountings, fittings and similar articles, and parts thereof: . . . Other, suitable for furniture: Of iron or steel, of aluminum or of zinc.” *See* Subheading 8302.42.30, HTSUS.

<sup>8</sup> Subheading 7326.90.85 covers “Other articles of iron or steel: . . . Other: . . . Other: . . . Other: . . . Other.” *See* Subheading 7326.90.85, HTSUS.

<sup>9</sup> Subheading 9403.90.80 covers “Other furniture and parts thereof: . . . Parts: . . . Other: . . . Other.” *See* Subheading 9403.90.80, HTSUS.

## II. *Standard of Review*

Customs classification decisions are reviewed *de novo*, through a two-step analysis. See 28 U.S.C. § 2640; *Faus Group, Inc. v. United States*, 581 F.3d 1369, 1371–72 (Fed. Cir. 2009). The first step of the analysis addresses the proper meaning of the relevant tariff provisions, which is a question of law. The second step involves determining whether the merchandise at issue falls within a particular tariff provision as construed. See *id.* (citing *Orlando Food Corp. v. United States*, 140 F.3d 1437, 1439 (Fed. Cir. 1998)).

Under USCIT Rule 56, summary judgment is appropriate where “there is no genuine issue as to any material fact” and the moving party is entitled to judgment as a matter of law. See USCIT R. 56(c). Summary judgment is thus appropriate in a customs classification case if there is no genuine dispute of material fact (because the nature of the merchandise at issue is not in question), such that the decision on the classification of the merchandise turns solely on the proper meaning and scope of the relevant tariff provisions. See *Faus Group*, 581 F.3d at 1371–72. Here, the parties disagree as to the meaning and scope of the tariff provisions at issue. However, there are no genuine disputes of material fact. In the absence of any such dispute, this matter is ripe for summary judgment.

Although Customs’ classification decisions are entitled to “a respect proportional to [their] ‘power to persuade,’” they do not merit *Chevron* deference. *United States v. Mead Corp.*, 533 U.S. 218, 235 (2001) (citing *Christensen v. Harris County*, 529 U.S. 576, 587 (2000); *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944)). Further, the statutory presumption of correctness that Customs’ classification decisions enjoy under 28 U.S.C. § 2639(a)(1) has no effect – as a practical matter – at the summary judgment stage, because “the presumption carries no force as to questions of law.” *Universal Electronics, Inc. v. United States*, 112 F.3d 488, 492–93 (Fed. Cir. 1997); see also *Rollerblade, Inc. v. United States*, 112 F.3d 481, 483–84 (Fed. Cir. 1997); *Goodman Mfg., L.P. v. United States*, 69 F.3d 505, 508 (Fed. Cir. 1995).

## III. *Analysis*

The tariff classification of all merchandise imported into the United States is governed by the General Rules of Interpretation (“GRIs”) and the Additional U.S. Rules of Interpretation (“ARIs”), which provide a framework for classification under the HSTUS, and are to be applied in numerical order. See *BASF Corp. v. United States*, 482 F.3d 1324, 1325–26 (Fed. Cir. 2007); 19 U.S.C. § 1202.<sup>10</sup> Most merchandise

<sup>10</sup> The HTSUS consists of the General Notes, the General Rules of Interpretation (“GRIs”), the Additional U.S. Rules of Interpretation (“ARIs”), and Sections I to XXII of the HTSUS



is classified pursuant to GRI 1, which states that “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 [GRIs 2 through 6].” See GRI 1, HTSUS. Only when the headings and Chapter and Section Notes do not themselves determine classification does one look to the subordinate GRIs. See *Mita Copystar America v. United States*, 160 F.3d 710, 712 (Fed. Cir. 1998).

The first step in a classification analysis is thus to construe the terms of the headings of the HTSUS, together with any pertinent Section and Chapter Notes (which are statutory law), to determine whether they require a specific classification. See *Avenues in Leather, Inc. v. United States*, 423 F.3d 1326, 1333 (Fed. Cir. 2005) (explaining that Section Notes and Chapter Notes “are not optional interpretive rules, but are statutory law, codified at 19 U.S.C. § 1202”) (internal quotation marks omitted); *Degussa Corp. v. United States*, 508 F.3d 1044, 1047 (Fed. Cir. 2007) (stating that the “section and chapter notes are integral parts of the HTSUS, and have the same legal force as the text of the headings”).

Tariff terms are construed in accordance with their common and commercial meanings; and a court may rely both on its own understanding of a term and on lexicographic and scientific authorities. See *Len-Ron Mfg. Co. v. United States*, 334 F.3d 1304, 1309 (Fed. Cir. 2003). Also instructive are the Harmonized Commodity Description and Coding System’s Explanatory Notes (“Explanatory Notes”), “which – although not controlling – provide interpretive guidance.” See *E.T. Horn Co. v. United States*, 367 F.3d 1326, 1329 (Fed. Cir. 2004) (citation omitted); see also *storeWALL*, 644 F.3d at 1362, 1363 (noting proper role of Explanatory Notes, and explaining that *storeWALL* trial court “appropriately looked to the Explanatory Notes for clarification” in defining term “unit furniture,” as that term is used in the Chapter Notes to Chapter 94 of the HTSUS).<sup>11</sup>

(including Chapters 1 to 99, together with all Section Notes and Chapter Notes, article provisions, and tariff and other treatment accorded thereto), as well as the Chemical Appendix. See *BASF Corp.*, 482 F.3d at 1325–26; *Libas, Ltd. v. United States*, 193 F.3d 1361, 1364 (Fed. Cir. 1999) (noting that the HTSUS “is indeed a statute but is not published physically in the United States Code”) (citing 19 U.S.C. § 1202). The terms of the HTSUS are “considered ‘statutory provisions of law for all purposes.’” See *Alcan Aluminum Corp. v. United States*, 165 F.3d 898, 904 n.5 (Fed. Cir. 1999) (internal citation omitted).

<sup>11</sup> The Explanatory Notes are the official interpretation of the Harmonized Commodity Description and Coding System (on which the HTSUS is based), as set forth by the World Customs Organization (the same body which drafts the international nomenclature). See *Rocknel Fastener, Inc. v. United States*, 267 F.3d 1354, 1360 (Fed. Cir. 2001) (noting that Explanatory Notes are “prepared by the World Customs organization to accompany the international harmonized schedule”). As Congress has recognized, the Explanatory Notes

The issue presented by the pending motions is whether elfa® top tracks and hanging standards are properly classifiable under heading 8302 as “[b]ase metal mountings, fittings and similar articles,” or under heading 9403 as “[o]ther furniture and parts thereof.” The Section Notes for Section XV of the HTSUS (which includes Chapter 83) specifically exclude “[a]rticles of chapter 94” (such as furniture) from classification under Section XV. *See* Section Note 1(k) to Section XV, HTSUS.<sup>12</sup> Therefore, if top tracks and hanging standards are classifiable under heading 9403, they cannot be classified under heading 8302.<sup>13</sup> Thus, the threshold question to be answered is whether elfa® top tracks and hanging standards are properly classifiable under heading 9403, as Container Store contends. Under the Court of Appeals’ decision in *storeWALL*, the answer to this question is unequivocally “yes.”

The HTSUS does not define the term “furniture.” As the Court of “provide a commentary on the scope of each heading of the Harmonized System and are thus useful in ascertaining the classification of merchandise under the system.” H.R. Conf. Rep. No. 576, 100th Cong., 2d Sess. 549 (1988), *reprinted in* 1988 U.S.C.C.A.N. 1547, 1582; *see also* Guidance for Interpretation of Harmonized System, 54 Fed. Reg. 35,127, 35,128 (Aug. 23, 1989) (noting that the Explanatory Notes provide a commentary on the scope of each heading of the HTSUS, and are the official interpretation of the Harmonized System at the international level). The Explanatory Notes are therefore highly authoritative – “persuasive” and “generally indicative of the proper interpretation of a tariff provision.” *Agfa Corp. v. United States*, 520 F.3d 1326, 1329–30 (Fed. Cir. 2008) (*quoting Degussa Corp. v. United States*, 508 F.3d 1044, 1047 (Fed. Cir. 2007) (citation omitted))

<sup>12</sup> Specifically, Section Note 1(k) to Section XV of the HTSUS (which includes Chapter 83), provides:

This section does not cover: . . .

(k) Articles of chapter 94 . . .

Section Note 1(k) to Section XV, HTSUS.

<sup>13</sup> The Government asserts that, by the same token, “if imported merchandise is classifiable in heading 8302, it cannot be classified in Chapter 94.” *See* Def.’s Brief at 7. Chapter Note 1(d) to Chapter 94 provides:

This chapter does not cover: . . .

(d) Parts of general use as defined in note 2 to section XV, of base metal (section XV), similar goods of plastics (chapter 39), or safes of heading 8303; . . .

Chapter Note 1(d) to Chapter 94, HTSUS. The phrase “parts of general use” is defined in Section Note 2 to Section XV:

Throughout the tariff schedule, the expression “parts of general use” means:

- (a) Articles of heading 7307, 7312, 7315, 7317, or 7318 and similar articles of other base metals;
- (b) Springs and leaves for springs, of base metal, other than clock or watch springs (heading 9114); and
- (c) Articles of heading 8301, 8302, 8308 or 8310 and frames and mirrors, of base metal, of heading 8306.

Section Note 2 to Section XV, HTSUS.

Appeals explained in *storeWALL*, however, Chapter Note 2 to Chapter 94 makes it clear that merchandise is classifiable under heading 9403 of the HTSUS only if the merchandise is “designed for placing on the floor or ground,” or if the merchandise falls with certain specified exceptions. See Chapter Note 2 to Chapter 94, HTSUS;<sup>14</sup> *storeWALL*, 644 F.3d at 1363; see also Def.’s Brief at 8–9; Def.’s Reply Brief at 2. And, as the Court of Appeals further explained, one of those specified exceptions covers – and thus includes within the definition of “furniture” – “[c]upboards, bookcases, other *shelved furniture* and *unit furniture*,” even if such merchandise is not designed for placing on the floor or ground and is instead “designed to be hung, to be fixed to the wall or to stand one on the other.” See Chapter Note 2(a) to Chapter 94, HTSUS (emphases added); *storeWALL*, 644 F.3d at 1363; see also Pl.’s Brief at 7; Def.’s Brief at 9; Def.’s Reply Brief at 2–3.<sup>15</sup>

The Court of Appeals acknowledged in *storeWALL* that the HTSUS does not define the term “unit furniture.” See *storeWALL*, 644 F.3d at 1363. However, the Court of Appeals endorsed the definition of “unit furniture” devised by the Court of International Trade, drawing on “dictionary definitions, Explanatory Note requirements, and [the 1971] Brussels Nomenclature Committee Report.” See *storeWALL*, 33 CIT at \_\_\_\_, 675 F. Supp. 2d at 1204; see also *storeWALL*, 644 F.3d at 1363.

Specifically, in *storeWALL*, the Court of International Trade explained that, although neither the Chapter Notes nor the Explanatory Notes define “unit furniture,” the Explanatory Notes make it clear that “unit furniture” must be “designed to be hung, to be fixed to the wall or to stand one on the other or side by side, for holding various objects or articles.” See *storeWALL*, 33 CIT at \_\_\_\_, 675 F. Supp. 2d at 1204 (quoting General Explanatory Notes, Chapter 94, at (4)(B)(i) (1996) (identical to 2002 edition in all relevant respects)). The court further observed that the Explanatory Notes expressly exclude

<sup>14</sup> Chapter Note 2 to Chapter 94 provides, in relevant part:

The articles (other than parts) referred to in headings 9401 to 9403 are to be classified in those headings only if they are designed for placing on the floor or ground.

The following are, however, to be classified in the above-mentioned headings even if they are designed to be hung, to be fixed to the wall or to stand one on the other:

(a) Cupboards, bookcases, other *shelved furniture* and *unit furniture*;  
Chapter Note 2 to Chapter 94, HTSUS (emphases added).

<sup>15</sup> In its briefs, which predate the Court of Appeals’ decision in *storeWALL*, Container Store claims that its merchandise is properly classified under HTSUS heading 9403 as “shelved furniture,” rather than “unit furniture.” See, e.g., Pl.’s Brief at 7–9, 11; Pl.’s Reply Brief at 1, 5–6, 10–11; Pl.’s Sur-Reply Brief at 2–3, 7, 9–10, 12. As discussed herein, however, the elfa® system falls squarely within the definition of “unit furniture” adopted by the Court of Appeals in *storeWALL*. In any event, whether the elfa® system is deemed “unit furniture” or “shelved furniture,” the outcome of the analysis here would be the same.

from coverage under Chapter 94 “other wall fixtures such as coat, hat and similar racks, key racks, clothes brush hangers, and newspaper racks.” See *storeWALL*, 33 CIT at \_\_\_\_, 675 F. Supp. 2d at 1204 (quoting General Explanatory Notes, Chapter 94 (1996) (identical to 2002 edition in all relevant respects)) (emphasis added). The court also took note of the Brussels Nomenclature Committee Report, which “emphasizes that ‘unit furniture’ is adaptable to consumer tastes and needs.” See *storeWALL*, 33 CIT at \_\_\_\_, 675 F. Supp. 2d at 1204 (citing Nomenclature Committee, 26th Session, Report (April 14, 1971)). Finally, the court looked to relevant dictionary definitions of the term “unit,” which focus essentially on the ability to use a “unit” in combination with other complementary components of furniture or equipment to form a larger whole. See *storeWALL*, 33 CIT at \_\_\_\_, 675 F. Supp. 2d at 1204 (citations omitted).

Thus, according to the definition derived by the Court of International Trade and adopted by the Court of Appeals, “unit furniture” is defined (for purposes of the HTSUS) as:

[A]n item

- (a) fitted with other pieces to form a larger system or which is itself composed of smaller complimentary items,
- (b) designed to be hung, to be fixed to the wall, or to stand one on the other or side by side, and
- (c) assembled together in various ways to suit the consumer’s individual needs to hold various objects or articles, but
- (d) exclud[ing] other wall fixtures such as coat, hat and similar racks, key racks, clothes brush hangers, and newspaper racks.

*storeWALL*, 644 F.3d at 1361 (quoting *storeWALL*, 33 CIT at \_\_\_\_, 675 F. Supp. 2d at 1204); see also *storeWALL*, 644 F.3d at 1363 (noting that Court of International Trade “properly define[d] ‘unit furniture’ in light of the Chapter Notes”).

Under the *storeWALL* definition, a completed system of elfa® components such as a top track and hanging standards, fitted with accessory components like drawers, baskets, and/or shelves, constitutes “unit furniture,” because it consists of components that are fitted together with other pieces to form a larger system, it is designed to be hung on or fixed to a wall, and it is assembled together so as to suit specific individual consumers’ particular needs to organize and store various objects or articles. The Government does not fundamentally dispute this point.

Instead, the gravamen of the Government’s argument is that a completed assembly of elfa® components does not *always* constitute “shelved” or “unit” furniture, because consumers in some instances may choose to accessorize top tracks only with elfa® hooks (as opposed to drawers, baskets, shelves, and/or other elfa® components). See Def.’s Reply Brief at 6 (asserting that “elfa configurations” can include “simply top tracks and hooks (no shelves)”); *id.* at 6, Exhs. P, Q (photos from elfa® utility catalogue, depicting “the use of top tracks with various hooks only – no hanging standards and no shelves,” cited as “an example of how top tracks and hooks can be used to simply suspend various items” on a wall). According to the Government, an elfa® configuration featuring only a top track and hooks is a type of “wall fixture” such as a “coat, hat [or] similar rack[],” which is expressly excluded from classification under heading 9403 by the Explanatory Notes to Chapter 94. See General Explanatory Notes, Chapter 94 (2002) (specifying that “[i]t therefore follows that . . . Chapter [94] does not cover other wall fixtures such as coat, hat and similar racks . . .”); see also, *e.g.*, Def.’s Reply Brief at 9.

But the argument that the Government advances in this case was expressly rejected by the Court of Appeals in *storeWALL*. The Court of Appeals there flatly dismissed the notion that “a completed storeWALL system utilizing only hooks is ‘merely a rack,’ and therefore, excluded from the . . . definition of ‘unit furniture.’” See *storeWALL*, 644 F.3d at 1364. The Court of Appeals explained that the “fungibility” of the system as a whole (the feature that is emphasized by the Government here) “is due entirely to the system’s versatility and adaptability, characteristics that are the hallmark of unit furniture.” See *id.* The Court of Appeals further underscored the difference between “unit furniture” – such as a storeWALL system or an elfa® system – and “wall fixtures such as coat, hat and similar racks,” which are excluded from classification as “furniture” by the General Explanatory Notes to Chapter 94 (quoted above):

The versatility and adaptability of a completed . . . system is the reason that such a system, equipped only with hooks, is dissimilar to wall fixtures such as coat, hat and similar racks. An end user may add shelving, cupboards, baskets, etc. to a storeWALL [or elfa®] system initially equipped only with just hooks. Indeed, the end user could remove all of the hooks and replace them with other accessories. However, a coat rack, a hat rack, or any conceivable “similar rack” does not possess that same flexibility. One day a storeWALL [or elfa®] system could only have hooks, the next it could only contain shelving – but a coat rack will always be just a coat rack.

*storeWALL*, 644 F.3d at 1364.

The Court of Appeals concluded that “[t]he fact that the end user has the option with the *storeWALL* system to add or subtract accessories is the very reason any such system is unit furniture.” See *storeWALL*, 644 F.3d at 1364. The Court of Appeals therefore held that, “[e]ven if equipped only with hooks, the *storeWALL* system retains the essential versatility and adaptability that is the very essence of unit furniture,” and is properly classifiable under heading 9403 of the HTSUS. See *id.* (emphasis added).

The Court of Appeals’ analysis in *storeWALL* applies with equal force here, and counsels the same result. The fact that an *elfa*® system (like a *storeWALL* system) does not always include shelving, and – indeed – may consist of only a top track and hooks, is of no moment. In the words of the Court of Appeals, even if accessorized solely with hooks, it is the very “versatility and adaptability” of systems such as the *elfa*® system and the *storeWALL* system that render them “unit furniture” and distinguish them from the run-of-the-mill “coat, hat and similar racks” that are specifically excluded from classification as “furniture.” See *storeWALL*, 644 F.3d at 1364. In sum, a complete *elfa*® system – like a complete *storeWALL* system – constitutes “unit furniture” and is classifiable under heading 9403.

Moreover, just as the Court of Appeals held that the components at issue in *storeWALL* were classifiable as “parts” of unit furniture, so too the *elfa*® top tracks and hanging standards at issue here are similarly classifiable as “parts” of unit furniture. See *storeWALL*, 644 F.3d at 1364. Much like the components at issue in *storeWALL*, which were “dedicated solely for use with a completed *storeWALL* system,” *elfa*® top tracks and hanging standards have no general or generic applications and are “dedicated solely for use with a completed [*elfa*®] system.” See *id.*; see also Pl.’s Brief at 9–11; Pl.’s Reply Brief at 7. The top tracks and hanging standards are therefore properly classified under HTSUS subheading 9403.90.80, which covers “Other furniture and parts thereof: Parts: Other: Other.” See Subheading 9403.90.80, HTSUS.<sup>16</sup>

#### IV. Conclusion

For all the reasons set forth above, *elfa*® “top tracks” and “hanging standards” are properly classified under subheading 9403.90.80 of

<sup>16</sup> Because the components at issue in *storeWALL* were made of plastic, they were classified under subheading 9403.90.50. See *storeWALL*, 644 F.3d at 1360, 1364. In contrast, the *elfa*® components at issue here are made of epoxy-bonded steel. They are therefore properly classified under subheading 9403.90.80.

the HTSUS. Container Store’s motion for summary judgment is therefore granted, and the Government’s cross-motion for summary judgment is denied.

Judgment will enter accordingly.

Dated: October 26, 2011  
New York, New York

*/s/ Delissa A. Ridgway*  
DELISSA A. RIDGWAY  
JUDGE

Slip Op. 11–136

AIRFLOW TECHNOLOGY, INC., Plaintiff, v. UNITED STATES, Defendant.

Court No. 02–00099

[Plaintiff’s motion for summary judgment is granted; defendant’s cross-motion is denied.]

Dated: October 31, 2011

*Jessica R. Rifkin*, Rodriguez O’Donnell Gonzalez & Williams, P.C., of Chicago, IL, argued for plaintiff. With her on the brief was *Thomas J. O’Donnell*.

*Mikki Cottet*, Senior Trial Counsel, International Trade Field Office, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of New York, NY, argued for defendant. With her on the brief were *Tony West*, Assistant Attorney General, and *Barbara S. Williams*, Attorney In Charge. Of counsel on the brief was *Michael W. Heydrich*, Office of the Assistant Chief Counsel, International Trade Litigation, Bureau of Customs and Border Protection, U.S. Department of Homeland Security, of New York, NY.

## OPINION

### **RIDGWAY, Judge:**

This test case, on remand from the Court of Appeals for the Federal Circuit, concerns the classification of 21 entries of Sperifilt filter media (“Sperifilt”) imported from Italy by plaintiff Airflow Technology, Inc. in 1998 and 1999. *See generally Airflow Technology, Inc. v. United States*, 524 F.3d 1287 (Fed. Cir. 2008) (“*Airflow II*”). *Airflow I* granted the Government’s cross-motion for summary judgment, sustaining the determination of the U.S. Customs Service classifying Sperifilt under subheading 5911.40.00 of the Harmonized Tariff Schedule of the United States (“HTSUS”). *See generally Airflow Technology, Inc. v. United States*, 31 CIT 524, 483 F. Supp. 2d 1337 (2007) (“*Airflow I*”), *rev’d and remanded*, 524 F.3d 1287 (Fed. Cir. 2008)

(“*Airflow II*”).<sup>1</sup> *Airflow* appealed, and the Court of Appeals reversed and remanded. *See Airflow II*, 524 F.3d at 1293.<sup>2</sup>

The parties’ cross-motions for summary judgment, filed on remand, are now pending. In its motion, *Airflow* reiterates its claim that Sperifilt is classifiable under HTSUS heading 5603 – specifically, subheading 5603.94.90, which covers “Nonwovens, whether or not impregnated, coated, covered or laminated: Other: Weighing more than 150 g/m<sup>2</sup>: Other: Other,” and is duty-free. *See* Subheading 5603.94.90, HTSUS; Memorandum in Support of Plaintiff’s Motion for Summary Judgment at 1, 5, 30 (“Pl.’s Brief”); Plaintiff’s Opposition to Defendant’s Cross-Motion for Summary Judgment and Reply to Defendant’s Opposition to Plaintiff’s Motion for Summary Judgment at 21–22 (“Pl.’s Reply Brief”).<sup>3</sup>

For its part, the Government continues to argue that classification under HTSUS heading 5911 is proper. In light of *Airflow II*, the Government contends on remand that the appropriate subheading is subheading 5911.10.20, which covers “Textile products and articles, for technical uses, specified in note 7 to this chapter: Textile fabrics, felt and felt-lined woven fabrics, coated, covered or laminated with rubber, leather or other material, of a kind used for card clothing, and similar fabrics of a kind used for other technical purposes, including narrow fabrics made of velvet impregnated with rubber, for covering weaving spindles (weaving beams): Other,” which carried duty rates of 6% and 5.6% *ad valorem* in 1998 and 1999, respectively. *See* Subheading 5911.10.20, HTSUS; Memorandum in Opposition to Plaintiff’s Motion for Summary Judgment and In Support of Defendant’s Cross-Motion for Summary Judgment at 1, 5–6, 11–16, 22–23, 25 (“Def.’s Brief”); Defendant’s Reply to Plaintiff’s Opposition to Defendant’s Cross-Motion for Summary Judgment at 1, 5–9 (“Def.’s Reply Brief”). In the alternative, the Government argues for classification under subheading 5911.90.00, which covers “Textile products and articles, for technical uses, specified in note 7 to this chapter: Other,” which carried duty rates of 6% and 5.6% in 1998 and 1999, respectively. *See* Subheading 5911.90.00, HTSUS; Def.’s Brief at 1–2, 5–6, 11–12, 16–23, 25; Def.’s Reply Brief at 1, 5, 10–15.

<sup>1</sup> The U.S. Customs Service – formerly part of the U.S. Department of Treasury – is now part of the U.S. Department of Homeland Security, and is commonly known as U.S. Customs and Border Protection. *See Bull v. United States*, 479 F.3d 1365, 1368 n.1 (Fed. Cir. 2007). The agency is referred to as “Customs” herein.

<sup>2</sup> Familiarity with *Airflow I* and *Airflow II* is presumed.

<sup>3</sup> All references herein are to the 1998 version of the HTSUS, which is identical to the 1999 version in all relevant respects.



Jurisdiction lies under 28 U.S.C. § 1581(a) (1994).<sup>4</sup> For the reasons that follow, the subject entries of Sperifilt filter media must be classified under HTSUS subheading 5603.94.90. Airflow’s motion for summary judgment therefore must be granted, and the Government’s cross-motion denied.

### I. *Background*

As detailed in *Airflow I*, Sperifilt filter media “is made up of three basic components: a high-loft, nonwoven medium made of polyester thermobonded fibers; a polyester yarn backing net; and a tackifying substance (*i.e.*, an adhesive),” and “is designed for use, manufactured for use, and actually used for air filtration in paint spray booths.” See *Airflow I*, 31 CIT at 525–26, 483 F. Supp. 2d at 1340; see also *Airflow II*, 524 F.3d at 1289. Sperifilt is manufactured by Speritex S.p.A. of Brusnengo, Italy, using the following process:

First, polyester staple fibers of different sizes are carded, to form uniform sheets of fibers. Several sheets are then layered, to achieve a specific weight and thickness sufficient to create a filter medium that progressively increases in density in one direction (the direction of the intended airflow), so that air will pass through the filter from the less dense portion through progressively denser portions, thus filtering out progressively smaller particles. After the layers are thermally bonded together, the filter medium is impregnated with a tackifying substance (*i.e.*, an adhesive). The tackified filter medium is then bonded to a backing (a net of polyester yarn) on the side of the finished product where the flow of filtered air will exit. The net backing ensures dimensional stability under high temperature conditions, and helps prevent fibers and particles from escaping. The result is a high-loft, nonwoven filter medium that captures particles of disparate sizes at different depths of the medium. According to Airflow, the finished product – the imported filter material – is produced in rolls that are approximately 66 feet long and between 22 and 81 inches wide.

*Airflow I*, 31 CIT at 526, 483 F. Supp. 2d at 1340 (citations omitted); see also *Airflow II*, 524 F.3d at 1289.

In 1998 and 1999, 21 entries of Sperifilt were imported through the Port of Chicago and were liquidated by Customs under HTSUS subheading 5911.40.00, which covers “Textile products and articles, for

<sup>4</sup> All statutory citations herein (other than citations to the HTSUS) are to the 1994 edition of the United States Code.

technical uses, specified in note 7 to this chapter: Straining cloth of a kind used in oil presses or the like . . . ,” with customs duties imposed at the rates of 11% and 10.5% for 1998 and 1999, respectively. See *Airflow II*, 524 F.3d at 1289; *Airflow I*, 31 CIT at 524, 483 F. Supp. 2d at 1339. Airflow filed a protest, which was denied, and this action followed. See *Airflow II*, 524 F.3d at 1289; see generally *Airflow I*, 31 CIT 524, 483 F. Supp. 2d 1337.

In *Airflow I*, Airflow argued that Sperifilt should have been classified under HTSUS subheading 5603.94.90, a duty-free provision covering “Nonwovens, whether or not impregnated, coated, covered or laminated: Other: Weighing more than 150 g/m<sup>2</sup>: Other: Other.” See *Airflow I*, 31 CIT at 524, 483 F. Supp. 2d at 1339; Subheading 5603.94.90, HTSUS; see also *Airflow II*, 524 F.3d at 1289–90. Airflow argued in the alternative that classification was appropriate under subheading 5911.90.00, a residual provision covering “Textile products and articles, for technical uses, specified in note 7 to this chapter: Other,” dutiable at the rate of 6% and 5.6% in 1998 and 1999, respectively. See *Airflow I*, 31 CIT at 524, 483 F. Supp. 2d at 1339; Subheading 5911.90.00, HTSUS.

Ruling on cross-motions for summary judgment, *Airflow I* determined that Sperifilt falls within the scope of the term “straining cloth” as the term is used in Note 7(a)(iii) to Chapter 59 of the HTSUS and in subheading 5911.40.00. See generally *Airflow I*, 31 CIT at 529–38, 483 F. Supp. 2d at 1343–50; see also *Airflow II*, 524 F.3d at 1290. Moreover, citing an Explanatory Note to heading 5603 which expressly excludes from that heading “Nonwovens for technical uses, of heading 59.11,” *Airflow I* concluded that a determination that merchandise is classifiable under a subheading of heading 5911 precludes classification of the merchandise under heading 5603. See *Airflow I*, 31 CIT at 538, 483 F. Supp. 2d at 1350. *Airflow I* therefore sustained Customs’ classification of Sperifilt under subheading 5911.40.00 of the HTSUS, and entered summary judgment in favor of the Government. See *Airflow I*, 31 CIT at 541, 483 F. Supp. 2d at 1353; see also *Airflow II*, 524 F.3d at 1290.

Airflow appealed, and the Court of Appeals reversed and remanded. See generally *Airflow II*, 524 F.3d 1287. Considering only “the proper interpretation of . . . the language of subheading 5911.40.00,” the Court of Appeals disagreed with *Airflow I*’s conclusion that the HTSUS term “straining cloth” covered air filtration media such as Sperifilt. See *id.*, 524 F.3d at 1290, 1292. Although the Court of Appeals acknowledged that “the terms ‘straining’ and ‘filtering’ carry similar meanings,” the court concluded that the meanings of the

terms are not “identical.” See *id.*, 524 F.3d at 1292. According to the Court of Appeals, the two terms “differ in one critical aspect – ‘straining’ suggests removing solids from liquids while ‘filtering’ suggests removing solids from liquids or gases.” See *id.*<sup>5</sup> The Court of Appeals ultimately concluded that the tariff term “straining cloths” is “limited to products that separate solids from liquids, and does not encompass products, such as Sperifilt, that can only separate solids from gases,” and held that Sperifilt therefore could not be classified under subheading 5911.40.00 of the HTSUS. See *id.*, 524 F.3d at 1293. As such,

<sup>5</sup> The Court of Appeals recognized that the Explanatory Note to heading 5911 on which *Airflow I* heavily relied “indicates that subheading 5911.40.00 applies broadly to any type of filtering cloth, including those used for filtering air.” See *Airflow II*, 524 F.3d at 1292–93 (discussing Explanatory Notes, Heading 5911, at (A)(3)); see generally *Airflow I*, 31 CIT at 534, 483 F. Supp. 2d at 1347 (stating, *inter alia*, that “the Explanatory Notes specifically state that the filtration media embraced by heading 5911 includes media ‘for gas cleaning or similar technical applications in industrial dust collecting systems,’ and thus “make it clear that Sperifilt filter media is covered by subheading 5911.40.00”) (emphasis added in *Airflow I*). However, because the Court of Appeals considered the language of the tariff provision itself (*i.e.*, “straining cloth”) to be “unambiguous and the Explanatory Notes contradictory,” the court gave no weight to the Explanatory Note. See *Airflow II*, 524 F.3d at 1293.

In reaching its decision in *Airflow II*, the Court of Appeals apparently was not presented with, and therefore did not have the benefit of, dictionary definitions indicating that, although “strain” may more frequently refer to the separation of a solid from a liquid, the term in fact is not necessarily so narrowly defined and, indeed, can be synonymous with the term “filter.” See, *e.g.*, American Heritage Dictionary of the English Language 1710 (4th ed. 2000) (defining “strain” as “[t]o draw off or remove by filtration,” and using the separation of solid from liquid as merely illustration); 16 Oxford English Dictionary 828 (2d ed. 1989) (defining “strain” as, *inter alia*, “[t]o press through a filtering medium, to filter”); *id.* at 830 (defining “straining” as, *inter alia*, “filtering, sifting, expressing”); Webster’s New World Dictionary, Second College Edition 1406 (1979) (defining “strain” as, *inter alia*, “to pass through a screen, sieve, filter, etc.; [to] filter”; and “to remove or free by filtration, etc.”); see also Recording of Oral Argument at 1:07:50–1:08:50 (counsel for Government voicing its disagreement with *Airflow II* as to definition of “strain,” and arguing that “there [are] other dictionaries, [which] are American dictionaries, that set forth the common meaning of the term [“strain”], and expressly provide that it includes . . . ‘strains gases, liquids, and dry goods’”); *id.* at 1:38:40–1:41:10 (counsel for Government arguing that term “strain” is defined broadly, as “to pass through a screen, sieve, filter, etc.; filter,” but acknowledging that Government failed to present this definition to Court of Appeals).

*Airflow II* similarly did not address the fact that the text of the Explanatory Note to heading 5911 on which *Airflow I* was predicated, which expressly states that heading 5911 encompasses filter media used in “technical applications in industrial dust collecting systems” (*i.e.*, air filters such as Sperifilt), is the same text as that in the 1986 version of the Explanatory Notes that was in place and thus available to Congress when it adopted the HTSUS in 1989. See *Airflow I*, 31 CIT at 534 n.12, 483 F. Supp. 2d at 1347 n.12 (discussing Explanatory Notes, Heading 5911, at (A)(3)). Thus, as *Airflow I* explained, “to the extent that legislative intent can be inferred from the Explanatory Notes then in place, it would seem that Congress intended heading 5911 to be interpreted in a manner consistent with those Explanatory Notes, which specifically refer to ‘straining cloth’ as including filter fabrics . . . that are used for purposes other than filtering liquids.” See *id.*

the Court of Appeals reversed *Airflow I*, and remanded the matter for a determination as to “whether Sperifilt is more properly classified under subheading 5911.90.00, directed to ‘other,’ or under subheading 5603.94.90” of the HTSUS. *See id.*

## II. Standard of Review

Customs classification decisions are reviewed *de novo*, through a two-step analysis. *See* 28 U.S.C. § 2640; *Faus Group, Inc. v. United States*, 581 F.3d 1369, 1371–72 (Fed. Cir. 2009). The first step of the analysis addresses the proper meaning of the relevant tariff provisions, which is a question of law. The second step involves determining whether the merchandise at issue falls within a particular tariff provision as construed. *See id.* (citing *Orlando Food Corp. v. United States*, 140 F.3d 1437, 1439 (Fed. Cir. 1998)).

Under USCIT Rule 56, summary judgment is appropriate where “there is no genuine issue as to any material fact” and the moving party is entitled to judgment as a matter of law. *See* USCIT R. 56(c). Summary judgment is thus appropriate in a customs classification case if there is no genuine dispute of material fact (because the nature of the merchandise at issue is not in question), such that the decision on the classification of the merchandise turns solely on the proper meaning and scope of the relevant tariff provisions. *See Faus Group*, 581 F.3d at 1371–72.

In the present case, the parties differ as to the meaning and scope of the various tariff provisions in question. However, there is no genuine issue as to any material fact. This matter is therefore ripe for summary judgment.

## III. Analysis

The tariff classification of all merchandise imported into the United States is governed by the General Rules of Interpretation (“GRIs”) and the Additional U.S. Rules of Interpretation (“ARIs”), which provide a framework for classification under the HTSUS, and are to be applied in numerical order. *See BASF Corp. v. United States*, 482 F.3d 1324, 1325–26 (Fed. Cir. 2007); 19 U.S.C. § 1202.<sup>6</sup> Most merchandise

<sup>6</sup> The HTSUS consists of the General Notes, the General Rules of Interpretation (“GRIs”), the Additional U.S. Rules of Interpretation (“ARIs”), and Sections I to XXII of the HTSUS (including Chapters 1 to 99, together with all Section Notes and Chapter Notes, article provisions, and tariff and other treatment accorded thereto), as well as the Chemical Appendix. *See BASF Corp.*, 482 F.3d at 1325–26; *Libas, Ltd. v. United States*, 193 F.3d 1361, 1364 (Fed. Cir. 1999) (noting that the HTSUS “is indeed a statute but is not published physically in the United States Code”) (citing 19 U.S.C. § 1202). The terms of the HTSUS are “considered ‘statutory provisions of law for all purposes.’” *See Alcan Aluminum Corp. v. United States*, 165 F.3d 898, 904 n.5 (Fed. Cir. 1999) (internal citation omitted).

is classified pursuant to GRI 1, which provides for classification “according to the terms of the headings and any relative section or chapter notes.” See GRI 1, HTSUS. Only if the headings and Chapter and Section Notes do not determine classification does one look to the subordinate GRIs. See *Mita Copystar America v. United States*, 160 F.3d 710, 712 (Fed. Cir. 1998). When an imported item is classifiable based on application of GRI 1, recourse to the subsequent GRIs and the ARIs is unnecessary and inappropriate. See *BASF Corp.*, 482 F.3d at 1325–26. Moreover, the appropriate subheading for classification is considered only after the proper heading is determined. See *Faus Group*, 581 F.3d at 1372.<sup>7</sup>

The first step in a classification analysis is thus to construe the terms of the headings of the HTSUS, together with any pertinent Section and Chapter Notes (which are statutory law), to determine whether they require a specific classification. See *Avenues in Leather, Inc. v. United States*, 423 F.3d 1326, 1333 (Fed. Cir. 2005) (explaining that Section Notes and Chapter Notes “are not optional interpretive rules, but are statutory law, codified at 19 U.S.C. § 1202”) (internal quotation marks omitted); *Degussa Corp. v. United States*, 508 F.3d 1044, 1047 (Fed. Cir. 2007) (stating that “section and chapter notes are integral parts of the HTSUS, and have the same legal force as the text of the headings”).

Tariff terms are construed “according to their common commercial meanings”; and a court may rely both on its own understanding of a term and on lexicographic and scientific authorities. See *Millenium Lumber Distribution Ltd. v. United States*, 558 F.3d 1326, 1328–29 (Fed. Cir. 2009); *Len-Ron Mfg. Co. v. United States*, 334 F.3d 1304, 1309 (Fed. Cir. 2003). Also instructive are the Explanatory Notes to the Harmonized Commodity Description and Coding System (“Explanatory Notes”), “which – although not controlling – provide interpretive guidance.” See *E.T. Horn Co. v. United States*, 367 F.3d 1326, 1329 (Fed. Cir. 2004) (citation omitted); see generally World Customs Organization, Harmonized Commodity Description and Coding System (2d ed. 1996).<sup>8</sup>

<sup>7</sup> GRI 6 governs classification at the subheading level, and requires a renewed sequential application of GRIs 1 to 5 to the particular subheadings under consideration. See GRI 6, HTSUS (“For legal purposes, the classification of goods in the subheadings of a heading shall be determined according to the terms of those subheadings and any related subheading notes and, *mutatis mutandis*, to the [GRIs], on the understanding that only subheadings at the same level are comparable.”).

<sup>8</sup> As Congress has recognized, the Explanatory Notes “provide a commentary on the scope of each heading of the Harmonized System and are thus useful in ascertaining the classification of merchandise under the system.” See H.R. Conf. Rep. No. 576, 100th Cong., 2d

The Explanatory Notes are the official interpretation of the Harmonized Commodity Description and Coding System (on which the HTSUS is based), as set forth by the World Customs Organization (the same body which drafts the international nomenclature). See *Rocknel Fastener, Inc. v. United States*, 267 F.3d 1354, 1360 (Fed. Cir. 2001) (explaining that Explanatory Notes are “prepared by the World Customs organization to accompany the international harmonized schedule”). Accordingly, although the Explanatory Notes “do not constitute controlling legislative history,” they serve a critical function as an interpretative supplement to the HTSUS, and “are intended to clarify the scope of HTSUS [provisions,] and to offer guidance in interpreting [those provisions].” See *Mita Copystar*, 21 F.3d at 1082 (citation omitted). The Explanatory Notes are thus highly authoritative – “persuasive” and “generally indicative of the proper interpretation of a tariff provision.” See *Agfa Corp. v. United States*, 520 F.3d 1326, 1329–30 (Fed. Cir. 2008) (quoting *Degussa Corp.*, 508 F.3d at 1047 (citation omitted)).

The issue presented by the pending motions is whether, in light of *Airflow II*, the subject entries of Sperifilt filter media are classifiable under heading 5911 as “Textile products and articles, for technical uses, specified in note 7 to this chapter” (*i.e.*, Chapter 59), as the Government contends, or under heading 5603 as “Nonwovens, whether or not impregnated, coated, covered or laminated,” as Airflow maintains. See Heading 5911, HTSUS; Heading 5603, HTSUS. The Explanatory Notes to heading 5603 expressly exclude “[n]onwovens for technical uses, of heading 59.11” from classification under heading 5603. See Explanatory Notes, Heading 5603, at (ij).<sup>9</sup> Therefore, if the entries of Sperifilt at issue here are classifiable under heading 5911, they cannot be classified under heading 5603. Thus, the threshold question to be answered is whether the subject entries are properly classifiable under heading 5911. In light of *Airflow II*, and for the reasons summarized below, the response to this question

Sess. 549 (1988), reprinted in 1988 U.S.C.C.A.N. 1547, 1582; see also Guidance for Interpretation of Harmonized System, 54 Fed. Reg. 35,127, 35,128 (Aug. 23, 1989) (noting that the Explanatory Notes provide a commentary on the scope of each heading of the HTSUS, and are the official interpretation of the Harmonized System at the international level). All citations to the Explanatory Notes herein are to the 1996 version of the Explanatory Notes.

<sup>9</sup> See also *FilmTec Corp. v. United States*, 27 CIT 1730, 1736–37, 293 F. Supp. 2d 1364, 1369–70 (2003) (discussing Explanatory Notes’ exclusion of “[n]onwovens for technical uses, of heading 59.11” from scope of heading 5603).

More generally, the Explanatory Notes also exclude from the scope of heading 5603 merchandise that is “covered more specifically by other headings.” See Explanatory Notes, Heading 5603; see also *Airflow II*, 524 F.3d at 1290 (referencing exclusion); *Airflow I*, 31 CIT at 527–28, 483 F. Supp. 2d at 1341–42 (discussing Explanatory Notes to heading 5603).

is “no.” Accordingly, the subject entries of Sperifilt must be classified under heading 5603, based on a straightforward application of GRI 1.<sup>10</sup>

#### A. *Heading 5911*

Heading 5911 covers “[t]extile products and articles, for technical uses, specified in note 7 to this chapter.” See Heading 5911, HTSUS. Thus, merchandise may be classified under heading 5911 only if it is: (1) a textile product or article; (2) for technical uses; (3) specified in Note 7 to Chapter 59. See Heading 5911, HTSUS. Criteria (1) and (2) above are not in dispute. As *Airflow I* explained, “[b]ecause Sperifilt filter media is made of polyester fibers and is manufactured for use in industrial applications, it is . . . a [t]extile product[] . . . [or] article[] for technical use[ ].” See *Airflow I*, 31 CIT at 528, 483 F. Supp. 2d at 1342 (quoting Heading 5911, HTSUS) (first alteration added).<sup>11</sup> Accordingly, if the subject entries fall within the range of merchandise set forth in Note 7, the entries are properly classified under heading 5911. See *Airflow I*, 31 CIT at 528, 483 F. Supp. 2d at 1342; Heading 5911, HTSUS.

Note 7 to Chapter 59 specifies that “[h]eading 5911 applies to the following goods, which do not fall in any other heading of section XI”:

- (a) Textile products in the piece, cut to length or simply cut to rectangular (including square) shape (other than those having the character of the products of heading 5908 to 5910), the following only:
  - (i) Textile fabrics, felt and felt-lined woven fabrics, coated, covered or laminated with rubber, leather or other material, of a kind used for card clothing, and similar fabrics of a kind used for other technical purposes, including narrow fabrics made of velvet impregnated with rubber, for covering weaving spindles (weaving beams);
  - (ii) Bolting cloth;

<sup>10</sup> The parties devote much ink to the scope of this remand proceeding. See Pl.’s Brief at 7; Def.’s Brief at 8–11; Pl.’s Reply Brief at 2–3; Def.’s Reply Brief at 2–4. Specifically, the parties debated whether, on remand, it would be permissible to classify the merchandise at issue under subheading 5911.10.20, given that the remand instructions in *Airflow II* made no mention of that subheading, and instead framed the issue on remand as “whether Sperifilt is more properly classified under subheading 5911.90.00, . . . or under subheading 5603.94.94.” See *Airflow II*, 524 F.3d at 1293. The outcome below (*i.e.*, classification under subheading 5603.94.90) obviates any need to reach the merits of the parties’ dispute concerning the scope of the remand.

<sup>11</sup> This threshold determination was unaffected by *Airflow II*, which considered only “the proper interpretation of ‘straining cloth of a kind used in oil presses or the like’– the language of subheading 5911.40.00.” See *Airflow II*, 524 F.3d at 1290.

- (iii) Straining cloth of a kind used in oil presses or the like, of textile material or of human hair;
  - (iv) Flat woven textile fabrics with multiple warp or weft, whether or not felted, impregnated or coated, of a kind used in machinery or for other technical purposes;
  - (v) Textile fabric reinforced with metal, of a kind used for technical purposes;
  - (vi) Cords, braids and the like, whether or not coated, impregnated or reinforced with metal, of a kind used in industry as packing or lubricating materials;
- (b) Textile articles (other than those of headings 5908 to 5910) of a kind used for technical purposes (for example, textile fabrics and felts, endless or fitted with linking devices, of a kind used in papermaking or similar machines (for example, for pulp or asbestos-cement), gaskets, washers, polishing discs and other machinery parts).

Note 7 to Chapter 59, HTSUS.<sup>12</sup> According to the Explanatory Notes, although the textile products and articles specified in Note 7 may be *prima facie* classifiable in other headings, they must be classified within heading 5911, because they “present particular characteristics which identify them as being for use in various types of machinery, apparatus, equipment or instruments or as tools or parts of tools.” See Explanatory Notes, Heading 5911.

*Airflow II* rejected Customs’ determination that Sperifilt falls within the scope of Note 7(a)(iii) to Chapter 59 and is therefore properly classified under subheading 5911.40.00. See *Airflow II*, 524 F.3d at 1293. With subheading 5911.40.00 off the table, the Government now contends that the subject entries of Sperifilt fall within the scope of Note 7(a)(i) (and thus should be classified under subheading 5911.10.20) or, in the alternative, that the entries fall within the scope of Note 7(b) (and are thus classifiable under subheading 5911.90.00). See *generally* Def.’s Brief at 11–23; Def.’s Reply Brief at 5–15.

As *Airflow* explains, however, contrary to the Government’s claims, Sperifilt does not fall within Chapter Note 7(a)(i), “nor is it a textile ‘article’ provided for in Chapter Note 7(b).” See Pl.’s Brief at 5; see *also*

<sup>12</sup> Certain subheadings of heading 5911 specifically cover some of the individual Note 7(a) categories. For example, subheading 5911.10 covers Note 7(a)(i) goods; subheading 5911.20 covers Note 7(a)(ii) goods; subheading 5911.40 covers Note 7(a)(iii) goods; and subheading 5911.90.0040 covers Note 7(a)(vi) goods. See Heading 5911, HTSUS.



Pl.'s Brief at 9; Pl.'s Reply Brief at 21; *see generally* Pl.'s Brief at 5, 8–29, 30; Pl.'s Reply Brief at 3–21.<sup>13</sup> The subject entries therefore cannot be classified under heading 5911 of the HTSUS.

### 1. Note 7(a)(i) to Chapter 59

The Government first argues that Sperifilt filter media falls within the scope of Note 7(a)(i), which corresponds to classification under subheading 5911.10. *See generally* Def.'s Brief at 5–6, 1316, 22–23; Def.'s Reply Brief at 5–9; *see also* Note 7(a)(i) to Chapter 59, HTSUS; Subheading 5911.10, HTSUS (mirroring the language of Note 7(a)(i)). Note 7(a)(i) includes only those “[t]extile products in the piece, cut to length or simply cut to rectangular . . . shape,” that are either: “[1] Textile fabrics, felt and felt-lined woven fabrics, coated, covered or laminated with rubber, leather or other material, of a kind used for card clothing, [or] [2] similar fabrics of a kind used for other technical purposes, including narrow fabrics made of velvet impregnated with rubber, for covering weaving spindles (weaving beams).” *See* Note 7(a)(i) to Chapter 59, HTSUS.<sup>14</sup>

According to the Government, Note 7(a)(i) covers fabrics that are of a “class or kind” of card clothing material, as well as “similar fabrics” used for other technical purposes, such as Sperifilt filter media. *See* Def.'s Brief at 14–16; Def.'s Reply Brief at 5–9. The Government argues that Sperifilt falls within Note 7(a)(i) because it is a nonwoven fabric similar to felt, and Note 7(a)(i) expressly includes “felt” and “similar fabrics.” *See* Def.'s Brief at 14–16; Def.'s Reply Brief at 9. Based on this reading, the Government contends that Sperifilt is clearly a “similar fabric of a kind used for other technical purposes.” *See* Def.'s Reply Brief at 8–9; Def.'s Brief at 14–15.

As outlined below, however, Sperifilt filter media is neither a textile fabric, felt or felt-lined woven fabric, coated, covered or laminated with rubber, leather or other material, of a kind used for card clothing, nor a similar fabric of a kind used for other technical purposes.

<sup>13</sup> Because the Court of Appeals held that Sperifilt is not classifiable under subheading 5911.40.00 (and is therefore not within the scope of Note 7(a)(iii)), and because, as both parties observe, Sperifilt clearly does not “fall within the scope of any of the categories of goods identified in Note [] 7(a)(ii), (iv), (v), or (vi),” consideration of Note 7 is limited to Note 7(a)(i) and Note 7(b). *See* Def.'s Brief at 13; *see also* Pl.'s Brief at 20–22.

<sup>14</sup> In this context, the phrase “in the piece” refers to a length of material that could “vary[] from 40 to 120 yards.” *See* Webster's Third New International Dictionary 1712 (1981) (defining “piece” as “a length varying from 40 to 120 yards of cloth suitable for processing and [especially] for dyeing or finishing”); *see also* 11 Oxford English Dictionary 793 (2d ed. 1989) (defining “piece” as, *inter alia*, “[a] length (varying according to the material) in which cloth or other textile fabric is woven,” and explaining (as an example) that “[a] ‘piece’ of cotton cloth varies from twenty-four to forty-seven yards in length, and from twenty-eight to forty inches in width”) (citation omitted).

a. “Textile fabrics, felt and felt-lined woven fabrics, coated, covered or laminated *with rubber, leather or other material, of a kind used for card clothing*”

The subject merchandise is not a textile fabric, a felt, or a felt-lined woven fabric (regardless of whether it may be “coated, covered or laminated with rubber, leather or other material”). Nor is it a material “of a kind used for card clothing.”

First, Sperifilt is not a “textile fabric.” Because Note 1 to Chapter 59 limits the term “textile fabrics” used in Chapter 59 to “the *woven fabrics* of [various chapters and headings], the braids and ornamental trimmings in the piece of heading 5808 and the knitted or crocheted fabrics of heading 6002,” Sperifilt – which is a nonwoven – is not a “textile fabric” for purposes of Note 7(a)(i). *See* Note 1 to Chapter 59, HTSUS (emphasis added).<sup>15</sup> There is no special context here which might warrant a definition other than that provided for in the relevant chapter notes. Thus, as Airflow argues and the Government concedes, because Sperifilt is not woven, knitted, nor crocheted, and because it is not a braid or ornamental trimming, it cannot be considered a “textile fabric” within the scope of Note 7(a)(i) to Chapter 59. *See* Pl.’s Brief at 10–11; Def.’s Brief at 13–14, 15; Note 1 to Chapter 59, HTSUS.<sup>16</sup>

Second, Sperifilt filter media is not a “felt.” *See* Def.’s Brief at 15 (acknowledging that Sperifilt is not felt); Pl.’s Reply Brief at 4 n.2 (same). For purposes of classification under the HTSUS, “‘felt’ and ‘nonwovens’ are distinct and separate entities” covered by separate HTSUS headings. *See* Pl.’s Reply Brief at 4 n.2; Heading 5602, HTSUS (covering various types of “[f]elt”); Heading 5603, HTSUS (covering various types of “[n]onwovens”); *see also* Note 3 to Chapter 56, HTSUS (stating that “[h]eadings 5602 and 5603 cover respectively felt and nonwovens”). Therefore, because the subject merchandise is *prima facie* classifiable as a heading 5603 “nonwoven” and not as a heading 5602 “felt,” it cannot be considered “felt” for purposes of Note 7(a)(i) to Chapter 59.

<sup>15</sup> In full, Note 1 provides that: “[e]xcept where the context otherwise requires,” the expression “textile fabrics” used in Chapter 59 “applies only to the *woven fabrics* of chapters 50 to 55 [covering various woven fabrics, including silk, wool and other animal hair, cotton, vegetable textile fibers and paper yarn, man-made filaments, and man-made staple fibers] and headings 5803 [gauze] and 5806 [narrow woven fabrics and narrow fabrics consisting of warp without weft assembled by means of an adhesive], the braids and ornamental trimmings in the piece of heading 5808 and the knitted or crocheted fabrics of heading 6002.” *See* Note 1 to Chapter 59, HTSUS (emphasis added).

<sup>16</sup> Similarly, because Sperifilt is nonwoven, it also cannot be considered a “felt-lined woven fabric.”

Finally, Sperifilt plainly is not a textile product “of a kind used for card clothing.” “Carding” is a process where “[a] wire-toothed brush or a machine fitted with rows of wire teeth [*i.e.*, a carding machine] . . . disentangle[s] fibers, as of wool, prior to spinning.” See American Heritage Dictionary of the English Language 280 (4th ed. 2000).<sup>17</sup> A “carding machine” is “a machine for carding wool, cotton, or other fiber consisting of cylinders having intermeshing wire teeth and revolving at different speeds or in opposite directions.” See Webster’s Third New International Dictionary 338 (1981); Plaintiff’s Statement of Material Facts as to Which There is No Genuine Issue to Be Tried (“Pl.’s Statement of Facts”) ¶¶ 17–28 (describing carding, carding machines, card clothing, and card clothing foundation cloth); Defendant’s Response to Plaintiff’s Statement of Material Facts as to Which No Genuine Issue Exists (“Def.’s Response to Pl.’s Statement of Facts”) ¶¶ 17–28 (admitting Airflow’s descriptions, albeit disputing relevance). The cylinders of a carding machine are covered with “card clothing,” which is “material consisting of leather or cloth in which [wire] teeth are set.” See Webster’s Third New International Dictionary 337 (1981).<sup>18</sup>

Here, as both parties acknowledge, Sperifilt is an air filtration medium, not a material “of a kind used for card clothing.” See Pl.’s Brief at 11–17; Def.’s Reply Brief at 7. In other words, Sperifilt is not used as card clothing and is not “commercially fungible” with goods used as card clothing. See *Primal Lite, Inc. v. United States*, 182 F.3d 1362, 1363–64 (Fed. Cir. 1999) (stating that “class or kind” of good referred to in ARI 1(a) is limited to “those goods that are commercially fungible with the imported goods”). Sperifilt therefore does not fall within the scope of the first part of Note 7(a)(i) to Chapter 59, covering certain fabrics of a kind used for card clothing. See Note 7(a)(i) to Chapter 59, HTSUS.

<sup>17</sup> See also Webster’s Third New International Dictionary 337 (1981) (defining “card” as, *inter alia*, “to cleanse, disentangle, and collect together (as animal or vegetable fibers) by the use of a card preparatory to spinning, the process being used to prepare fibers of relatively short length”); 2 Oxford English Dictionary 889 (2d ed. 1989) (defining “card” as, *inter alia*, “[t]o prepare wool, tow, etc., for spinning, by combing out impurities and parting and straightening the [fibers] with a card”).

<sup>18</sup> See also 2 Oxford English Dictionary 887 (2d ed. 1989) (referring to “card-cloth” and “card-clothing” as “the leather or indiarubber backing of a card”); 2 Oxford English Dictionary 88687 (2d ed. 1989) (defining “card” as, *inter alia*, “[a] sort of wire brush for the [combing out, and setting in order the fibers of wool, hemp, etc.], consisting of a strip of leather, vulcanized rubber, or similar material, into which short steel wires are inserted. These strips are fixed on a flat surface or on the cylinder of a carding-machine, and the wool is passed between two sets of them working with each other.”).

b. “[S]imilar fabrics of a kind used for other technical purposes”

In light of the above, Sperifilt filter media can fall within the scope of Note 7(a)(i) to Chapter 59 only if it is a “similar fabric[] of a kind used for other technical purposes [*i.e.*, other than card clothing].” See Note 7(a)(i) to Chapter 59, HTSUS.<sup>19</sup> According to the Government, Sperifilt is covered by Note 7(a)(i) because it is “used for other technical purposes” and “[shares] similar characteristics [with] the fabrics identified in Chapter 59 Note 7(a)(i).” See Def.’s Brief at 15; see also *id.* at 14 (arguing that Note 7(a)(i) includes “nonwovens (such as felt), combinations of nonwovens and textile fabrics (such as felt-lined woven fabrics), and ‘similar fabrics’”); *id.* at 16 (arguing that Sperifilt filter media “shares similar characteristics to ‘felt’”); Def.’s Reply Brief at 8–9 (arguing that “Sperifilt falls within the scope of Note 7(a)(i)”). But, although Sperifilt is indeed used for “other technical purposes” (*i.e.*, air filtration in industrial spray paint booths), Sperifilt is not “similar” to the material described in the first part of Note 7(a)(i) to Chapter 59.

Contrary to the Government’s claims, merchandise does not fall within the scope of Note 7(a)(i) merely because it shares characteristics with “[t]extile fabrics, felt [or] felt-lined woven fabrics.” See Note 7(a)(i) to Chapter 59, HTSUS; Def.’s Brief at 14–16; see also Def.’s Reply Brief at 4–9. As the text of the note makes clear, Note 7(a)(i) “similar fabrics of a kind used for other technical purposes” must be similar to “[t]extile fabrics, felt and felt-lined woven fabrics, *coated, covered or laminated with rubber, leather or other material,*” which are the type of products “used for card clothing.” See Note 7(a)(i) to Chapter 59, HTSUS (emphasis added); see also Def.’s Reply Brief at 8 (stating that “Note 7(a)(i) includes fabrics which resemble ‘textile fabrics,’ ‘felt,’ and ‘feltlined woven fabrics’ which belong to the class to which fabrics used for ‘card clothing’ belong, but which are used for technical purposes different than ‘card clothing’”); Pl.’s Reply Brief at 6 (arguing that Note 7(a)(i) “similar fabrics” must be similar to fabrics

<sup>19</sup> Although not a “textile fabric” under Note 1 to Chapter 59, a nonwoven such as Sperifilt is nevertheless a “fabric.” See Def.’s Brief at 15 (stating that “[a]lthough not statutorily considered a ‘textile fabric,’ or a felt, Sperifilt is certainly a fabric”); Defendant’s Additional Statement of Material Facts as to Which No Genuine Issue Exists ¶ 1 (stating that “[a]s a nonwoven cloth, Sperifilt is a fabric”); Plaintiff’s Response to Defendant’s Additional Statement of Material Facts as to Which No Genuine Issue Exists ¶ 1 (admitting that “Sperifilt is a nonwoven, and that it may be considered a ‘fabric’ under the broadest definitions,” but averring “that other definitions of ‘fabric’ are more restrictive”); see also American Heritage Dictionary of the English Language 1198 (4th ed. 2000) (defining “nonwoven” as “[m]aterial or . . . fabric made by a process not involving weaving” that is “[u]sed of textiles”); Webster’s Third New International Dictionary 1539 (1981) (defining “nonwoven” as something “made without weaving; *esp.* : having textile fibers bonded together by adhesive resins, rubber, or plastic or felted together under pressure,” *e.g.*, “fabrics”).

“of a kind used for card clothing”). In short, according to the terms of Note 7(a)(i), material is a “similar fabric” within Note 7(a)(i) if it: (1) is “of a kind used for other technical purposes”; and (2) possesses qualities similar to those listed in the first part of Note 7(a)(i).

To accept the Government’s interpretation – that “similar” refers only to “[t]extile fabrics, felt and felt-lined woven fabrics” – would mean that the second part of Note 7(a)(i) broadly covers “fabrics of a kind used for technical purposes.” See Def.’s Brief at 15 (arguing that Note 7(a)(i) “clearly includes a variety of different fabrics which are used for different technical purposes, including ‘card clothing’ and ‘weaving’”). But, as Airflow correctly points out, any such reading would render the first clause of Note 7(a)(i), as well as much of the remainder of Note 7(a), largely superfluous. See Pl.’s Reply Brief at 9 & n.7 (stating that, “if the Government’s argument were followed to its logical conclusion, *all* coated fabrics for *all* technical uses would be covered by Note 7(a)(i),” and that “many of the provisions of Note 7(a) would be subsumed within Note 7(a)(i)”).

Here, the subject merchandise is clearly not similar to woven fabric or felt that is coated, covered, or laminated with rubber, leather, or other material – the type of fabric used for card clothing. See Pl.’s Brief at 18–20; Pl.’s Reply Brief at 6–10. As described above, card clothing refers to the foundation or base material “through which many fine, closely spaced, specially bent wires project,” and which is used to cover the cylinders of carding machines that operate to card (*i.e.*, disentangle) various textile fibers. See Pl.’s Statement of Facts ¶¶ 18–19.<sup>20</sup> For these reasons, card clothing “must possess four attributes: (1) strength; (2) flexibility or elasticity; (3) support; and (4) resistance to stretching[,]” and “must retain these attributes for a long period of time.” See Pl.’s Statement of Facts ¶ 20; Def.’s Response to Pl.’s Statement of Facts ¶ 20; *see also* Pl.’s Brief at 1114 (describing “card clothing”).

Further, like card clothing fabric, the only “similar fabric” specifically identified in Note 7(a)(i) – “narrow fabrics made of velvet impregnated with rubber, for covering weaving spindles” – is also fastened to machinery for use in a mechanical process. See Note 7(a)(i) to Chapter 59, HTSUS (providing that “similar fabrics of a kind used for other technical purposes[] includ[es] narrow fabrics made of velvet impregnated with rubber, for covering weaving spindles (weaving beams)”). Like Note 7(a)(i) card clothing fabric, which is “coated,

<sup>20</sup> See generally Pl.’s Statement of Facts ¶¶ 17–28 (describing carding, carding machines, card clothing, and card clothing foundation cloth); Def.’s Response to Pl.’s Statement of Facts ¶¶ 17–28 (admitting Airflow’s descriptions, though disputing relevance); Pl.’s Brief at 11–14 (describing “card clothing”).

covered, or laminated with rubber, leather or other material,” these weaving spindle fabrics are impregnated with rubber, presumably to provide the necessary strength, flexibility, and durability necessary to perform while maintaining their shape and withstanding continuous mechanical forces. *See* Pl.’s Reply Brief at 8 (stating that, “[l]ike card clothing foundation cloth, [Note 7(a)(i) weaving spindle fabrics] must necessarily possess the strength and durability to perform their function under demanding operating conditions, as well as the flexibility and elasticity to be wound around the weaving beams and not tear or become overly elongated”).

Comparing these characteristics to the description of Sperifilt, it is clear that Sperifilt lacks the qualities characteristic of the fabrics described in the first part of Note 7(a)(i), and is unlike the sole example of “similar fabrics” specified in the second part of Note 7(a)(i). *See generally* Pl.’s Brief at 18–20; Pl.’s Reply Brief at 6–10.

As discussed above, Note 7(a)(i) fabrics – whether of a kind used for card clothing or for other technical purposes – are coated, covered, laminated, or impregnated with rubber, leather or other material, so that they possess the necessary strength, durability, and flexibility to fulfill their functions while withstanding the stress of mechanical forces. Sperifilt, on the other hand, is a light and porous medium designed to trap solid particulates of varying sizes within its progressively thickening layers during air filtration. Unlike the fabrics specified in Note 7(a)(i) which cover and/or support parts of a machine, Sperifilt is inserted as a panel into the ventilation system of an industrial paint spray booth, and remains stationary during the air filtration process. *See Airflow II*, 524 F.3d at 1289 (describing Sperifilt); *Airflow I*, 31 CIT at 526, 483 F. Supp. 2d at 1340 (same); Pl.’s Statement of Facts ¶ 7 (explaining that Sperifilt filter media is cut into panels and inserted into paint spray booths); Def.’s Response to Pl.’s Statement of Facts ¶ 7 (same).

Finally, although Sperifilt is impregnated with a tackifying substance and backed by a net of polyester yarn (to provide dimensional stability under high temperature conditions and to prevent particles from escaping), these attributes are not comparable to the rubber or leather coating, covering, lamination, or impregnation to which Note 7(a)(i) refers. Sperifilt’s tackifying substance and polyester net backing are designed to enhance Sperifilt’s filtration capabilities. The rubber or leather coating, covering, lamination, or impregnation of Note 7(a)(i) products, on the other hand, is intended to strengthen the material’s flexibility and durability. For these reasons, any similarity between Sperifilt and the “coated, covered[,] laminated” and “impreg-

nated” fabrics described by Note 7(a)(i) is “irrelevant.” *See generally* Pl.’s Reply Brief at 9.

Thus, despite the Government’s claims to the contrary – which it bases merely on broad dictionary definitions and without reference to the fact that “similar fabrics” must be “similar” to fabrics that are “coated, covered or laminated with rubber, leather or other material” – Sperifilt filter media is not similar to the fabrics identified in Note 7(a)(i) to Chapter 59. *See* Def.’s Brief at 14–16; Def.’s Reply Brief at 7–9. In sum, not only are Sperifilt filter media and the specified Note 7(a)(i) products dissimilar, but their fundamental and defining characteristics are at odds with one another: Note 7(a)(i) products are designed to be strong, sturdy, and supportive components of moving machines, while the subject merchandise is a porous, “high-loft,” and stationary medium for air filtration.

For the reasons detailed above, Sperifilt is neither a fabric “of a kind used for card clothing” or a “similar fabric[] of a kind used for other technical purposes.” Sperifilt therefore does not fall within the scope of Note 7(a)(i) to Chapter 59, and is not classifiable under subheading 5911.10.20 of the HTSUS.

## 2. Note 7(b) to Chapter 59

Sperifilt also is not a “textile *article*” within the scope of Note 7(b) to Chapter 59, and therefore cannot be classified under subheading 5911.90.00, contrary to the Government’s argument in the alternative. *See* Note 7(b) to Chapter 59, HTSUS (emphasis added); Def.’s Brief at 1–2, 6, 23, 25; Def.’s Reply Brief at 1, 15; *see generally* Def.’s Brief at 1–2, 6, 16–23, 25; Def.’s Reply Brief at 1, 10–15.

As set forth above, Note 7(b) covers “[t]extile articles . . . of a kind used for technical purposes (for example, textile fabrics and felts, endless or fitted with linking devices, of a kind used in papermaking or similar machines (for example, for pulp or asbestos-cement), gaskets, washers, polishing discs and other machinery parts).” *See* Note 7(b) to Chapter 59, HTSUS. The Government contends that Note 7(b) “[broadly] encompasses ‘textile articles’ which, as properly defined, includes textile ‘products.’” *See* Def.’s Brief at 19; *see also id.* at 16–19; Def.’s Reply Brief at 10. Based on that expansive reading, the Government argues that “Sperifilt is clearly an ‘article’ as the term is commonly defined.” *See* Def.’s Brief at 19; *see also* Def.’s Reply Brief at 10 (arguing that “[b]ecause Sperifilt is a kind of filter media, there can be no legitimate dispute that it falls within the meaning of the term ‘article’ and, therefore, is a ‘textile article’ within the scope of

. . . Note 7(b)).<sup>21</sup> According to the Government, nothing in the text of the subheading, or the chapter notes, or the Explanatory Notes precludes textile goods that are imported in rolls and cut post-importation – such as the subject merchandise – from being classified under subheading 5911.90.00. *See* Def.’s Reply Brief at 10. The Government concludes that Sperifilt is within the scope of Note 7(b) to Chapter 59 and is classifiable under subheading 5911.90.00 because Sperifilt is a finished good dedicated for use as an air filtration medium upon importation. *See* Def.’s Brief at 19; Def.’s Reply Brief at 10–15.

However, the Government’s claim that Note 7(b) “textile articles” encompass “textile products” ignores Note 7’s fundamental distinction between “products” and “articles.” *See generally* Pl.’s Reply Brief at 11–12 (arguing that “[i]nterpreting the unambiguous language of Note 7(b) to include both textile *products* and textile *articles*, as claimed by the Government, disregards the clear separation of Note 7(a) and (b) and renders Note 7(a) meaningless and superfluous”). Unlike Note 7(a), which describes a variety of “textile *products*” (whether “in the piece, cut to length or simply cut to rectangular . . . shape”), Note 7(b) is strictly limited to “textile *articles*.” *See* Note 7 to Chapter 59, HTSUS (emphases added); *see also* Explanatory Notes, Heading 5911, at (A) and (B). Based on the deliberate use of these two distinct terms within the same chapter note, the inescapable conclusion is that Note 7(a) “textile products” and Note 7(b) “textile articles” refer to different types of goods, and Note 7 must be read and applied accordingly.

Although sometimes used interchangeably in common parlance, the terms “product” and “article” – for purposes of Note 7 to Chapter 59 – must be given different meanings. A “product” is defined broadly as “something produced” by either “physical labor or intellectual effort,” “a natural process,” or “chemical change.” *See* Webster’s Third New International Dictionary 1810 (1981); *see also* American Heritage Dictionary of the English Language 1399 (4th ed. 2000) (defining “product” as “[s]omething produced by human or mechanical effort or by natural process”). An “article,” on the other hand, is “a material thing[,] item, object”; “a thing of a particular class or kind as distinct from a thing of another class or kind.” *See* Webster’s Third New International Dictionary 123 (1981); *see also* American Heritage Dictionary of the English Language 101–02 (4th ed. 2000) (defining

<sup>21</sup> In the previous stage of this litigation, the Government initially stated that it does not claim that the subject merchandise is a “textile article.” *See* Defendant’s Responses to Plaintiff’s First Interrogatories and Requests for Production ¶ 4(a). However, as the Government points out, that statements was “based upon [its] claims as they existed at the time [prior to decision in *Airflow II*].” *See* Def.’s Brief at 19; *see also id.* at 17–19.



“article” as, *inter alia*, “[a]n individual thing or element of a class; a particular object or item: [e.g.,] an article of clothing; articles of food”).

As discussed in greater detail below, as the terms are used in Note 7 to Chapter 59, a “textile product” appears to refer to textile materials (e.g., textile fabrics, felts, cloth), whereas a “textile article” refers to a textile object or item with a fixed identity and dimensions (e.g., gaskets, washers, polishing disks). See Pl.’s Brief at 22 (explaining that “textile *materials* of Chapter Note 7(a) are textile products which are used to make finished goods; the textile *articles* of Chapter Note 7(b) are finished goods themselves”).

The distinction between a “textile product” and a “textile article” for purposes of Note 7 to Chapter 95 is illustrated by the specific examples of such goods set forth in Note 7 and in the relevant Explanatory Notes. See Note 7 to Chapter 59, HTSUS; Explanatory Notes, Heading 5911, at (B); see also Pl.’s Reply Brief at 12–13 (stating that “the language of Note 7(b) itself[ and] the [Explanatory Notes] to heading 5911 . . . confirm that Note 7(b) ‘articles’ are *not* textile materials imported in rolls and cut post-importation”).

Note 7(a) provides for certain textile *materials* (albeit, in some cases, somewhat advanced materials) that may be imported in rolls or bolts, such as “[b]olting cloth,” “[s]training cloth,” “[f]lat woven textile fabrics . . . of a kind used in machinery,” and “[t]extile fabric reinforced with metal.” See Note 7(a) to Chapter 59, HTSUS; see also Pl.’s Brief at 11 n.8 (stating that “Note 7(a) textile products are those imported either uncut (in rolls or bolts) or subject only to certain simple cutting steps”); Pl.’s Reply Brief at 12–13. In contrast, Note 7(b) covers specific *objects* or *items* – “machinery parts” made of textiles, such as “gaskets, washers, [and] polishing discs,” and endless fabric used in papermaking machines – rather than textile material that may be imported in rolls or bolts and subsequently used to make objects or items. See Note 7(b) to Chapter 59, HTSUS; see also Pl.’s Reply Brief at 12 (stating that “Note 7(b) ‘articles’ are *not* textile materials imported in rolls and cut post-importation”). Similarly, the examples of Note 7(b) articles listed in the Explanatory Notes also include only articles that have been “made up,” *i.e.*, “cut to shape” and/or “assembled by sewing.” See Explanatory Notes, Heading 5911, at (B); see also Note 7 to Section XI, HTSUS (defining “made up”).<sup>22</sup>

<sup>22</sup> The Explanatory Notes state that Note 7(b) covers “[a]ll textile articles of a kind used for technical purposes (other than those of headings 59.08 to 59.10),” for example:

- (1) Any of the fabrics of [Note 7(a)] which have been made up (cut to shape, assembled by sewing, etc.), for example, straining cloths for oil presses made by assembly of several pieces of fabric; bolting cloth cut to shape and trimmed with tapes or furnished with metal eyelets or cloth mounted on a frame for use in screen printing.

Indeed, the Explanatory Notes specifically make the point that Note 7(a) “textile products” constitute the type of material from which Note 7(b) “textile articles” may be made. *See* Explanatory Notes, Heading 5911, at (B)(1) (stating that Note 7(b) articles include “[a]ny of the fabrics of [Note 7(a)] which have been made up (cut to shape, assembled by sewing, etc.)”); *see also* Pl.’s Brief at 22 (explaining that “textile *materials* of Chapter Note 7(a) are textile products which are used to make finished goods; the textile *articles* of Chapter Note 7(b) are finished goods themselves”). In sum, it is clear from these examples that, unlike Note 7(a) “textile products,” which may be imported in rolls or bolts, Note 7(b) “textile articles” upon importation possess the fixed identity and specific dimensions required for use with a particular machine or for some other specific technical application.<sup>23</sup>

Airflow points to case law distinguishing between certain articles (or parts thereof) and the material from which such articles are made (which is often imported in rolls) to further bolster its position (by analogy, if nothing else).<sup>24</sup> As Airflow notes, “[w]here textile goods are imported ‘in the piece’ or uncut, those goods cannot be considered or

- (2) Textile fabrics and felts, endless or fitted with linking devices, of a kind used in paper-making or similar machines (for example, for pulp or asbestos-cement) (excluding machinery belts of heading 59.10).
- (3) Articles formed of linked monofilament yarn spirals and having similar uses to the textile fabrics and felts of a kind used in paper-making or similar machines referred to in (2) above.
- (4) Gaskets and diaphragms for pumps, motors, etc., and washers (excluding those of heading 84.84).
- (5) Discs, sleeves and pads for shoe polishing and other machines.
- (6) Textile bags for oil presses.
- (7) Cords cut to length, with knots, loops, or metal or glass eyelets, for use on Jacquard or other looms.
- (8) Loom pickers.
- (9) Bags for vacuum cleaners, filter bags for air filtration plant, oil filters for engines, etc.

Explanatory Notes, Heading 5911, at (B) (emphases omitted).

<sup>23</sup> Gasket and washers, for example, are typically manufactured in standard sizes. Similarly, polishing discs, bags for oil presses, vacuum cleaner bags, and filter bags all are generally manufactured for use with particular models and machinery upon importation.

<sup>24</sup> *See, e.g., Baxter Healthcare Corp. of Puerto Rico v. United States*, 182 F.3d 1333, 1339 (Fed. Cir. 1999) (considering classification of rolls of material for use as gas-exchanging membrane of oxygenator, and concluding that material cannot be classified as part of oxygenator because “[a]t the time of import, the individual parts cannot be discerned from the roll, and the roll nowhere marks or otherwise identifies the individual parts to be made from it”); *Harding Co. v. United States*, 23 C.C.P.A. 250, 252–53 (1936) (holding that item made from asbestos yarn, wire, and mixture of other materials, used for the sole purpose of making brake linings, was properly classified as manufacture of yarn rather than as “part” of automobile because individual brake lining parts to be made from material were not identified or otherwise “fixed with certainty,” and instead had to be individually cut to

classified as ‘articles’ [when] the individual finished articles to be made from those goods are not ‘fixed with certainty’ at the time of importation (such as where the amount or number of unfinished goods that could be made from a particular roll or bolt of fabric is unknown at the time of importation).” See Pl.’s Brief at 22–23; see also *id.* at 23–25 (citing cases); Pl.’s Reply Brief at 14–15 (same).

In the present case, as Airflow underscores, the subject entries of Sperifilt filter media were imported as rolls that had “no pre-cuts, cutting marks, or any other indication whatsoever as to the length and width to which the imported [media] was to be cut.” See Pl.’s Brief at 26; see also Pl.’s Reply Brief at 12–16. Rolls of Sperifilt are generally – if not always – cut post-importation to the specific dimensions required for installation into one of approximately 150 different spray

custom fit each brake shoe made); *United States v. Buss & Co.*, 5 U.S. Cust. App. 110, 113 (1914) (recognizing that “most small articles are not produced as individual or separate products of the loom, but for economy of manufacture are first woven ‘in the piece,’” and stating that “where such articles are imported in the piece and nothing remains to be done except to cut them apart they shall be treated for dutiable purposes as if already cut apart and assessed according to their individual character or identity,” but “only [where] the character or identity of the individual articles is fixed with certainty and [where] the woven piece in its entirety is not commercially capable of any other use”); *Benteler Indus., Inc. v. United States*, 17 CIT 1349, 1354–57, 840 F. Supp. 912, 915–18 (1993) (concluding that seamless steel tubular sections used in automobile manufacturing could be classified as parts thereof because number of beams to be cut exactly from each section was known prior to importation); *Coraggio Design, Inc. v. United States*, 12 CIT 143, 147 (1988) (considering classification of fabric with pre-woven hems used to make drapery and stating that “[a]s the rule of *Buss* and its progeny make apparent, material cannot be classified as more than woven fabric when it is not processed to the point where the individual ‘article’ is identifiable with certainty, not cut to specific lengths or marked for cutting, and not advanced to point where significant processing steps no longer remain”); *Bendix Mouldings, Inc. v. United States*, 388 F. Supp. 1193, 1194–95 (Cust. Ct. 1974) (concluding that uncut wood moldings used only to make picture frames, but not dedicated to making of any particular picture frame were not classifiable as unfinished frames; only as material from which frames made); see also Pl.’s Brief at 22–25 (citing cases); Pl.’s Reply Brief at 14–15 (same). But see *Ludvig Svensson (U.S.) Inc. v. United States*, 23 CIT 573, 580–81, 62 F. Supp. 2d 1171, 1178–79 (1999) (classifying screening used solely in construction of greenhouses, which is imported in rolls and cut to length to meet customer specifications, as parts of agricultural machinery, rather than as material, because function and purpose of screening identifiable upon importation and post-importation processing merely attributable to installation).

The Government disputes the relevance of many of these cases cited by Airflow, objecting that some “address whether an article is classifiable as a ‘part’ or as a ‘material,’” while others (such as *Coraggio Design* and *Bendix Mouldings*) were decided under the predecessor to the HTSUS. See Def.’s Reply Brief at 12; Def.’s Brief at 22 (same). The cases nevertheless speak to the distinction between “materials” imported in rolls or lengths and “articles.” See Pl.’s Reply Brief at 15.

booth models in which it is used. *See* Pl.’s Brief at 26.<sup>25</sup> Airflow further emphasizes that “Sperifilt [was] never dedicated to filling a particular customer order at the time of importation,” and that, “[g]iven the extreme variation in sizes required for finished Sperifilt panels, it was impossible to know how many Sperifilt panels could be made from any particular imported roll of Sperifilt at the time of importation.” *See* Pl.’s Brief at 26.

The imported item at issue here is the generic *roll* of Sperifilt filter media from which individual air filters will be fashioned following importation. And although the roll of Sperifilt possesses the necessary air filtration characteristics at the time of importation, there is no “textile *article*” until the imported product is matched (and cut from the roll and shaped, if necessary) to the precise dimensions of a specific industrial paint spray booth *after importation*. For all these reasons, Sperifilt filter media, as imported, is not a “textile article” within the meaning of Note 7(b) to Chapter 59 of the HTSUS.

Nor can the subject merchandise be considered an “incomplete” textile article within Note 7(b) by application of GRI 2(a), as the

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<sup>25</sup> There is some dispute as to whether the imported rolls of Sperifilt are *always* cut post-importation to fit the dimension of a particular customer’s paint spray booth. There is no apparent reason why a roll of Sperifilt could not be installed as imported, without any cutting, if some specific application required a filter of the exact dimensions of the roll as imported. However, there is no specific record evidence of any such use. To the contrary, the Government has acknowledged that “Sperifilt filter media is cut to size to fit within individual paint spray booths according to the orders received.” *See* Def.’s Response to Pl.’s Statement of Facts ¶ 7, ¶ 8 (*quoting* Wittert Affidavit (Aug. 24, 2005) ¶ 7); *see also* Def.’s Brief at 20 (acknowledging that Sperifilt filter media is cut to size); Def.’s Reply Brief at 11 (same); Recording of Oral Argument at 2:13:20–2:13:40 (Government counsel stated that “[the Government does] not dispute that Sperifilt . . . is cut; but we can also not say that it is not used in its imported condition[.]”); Pl.’s Statement of Facts ¶ 5 (stating that “[a]ll or virtually all (approximately 99 percent) of Sperifilt media was cut to length, and sometimes cut to width as well, after importation into the United States and before delivery to a customer”); Pl.’s Statement of Facts ¶ 10 (stating that “[w]hen filling a customer purchase order for Sperifilt, Airflow . . . was always required to cut the Sperifilt” because “the required size of Sperifilt would differ for each paint spray booth”).

Contrary to the Government’s characterization, an Airflow representative’s statement that “[p]aint spray booths are frequently designed so that the filter media can be unrolled as one complete blanket to cover the spray booth ceiling rather than having the filter media installed in ring panel as a separate framing system” indicates only that Sperifilt is sometimes used in large, single pieces, and does not indicate that an entire roll of Sperifilt filter media, as imported, is sometimes used uncut in its entirety in spray booths, as the Government implies. *See* Pl.’s Reply Brief at 19 (*quoting* Wittert Affidavit (July 31, 2003) ¶ 14) (internal quotation marks omitted); *see also* Pl.’s Reply Brief at 17–21 (countering Government’s characterization and attempt to dispute other statements made by Airflow’s president and co-founder); Def.’s Brief at 22; Pl.’s Statement of Facts ¶ 8 (stating that “[n]one of the models of paint spray booths was large enough to accommodate an entire uncut roll of Sperifilt, as imported”).

Government seeks to argue. *See* Def.’s Brief at 20 (arguing that “even if Sperifilt could be considered an ‘incomplete’ textile article in its imported condition, it would nevertheless fall within Chapter 59 Note 7(b)” because at the time of importation “Sperifilt has . . . all of the essential characteristics of a filtration media which is actually used in paint spray booths”); *see generally* Def.’s Brief at 20–21; Def.’s Reply Brief at 11–15; *but see* Pl.’s Reply Brief at 16–21 (disputing the Government’s argument on this point).

Addressing certain incomplete or unfinished articles, GRI 2(a) provides, in relevant part, that “[a]ny reference in a heading to an article shall be taken to include a reference to that article incomplete or unfinished, provided that, as entered, the incomplete or unfinished article has the *essential character* of the complete or finished article.” *See* GRI 2(a), HTSUS (emphasis added); *see also* Explanatory Notes, GRI 2(a), at (I) (stating that GRI 2(a) “extends the scope of any heading which refers to a particular article” to include incomplete or unfinished version of article so long as it possess “essential character of the complete or finished article”). Thus, unless the terms of a heading require otherwise, GRI 2(a) essentially functions to expand the scope of any GRI 1 analysis to include certain unfinished articles. *See ABB, Inc. v. United States*, 421 F.3d 1274, 1276 n.4 (Fed. Cir. 2005) (stating that “[a]lthough it is well settled law that merchandise is classified according to its condition when imported, [GRI] 2(a) provides that any reference in a heading to an article shall be taken to include a reference to that article entered unassembled” (internal quotation marks and citation omitted)).

Here, the Government argues that, even if Sperifilt is considered “incomplete” upon importation, it nevertheless falls within the scope of Note 7(b) to Chapter 59 by virtue of GRI 2(a), because it possesses the essential characteristics of an industrial paint spray booth air filter. *See* Def.’s Brief at 20–21; Def.’s Reply Brief at 11–12. According to the Government, the “simple cutting” required to fashion a filter panel to fit into a particular spray booth’s dimensions “does not alter the essence, character, or use of Sperifilt [filter media].” *See* Def. Reply Brief at 11.

However, as outlined above, interpreting the language of Note 7(b) to include both textile products (whether referred to as textile material, “unfinished” textile articles, or otherwise) in addition to “textile articles” would “disregard[] the clear separation of Note 7(a) and (b) and render[] Note 7(a) meaningless and superfluous.” *See* Pl.’s Reply Brief at 11; *see also Faus Group, Inc. v. United States*, 28 CIT 1879, 1904 n.44, 358 F. Supp. 2d 1244, 1266 n.44 (2004) (noting that GRI 1 limits the scope of GRI 2(a) to only those situations where “such

headings or notes do not otherwise require” (*quoting* GRI 1, HTSUS) (internal quotation marks omitted)).

The Government’s GRI 2(a) theory ignores the fact that the HTSUS term at issue is “textile articles,” not “industrial paint spray booth air filters.” Contrary to the Government’s claim, for a good to be classified as an incomplete or unfinished “textile article” of heading 5911 (as specified in Note 7(b)), GRI 2(a) requires that it possess, among other things, the essential character of a “textile article.” *See* GRI 2(a), HTSUS; Heading 5911, HTSUS. And, as detailed above, an essential characteristic of a Note 7(b) “textile article” is dimensions fixed with certainty upon importation. The Sperifilt at issue here cannot be classified as unfinished “textile articles,” because – as imported, in unmarked rolls – Sperifilt lacks the fixed dimensions of a Note 7(b) “textile article.” *See* Pl.’s Reply Brief at 16–17 (*quoting* Customs headquarters ruling letter stating “that for textile materials . . . to be classified under the HTSUS as unfinished articles pursuant to GRI 2(a), the identity of the finished articles to be made from those materials must be fixed with certainty” (internal quotation marks and citation omitted)).

Notwithstanding Sperifilt’s air filtration capabilities upon importation, an unmarked roll of Sperifilt filter media, as imported, does not possess the character of an individual air filter panel (which arguably could be considered a “textile article”). Because a roll of Sperifilt filter media lacks the fixed dimensions and identity central to classification as a “textile article,” it does not possess the “essential character” of a completed “textile article,” and therefore cannot be considered an “incomplete” or “unfinished” textile article pursuant to GRI 2(a).

To be sure, an imported roll of filter media will at some point most likely be fashioned into one or more textile “articles,” *i.e.*, panels of air filter media. But because the requisite dimensional characteristics of such “textile articles” were not established or designated at the time of importation, a roll of Sperifilt filter media is neither a completed Note 7(b) “textile article” nor an “incomplete” or “unfinished” Note 7(b) “textile article.” For the foregoing reasons, the subject merchandise is not covered by Note 7(b) to Chapter 59, and thus is not classifiable under subheading 5911.90.00 of the HTSUS.

### B. Heading 5603

Because the subject merchandise is not within the scope of Note 7 to Chapter 59, it is not classifiable under heading 5911. Thus, the Explanatory Note to heading 5603 that excludes classification thereunder in instances where a good is also *prima facie* classifiable under heading 5911 is inapplicable.

As set forth above, the entries of Sperifilt at issue here cannot be classified under heading 5911 of the HTSUS. The competing heading – which Airflow presses – is heading 5603, which covers “Nonwovens, whether or not impregnated, coated, covered or laminated.” See Heading 5603, HTSUS; Pl.’s Brief at 1, 5, 30; Pl.’s Reply Brief at 21–22.<sup>26</sup>

Goods classified within Chapter 56 are “textile products of a special character, *e.g.*, wadding, felt, *nonwovens*, special yarns, cordage and certain articles of these materials.” See General Explanatory Notes, Chapter 56 (emphasis added). A heading 5603 “nonwoven” is “a sheet or web of predominantly textile [fibers] oriented directionally or randomly and bonded.” See Explanatory Notes, Heading 5603.<sup>27</sup> The fibers of a nonwoven “may be of natural or man-made origin,” and “may be staple [fibers] (natural or man-made) or man-made filaments or be formed *in situ*.” See Explanatory Notes, Heading 5603. Nonwovens “can be produced in various ways and [their] production can be conveniently divided into . . . three stages: web formation, bonding [including thermal bonding] and finishing.” See Explanatory Notes, Heading 5603; see also Explanatory Notes, Heading 5603, at I, II, and III (describing web formation, bonding, and finishing).<sup>28</sup>

The Explanatory Notes provide that, “[e]xcept where they are covered more specifically by other headings in the Nomenclature, [heading 5603] covers nonwovens in the piece, cut to length or simply cut to rectangular (including square) shape from larger pieces without other working, whether or not presented folded or put up in packings (*e.g.*, for retail sale).” See Explanatory Notes, Heading 5603 (emphasis omitted). In addition, among other things, the Explanatory Notes expressly state that heading 5603 covers “[nonwoven] sheets for fil-

<sup>26</sup> Note 3 to Chapter 56 provides that heading 5603 covers nonwovens that are “impregnated, coated, covered or laminated with plastics or rubber whatever the nature of these materials (compact or cellular),” and that the heading “also includes nonwovens in which plastics or rubber forms the bonding substance.” See Note 3 to Chapter 56, HTSUS. Note 3 to Chapter 56 also describes a number of goods that are excluded from classification under heading 5603, but which have no bearing on this case. See Note 3 to Chapter 56, HTSUS.

<sup>27</sup> “Nonwoven” is defined as “[m]aterial or . . . fabric made by a process not involving weaving.” See American Heritage Dictionary of the English Language 1198 (4th ed. 2000); see also Webster’s Third New International Dictionary 1539 (1981) (defining “nonwoven” as something “made without weaving; [especially] having textile fibers bonded together by adhesive resins, rubber, or plastic or felted together under pressure,” *e.g.*, “fabrics”).

<sup>28</sup> The Explanatory Notes further indicate that “[n]onwovens differ in thickness and in their characteristic features (flexibility, elasticity, resistance to tearing, absorbency, stability, etc.) according to the manufacturing or bonding process, the density of the [fibers] or filaments and the number of webs”; and that “the fact that the textile [fibers] or filaments are bonded throughout the thickness, and generally throughout the width, of the web or sheet also helps to distinguish these fabrics from certain types of wadding of heading 56.01 [(covering, *inter alia*, wadding of textile materials)].” See Explanatory Notes, Heading 5603.

tering liquids or air.” See Explanatory Notes, Heading 5603.<sup>29</sup> Heading 5603 “nonwovens” may also be “covered on one or both surfaces (by gumming, sewing or by any other process) with textile fabric or with sheets of any other material,” so long as they continue to “derive their essential character from the nonwoven.” See Explanatory Notes, Heading 5603, at III.

In the case at bar, both parties agree that Sperifilt is *prima facie* classifiable under heading 5603. See Def.’s Brief at 23 (stating that, “as [the Government has] previously acknowledged, Sperifilt is a nonwoven and is *prima facie* classifiable in Heading 5603”); Pl.’s Brief at 7, 30; Pl.’s Reply Brief at 21; see also *Airflow II*, 524 F.3d at 1290 (stating that “[t]he [G]overnment did not dispute that Sperifilt is *prima facie* classifiable under heading 5603”); *Airflow I*, 31 CIT at 527, 483 F. Supp. 2d at 1341 (noting that “[t]he Government does not dispute that Sperifilt filter media is *prima facie* classifiable under HTSUS heading 5603”).

Indeed, in light of *Airflow II* and the analysis of heading 5911 set forth above, the subject entries of Sperifilt must be classified under heading 5603. Sperifilt filter media is a nonwoven made of thermo-bonded polyester staple fibers, impregnated with an adhesive, and attached to a polyester yarn backing. The language of heading 5603 expressly covers impregnated nonwovens. And although Sperifilt incorporates a polyester yarn backing, that backing does not remove Sperifilt from the scope of heading 5603. See Explanatory Notes, Heading 5603, at III.<sup>30</sup> Moreover, as noted above, the Explanatory Notes specifically provide that heading 5603 covers nonwoven air filtration media, such as Sperifilt. See Explanatory Notes, Heading 5603.

Because “[t]he weight of the completed Sperifilt filter media ranges between 540 and 600 g/m<sup>2</sup>,” the appropriate subheading is subheading 5603.94.90, which covers “Nonwovens, whether or not impregnated, coated, covered or laminated: Other: Weighing more than 150 g/m<sup>2</sup>: Other: Other,” and is duty-free. See Subheading 5603.94.90, HTSUS; Joint Statement of Material Facts at ¶¶11, ¶12 (describing

<sup>29</sup> See, e.g., *FilmTec*, 27 CIT 1730, 293 F. Supp. 2d 1364 (classifying nonwoven fabric sheets imported in rolls and used as part of filter medium under heading 5603, rather than heading 5911).

<sup>30</sup> The nonwoven “component” constitutes 78 % of the subject merchandise’s weight, and the additional elements – the adhesive and the polyester backing – merely enhance and provide stability for the nonwoven medium, which is “layered and assembled in such a way as to achieve a weight and thickness sufficient to create a filter medium.” See Joint Statement of Material Facts at ¶¶ 11–15; see also Pl.’s Statement of Facts ¶ 1 (stating that, “[w]ith the exception of . . . paragraph 6, Plaintiff repeats and reincorporates ¶¶ 1–28 of the parties’ joint statement of material facts as to which there is no genuine issue to be tried, submitted in connection with the original proceeding in this case”).



components of Sperifilt filter media, and explaining that each sheet of polyester staple fiber (several of which are bonded together to form the nonwoven media) weighs approximately 50 g/m<sup>2</sup>).

**IV. Conclusion**

In light of *Airflow II* and for all the reasons set forth above, the subject entries of Sperifilt filter media must be classified under sub-heading 5603.94.90 of the HTSUS. Plaintiff's motion for summary judgment must therefore be granted, and Defendant's cross-motion is denied.

Judgment will enter accordingly.

Dated: October 31, 2011  
New York, New York

*/s/ Delissa A. Ridgway*

DELISSA A. RIDGWAY

JUDGE

