U.S. Customs and Border Protection

PROPOSED REVOCATION OF ONE RULING LETTER AND PROPOSED REVOCATION OF TREATMENT RELATING TO THE TARIFF CLASSIFICATION OF A WHITE NOISE MACHINE

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

ACTION: Notice of proposed revocation of one ruling letter and proposed revocation of treatment relating to the tariff classification of a white noise machine.

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

DATE: Comments must be received on or before March 10, 2023.

ADDRESS: Written comments are to be addressed to U.S. Customs and Border Protection, Office of Trade, Regulations and Rulings, Attention: Monique Moore, Commercial and Trade Facilitation Division, 90 K St., NE, 10th Floor, Washington, DC 20229–1177. Due to the COVID-19 pandemic, CBP is also allowing commenters to submit electronic comments to the following email address: 1625Comments@cbp.dhs.gov. All comments should reference the title of the proposed notice at issue and the *Customs Bulletin* volume, number and date of publication. Due to the relevant COVID-19-related restrictions, CBP has limited its on-site public inspection of public comments to 1625 notices. Arrangements to inspect submitted comments should be made in advance by calling Ms. Monique Moore at (202) 325–1826.

FOR FURTHER INFORMATION CONTACT: Michael Thompson, Electronics, Machinery, Automotive and International Nomenclature Branch, Regulations and Rulings, Office of Trade, at michael.f.thompson@cbp.dhs.gov.

SUPPLEMENTARY INFORMATION:

BACKGROUND

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

Pursuant to 19 U.S.C. § 1625(c)(1), this notice advises interested parties that CBP is proposing to revoke one ruling letter pertaining to the tariff classification of a white noise machine. Although in this notice, CBP is specifically referring to New York Ruling Letter (NY) N283732, dated March 21, 2017 (Attachment A), this notice also covers any rulings on this merchandise which may exist, but have not been specifically identified. CBP has undertaken reasonable efforts to search existing databases for rulings in addition to the one identified. No further rulings have been found. Any party who has received an interpretive ruling or decision (i.e., a ruling letter, internal advice memorandum or decision, or protest review decision) on the merchandise subject to this notice should advise CBP during the comment period.

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

In NY N283732, CBP classified a white noise machine in heading 8479, HTSUS, specifically in subheading 8479.89.95, HTSUS, which

provides for "Machines and mechanical appliances having individual functions, not specified or included elsewhere in this chapter; parts thereof: Other machines and mechanical appliances: Other: Other." CBP has reviewed NY N283732 and has determined the ruling letter to be in error. It is now CBP's position that the subject white noise machine is properly classified, in heading 8509, HTSUS, specifically in subheading 8509.80.50, HTSUS, which provides for "Electromechanical domestic appliances, with self-contained electric motor, other than vacuum cleaners of heading 8508; parts thereof: Other appliances: Other."

Pursuant to 19 U.S.C. § 1625(c)(1), CBP is proposing to revoke NY N283732 and to revoke or modify any other ruling not specifically identified to reflect the analysis contained in the proposed Headquarters Ruling Letter (HQ) H328381, set forth as Attachment B to this notice. Additionally, pursuant to 19 U.S.C. § 1625(c)(2), CBP is proposing to revoke any treatment previously accorded by CBP to substantially identical transactions.

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

GREGORY CONNOR
for
YULIYA A. GULIS,
Director
Commercial and Trade Facilitation Division

Attachments

ATTACHMENT A

N283732

March 21, 2017
CLA-2–84:OT:RR:NC:N1:104
CATEGORY: Classification
TARIFF NO.: 8479.89.9499

MR. MATTHEW SNYDER
SNOOZ LLC
60 BONDS DRIVE
BOURBONNAIS, IL 60914

RE: The tariff classification of a white noise machine from Malaysia

DEAR MR. SNYDER:

In your letter dated February 17, 2017 you requested a tariff classification ruling.

The imported product, called the SNOOZ, is used to create white noise sounds for sleeping or noise masking. The device produces these sounds with a small brushless DC motor used to spin a fan blade that is inside a plastic acoustic enclosure. The SNOOZ fan is designed to create maximum sound with minimal air movement. It does not reproduce the sound electronically but it creates the noise using a fan and the double wall adjustable housing.

The device includes an AC adapter, decorative fabric wrap, printed circuit board and a touch control surface to control the volume of the fan speed inside the device. The device will also be able to be controlled by a smart phone application.

In your ruling request, you suggested classifying the SNOOZ under heading 8543, Harmonized Tariff Schedule of the United States (HTSUS), which provides for "Electrical machines and apparatus, having individual functions, not specified or included elsewhere in this chapter; parts Thereof". The device incorporates mechanical attributes that are not subsidiary to the electrical attributes. The electrical components for the instant item are provided for outside of heading 8543, HTSUS, and the adjustable enclosure changes the sound. In view of the above, classification in heading 8543, HTSUS, would not be appropriate.

The applicable subheading for the SNOOZ product will be 8479.89.9499, HTSUS, which provides for "Machines and mechanical appliances having individual functions, not specified or included elsewhere in this chapter, parts thereof: Other machines and mechanical appliances: Other: Other: Other". The rate of duty will be 2.5 percent ad valorem.

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

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

A copy of the ruling or the control number indicated above should be provided with the entry documents filed at the time this merchandise is imported. If you have any questions regarding the ruling, contact National Import Specialist Patricia O'Donnell at patricia.k.odonnell@cbp.dhs.gov.

Sincerely,

STEVEN A. MACK
Director
National Commodity Specialist Division

ATTACHMENT B

H328381
CLA-2 OT:RR:CTF:EMAIN H328381 MFT
CATEGORY: Classification
TARIFF NO.: 8509.80.50

MR. KYL J. KIRBY
KYL J. KIRBY, ATTORNEY AND COUNSELOR AT LAW, P.C.
1400 LIPSCOMB STREET
FORT WORTH, TX 76104

MR. MATTHEW SNYDER
SNOOZ, INC.
60 BONDS DRIVE
BOURBONNAIS, IL 60914

RE: Revocation of NY N283732; tariff classification of a white noise machine

DEAR MESSRS. KIRBY AND SNYDER:

This letter is in reference to New York Ruling Letter (NY) N283732, issued to SNOOZ, Inc. on March 21, 2017, pertaining to the tariff classification of a certain white noise machine under the Harmonized Tariff Schedule of the United States (HTSUS). We find NY N283732 to be in error and are therefore revoking it for the reasons set forth below.

FACTS:

The merchandise at issue in NY N283732 is described as follows:

> The imported product, called the SNOOZ, is used to create white noise sounds for sleeping or noise masking. The device produces these sounds with a small brushless DC motor used to spin a fan blade that is inside a plastic acoustic enclosure. The SNOOZ fan is designed to create maximum sound with minimal air movement. It does not reproduce the sound electronically but it creates the noise using a fan and the double wall adjustable housing.
>
> The device includes an AC adapter, decorative fabric wrap, printed circuit board and a touch control surface to control the volume of the fan speed inside the device. The device will also be able to be controlled by a smart phone application.

In addition to the above facts, we have learned that the subject merchandise weighs two pounds.

NY N283732 classified the subject merchandise under subheading 8479.89.94, HTSUS, which provided for "Machines and mechanical appliances having individual functions, not specified or included elsewhere in this chapter, parts thereof: Other machines and mechanical appliances: Other: Other."[1]

[1] Effective January 27, 2022, subheading 8479.89.94, HTSUS, was removed from the schedule and renumbered as subheading 8479.89.95, HTSUS.

ISSUE:

Whether the subject white noise machine is properly classified in heading 8479, HTSUS, which provides for "Machines and mechanical appliances having individual functions, not specified or included elsewhere in this chapter; parts thereof," or in heading 8509, HTSUS, which provides for "Electromechanical domestic appliances, with self-contained electric motor, other than vacuum cleaners of heading 8508; parts thereof."

LAW AND ANALYSIS:

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

The HTSUS headings under consideration are as follows:

> 8479 Machines and mechanical appliances having individual functions, not specified or included elsewhere in this chapter; parts thereof:
>
> * * * * *
>
> 8509 Electromechanical domestic appliances, with self-contained electric motor, other than vacuum cleaners of heading 8508; parts thereof:

Note 1(f) to Chapter 84, HTSUS, provides, *inter alia*, that the chapter excludes electromechanical domestic appliances of heading 8509, HTSUS. Note 4 to Chapter 85, HTSUS, defines the scope of heading 8509, HTSUS, as follows:

> Heading 8509 covers only the following electromechanical machines of the kind commonly used for domestic purposes:
>
> (a) Floor polishers, food grinders and mixers, and fruit or vegetable juice extractors, of any weight;
>
> **(b) Other machines provided the weight of such machines does not exceed 20 kg, exclusive of extra interchangeable parts or detachable auxiliary devices.**
>
> The heading does not, however, apply to fans or ventilating or recycling hoods incorporating a fan, whether or not fitted with filters (heading 8414), centrifugal clothes dryers (heading 8421), dishwashing machines (heading 8422), household washing machines (heading 8450), roller or other ironing machines (heading 8420 or 8451), sewing machines (heading 8452), electric scissors (heading 8467) or to electrothermic appliances (heading 8516).
>
> (**Emphasis** added).

Thus, if the subject white noise machine constitutes an "electromechanical domestic appliance" of heading 8509, HTSUS, classifiable under that heading, it cannot be classified under heading 8479, HTSUS.

The Harmonized Commodity Description and Coding System Explanatory Notes (ENs) constitute the official interpretation of the Harmonized System

at the international level. While neither legally binding nor dispositive, the ENs provide a commentary on the scope of each heading of the HTSUS and are generally indicative of the proper interpretation of these headings. *See* T.D. 89–80, 54 Fed. Reg. 35127, 35128 (Aug. 23, 1989).

EN 85.09 provides, in pertinent part, the following guidance:

> This heading covers a number of domestic appliances in which an electric motor is incorporated. The term "domestic appliances" in this heading means appliances normally used in the household. These appliances are identifiable, according to type, by one or more characteristic features such as overall dimensions, design, capacity, volume. The yardstick for judging these characteristics is that the appliances in question must not operate at a level in excess of household requirements.

We find that the subject white noise machine constitutes an electromechanical domestic appliance under heading 8509, HTSUS. First, the device includes a self-contained, DC motor and thus incorporates an electric motor per the requirement of the legal text. Second, the device produces sound electromechanically; i.e., the electric motor powers the fan within the acoustic housing. Third, the device weighs only two pounds, well below the 20 kg threshold provided in Note 4(b), *supra*. Furthermore, there is no indication that the device exhibits functions or characteristics beyond those required for common household use. Therefore, the subject white noise machine constitutes an electromechanical domestic appliance under heading 8509, HTSUS.[2]

Because the device is classifiable under heading 8509, HTSUS, it is precluded from classification under heading 8479, HTSUS, in accordance with Note 1(f), *supra*.

HOLDING:

By application of GRIs 1 and 6, the subject white noise machine is classified in heading 8509, HTSUS, specifically in subheading 8509.80.50, HTSUS, which provides for "Electromechanical domestic appliances, with self-contained electric motor, other than vacuum cleaners of heading 8508; parts thereof: Other appliances: Other." The general, column one rate of duty is 4.2 percent *ad valorem*.

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

EFFECT ON OTHER RULINGS:

NY N283732 (March 21, 2017) is hereby revoked.

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

Sincerely,

YULIYA A. GULIS,
Director
Commercial and Trade Facilitation Division

[2] The subject merchandise is not classifiable under heading 8519, HTSUS, because it creates sound electromechanically via a fan powered by an electric motor; it does not reproduce an original sound wave. *Cf.* NY N042716 (dated Nov. 14, 2008) (classifying a white noise machine that reproduced sound via "Mask ROM-chip technology" under heading 8519, HTSUS).

PROPOSED REVOCATION OF ONE RULING LETTER, PROPOSED MODIFICATION OF ONE RULING LETTER, AND PROPOSED REVOCATION OF TREATMENT RELATING TO THE TARIFF CLASSIFICATION OF REFLECTIVE ALUMINUM COMPOSITE PANELS

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

ACTION: Notice of proposed revocation of one ruling letter, proposed modification of one ruling letter, and proposed revocation of treatment relating to the tariff classification of reflective aluminum composite panels.

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

DATE: Comments must be received on or before March 10, 2023

ADDRESS: Written comments are to be addressed to U.S. Customs and Border Protection, Office of Trade, Regulations and Rulings, Attention: Monique Moore, Commercial and Trade Facilitation Division, 90 K St., NE, 10th Floor, Washington, DC 20229–1177. Due to the COVID-19 pandemic, CBP is also allowing commenters to submit electronic comments to the following email address: 1625Comments@cbp.dhs.gov. All comments should reference the title of the proposed notice at issue and the *Customs Bulletin* volume, number and date of publication. Due to the relevant COVID-19-related restrictions, CBP has limited its on-site public inspection of public comments to 1625 notices. Arrangements to inspect submitted comments should be made in advance by calling Ms. Monique Moore at (202) 325–1826.

FOR FURTHER INFORMATION CONTACT: Ms. Amanda Alexander, Chemicals, Petroleum, Metals and Miscellaneous Articles Branch, Regulations and Rulings, Office of Trade, at (202) 325–1552.

SUPPLEMENTARY INFORMATION:

BACKGROUND

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

Pursuant to 19 U.S.C. § 1625(c)(1), this notice advises interested parties that CBP is proposing to revoke one ruling letter and to modify one ruling letter pertaining to the tariff classification of reflective aluminum composite panels. Although in this notice, CBP is specifically referring to Headquarters Ruling Letter ("HQ") 953138, dated March 18, 1993 (Attachment A), and New York ("NY") N284130, dated September 15, 2017 (Attachment B), this notice also covers any rulings on this merchandise which may exist, but have not been specifically identified. CBP has undertaken reasonable efforts to search existing databases for rulings in addition to the one identified. No further rulings have been found. Any party who has received an interpretive ruling or decision (i.e., a ruling letter, internal advice memorandum or decision, or protest review decision) on the merchandise subject to this notice should advise CBP during the comment period.

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

In HQ 953138, CBP classified reflective aluminum composite panels in heading 7616, HTSUS, and specifically in subheading 7616.90.00, HTSUS (1993), which provides for "Other articles of aluminum: Other." In NY N284130, CBP classified reflective aluminum

composite panels in heading 7616, HTSUS, and specifically in subheading 7616.99.5190, HTSUS (2017), which provides for "Other articles of aluminum: Other: Other: Other: Other: Other: Other." CBP has reviewed HQ 953138 and NY N284130 and has determined the ruling letters to be in error. It is now CBP's position that the subject reflective aluminum composite panels with an aluminum component thickness exceeding 0.2 mm are classified in heading 7606, HTSUS, which provides for "Aluminum plates, sheets and strip, of a thickness exceeding 0.2 mm." The subject reflective aluminum panels with an aluminum component thickness not exceeding 0.2 mm are classified in heading 7607, HTSUS, which provides for "Aluminum foil (whether or not printed, or backed with paper, paperboard, plastics or similar backing materials) of a thickness (excluding any backing) not exceeding 0.2 mm."

Pursuant to 19 U.S.C. § 1625(c)(1), CBP is proposing to revoke HQ 953138, to modify NY N284130, and to revoke or modify any other ruling not specifically identified to reflect the analysis contained in the proposed Headquarters Ruling Letter ("HQ") H230936, set forth as Attachment C to this notice. Additionally, pursuant to 19 U.S.C. § 1625(c)(2), CBP is proposing to revoke any treatment previously accorded by CBP to substantially identical transactions.

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

YULIYA A. GULIS,
Director
Commercial and Trade Facilitation Division

Attachments

HQ 953138
March 18, 1993
CLA-2-C:R:C:M 953138 MMC
CATEGORY: Classification
TARIFF NO.: 7616.90.00

MR. JOHN M. PETERSON, ESQ.
NEVILLE, PETERSON, & WILLIAMS
39 BROADWAY
NEW YORK, NEW YORK 10006

RE: Reflective aluminum decorative covering; headings 7606, 7607, 3901, 8306; HQ 086405; chapter 76 note 1(d)

DEAR MR. PETERSON:

This is in response to your letter dated 11/14/92 submitted on behalf of Mitsubishi Kasei America, Inc., to the Regional Commissioner of Customs in New York for a classification ruling on "A-Look" and "A-Look EX" decorative coverings under the Harmonized Tariff Schedule of the United States (HTSUS). Your letter was forwarded together with a sample of the article to Customs Headquarters for a reply.

FACTS:

A-Look is a composite material made by laminating a polyethylene core between two sheets of aluminum alloy. The silver colored surface is electroplated with a layer of nickel and chromium, the bronze colored surface is electroplated with nickel alloy, and the gold colored surface is electroplated with brass. The back of A-Look is coated with an acrylic resin. A- Look EX is also a composite material made by laminating a polyethylene core between two sheets of aluminum alloy with a backing of fluoride resin. A-Look EX is specially designed for use outdoors and in locations exposed to high humidity.

Both articles are imported in standard sizes ranging from 2 feet square to 4 feet by 10 feet square, however they can be manufactured in any size and are advertised as an unbreakable, light weight, flexible, metallic mirror. Both products' reflective exterior surface may be etched or inscribed with decorative patterns. Both can be bent and applied to curved surfaces, machined to different sizes and shapes, and mechanically worked (e.g., by cutting, punching, grooving and bending). Both articles are used in a variety of places such as ceilings, walls, columns, furniture, displays, and as trims and accents.

The articles are sold in two different thicknesses, 3 millimeters (mm) and 2 millimeters (mm). The amount of polyethylene creates the difference in thickness. Polyethylene is the heaviest component of the 3 mm thick sample weighing 0.49 of a pound(lb.) per square foot(sq. ft.). The aluminum sheets weigh 0.28 lb. per sq. ft. The polyethylene costs $0.20 per sq. ft. and the aluminum sheets cost $0.34 per sq.ft.. For the 2 mm sample, polyethylene predominates by weight, weighing 0.29 lb. per sq.ft., compared to the aluminum sheets which weigh 0.28 lb. per sq. ft.. Aluminum costs $0.34 per sq.ft., while the polyethylene costs $0.12 per sq.ft.. Trace amounts of nickel, brass, or chromium are electroplated onto the front aluminum sheet to give the different articles their varying colors.

ISSUE:

Are the products classifiable as (1) a mirror of base metal, (2) other articles of aluminum, (3) aluminum plates, sheets and strip, of a thickness exceeding 0.2mm, (4) aluminum foil (whether or not printed, or backed with paper, paperboard, plastics, or similar backing materials) of a thickness not exceeding 0.2mm, or as (4) polymers of ethylene, in primary forms?

LAW AND ANALYSIS:

Classification of merchandise under the HTSUS is in accordance with the General Rules of Interpretation (GRI's). GRI 1, HTSUS, states in part that for legal purposes, classification shall be determined according to the terms of the headings and any relative section or chapter notes. The headings at issue are as follows:

8306	(m)irrors of base metal;
7606	Aluminum plates, sheets and strip, of a thickness exceeding 0.2min.
7607	Aluminum foil (whether or not printed, or backed with paper, paperboard, plastics or similar backing materials) of a thickness (excluding any backing) not exceeding 0.2 turn
7616	Other articles of aluminum
3901	Polymers of ethylene, in primary forms

You have suggested that A-Look is classifiable as a mirror of base metal in subheading 8306.30.00, HTSUS. We disagree.

In understanding the language of the HTSUS, the Harmonized Commodity Description and Coding System Explanatory Notes may be. consulted. The Explanatory Notes (EN), although not dispositive, are to be used to determine the proper interpretation of the HTSUS. 54 Fed. Reg. 35127, 35128, (August 23, 1989). EN 83.06, pg. 1123, states in pertinent part that mirrors of base metal include metallic mirrors(other than optical elements), e.g., wall or pocket mirrors and rear-view mirrors, generally made of steel, or of chromium, nickel, or silver-plated steel or brass. While the EN lists examples of types of "mirrors of base metal" it does not define the term itself. Nowhere else in the HTSUS is the term "mirror of base metal" defined.

A tariff term that is not defined in the HTSUS or in the EN's is construed in accordance with its common and commercial meaning, Nippon Koqasku (USA) Inc. v. United States, 69 CCPA 89, 673 F.2d 380 (1982). Common and commercial meaning may be determined by consulting dictionaries, lexicons, scientific authorities and other reliable sources. C.J. Tower & Sons rs. United States, 69 CCPA 128, 673 F.2d 1268 (1982). Webster's New Riverside University Dictionary (1988) defines mirror as a surface able to reflect enough undiffused light to form a virtual image of an object placed before it. Something that faithfully reflects or gives a true picture of something else. The Random House Dictionary of the English Language, Unabridged, (1966) defines mirror as "a reflecting surface, originally of polished metal but now usually of glass with a silvery, metallic, or amalgam backing; such a surface set into a frame, attached to a handle, etc. for use in viewing oneself, etc. McGraw-Hill Encyclopedia of Science and Technology, 7th Edition, (1992) further defines mirror by stating in pertinent part the most familiar use of

reflecting optical surfaces is for the examination of one's own reflected image in a flat or plane mirror. From these definitions it would appear that there are two requirements for an article to be considered a mirror; it must be able to reflect enough undiffused light to form a virtual image of an object placed before it, and its most common use is to view one's own reflected image.

Additional U.S. Note l(a), HTSUS, provides that in the absence of special language or context which otherwise requires- (a) a tariff classification controlled by use (other than actual use) is to be determined in accordance with the use in the United States at, or immediately prior to, the date of importation, of goods of that class or kind to which the imported goods belong, and the controlling use is the principal use. At importation, the principal use of these articles are not as mirrors, but rather as decorative wall coverings.

The A-Look and A-Look EX products do not meet the two requirements for consideration as a mirror. Many of the articles will be machined and worked in such a way that it will be impossible for the product to form a virtual image of an object placed before it. Furthermore, those few samples which are able to reflect a virtual image will not be principally used to examine one's own reflected image, but rather to cover walls, ceilings, furniture, etc. as a decoration.

We note that this interpretation of heading 8306, HTSUS, concurs with the HTSUS's interpretation of glass wall decorations and glass mirrors. In HQ 086405 dated 4/16/90, we found that a glass mirrored wall decoration was classifiable in heading 7013, HTSUS, which provides for glassware of a kind used for table, kitchen, toilet, office, indoor decoration or similar purposes. The submitted sample was a piece of etched reflective glass contained in a wooden frame. The central portion of the glass featured the name and logo of an NFL football team. The names of the other NFL teams and a colored strip outlined the periphery of the glass.

Heading 7009, HTSUS, provides for glass mirrors, whether or not framed, including rear-view mirrors. The EN's for this heading at page 933 indicate that this heading includes [m]irrors, whether or not framed, bearing printed illustrations on one surface, provided they retain the essential character of mirrors. However, once the printing is such as to preclude use as a mirror, these goods are classifiable in heading 7013, HTSUS, as decorative articles of glass. We ruled, in HQ 086405 that this article lost its essential character as a mirror because the sample would not be principally used to see one's reflection. The purpose of the article was embodied in its decorative effect.

Four remaining headings describe the A-Look and A-Look EX products. Of these four, three describe a different form of aluminum which would correspond to the aluminum parts of the articles and the fourth describes the polyethylene secured between the two aluminum parts. Because the articles are described in more than one heading they are considered composite goods.

GRI 3 states that when, by application of rule 2(b) or for any other reason, goods are, prima facie, classifiable under two or more headings, classification shall be effected as follows:

> (b) Mixtures, composite goods consisting of different materials or made up of different components, and goods put up for retail sale, which cannot be classified by reference to 3(a), shall be classified as if they consisted of the material or component which gives them their essential character, insofar as this criterion is applicable.

EN VIII to GRI 3(b), pg. 4, states that, the factor which determines essential character will vary as between different kinds of goods. It may for

example, be determined by the nature of the material or component, its bulk, quantity, weight or value, or by the role of a constituent material in relation to the use of the goods.

We find that aluminum imparts the essential character to these articles. As noted above, aluminum costs more than polyethylene. Furthermore, the front and back of the articles are comprised of aluminum, and aluminum is the surface which serves as a base for the trace amounts of nickel, chromium, or brass which give the articles their reflective quality. While polyethylene weighs more it costs less and serves only as support for the aluminum.

Because we have determined that the articles are essentially of aluminum, three possible headings are left that describe the articles; heading 7606, HTSUS, which provides for aluminum sheets, heading 7607, HTSUS, which provides for aluminum foil, and heading 7616, which provides for other articles of aluminum.

Heading 7606, HTSUS, provides for aluminum plates, sheets and strip, of a thickness exceeding 0.2turn. Heading 7607, HTSUS, provides for aluminum foil. Chapter 76 note l(d) defines plates, sheets, strip and foil as: Flat-surfaced products coiled or not, of solid rectangular (other than square) cross section with or without rounded corners, of a uniform thickness, which are:

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

These products are not an aluminum sheet or aluminum foil because they do not meet the description outlined in the EN's for products of either of the two headings. EN 76.06, pg. 1065, states that aluminum sheets correspond to similar goods made of copper. The provisions to heading 74.09 apply mutatis mutandis to this heading. EN 74.09, pg.1048, provides that all such goods remain in the heading (in this instance heading 7606) if worked (e.g., cut to shape, perforated, corrugated, ribbed, channelled, polished, coated, embossed, or rounded at the edges) provided they do not thereby assume the character of articles or of products of other headings. A-Look and A-Look EX, cannot be considered an aluminum sheet because they consist of two aluminum sheets with a polyethylene core and backings of resin. The entire product is not an aluminum sheet, but an article made from aluminum sheets.

Further, these articles are not classifiable as aluminum foil. EN 74.10, pg. 1048, which applies mutatis mutandis, to aluminum foil states, in pertinent part:

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

Thus, even if we assume that the aluminum meets the 0.2turn thickness requirement and the resin backing could be found attributable to one of the sheets and the polyethylene backing could be attributable to the other aluminum sheet, the finished product would not meet the EN description. Although we have not been informed as to the precise reason for the resin and polyethylene layers, they appear to be present for structural, and installation reasons as well as a form of protection from the environment. Clearly, they are not for convenience of handling, transport, etc. Furthermore, the EN refers to foil sheets backed with plastics, etc., not sheets backed with poly-

ethylene in combination with other backed foil sheets. These sheets cannot be aluminum foil for the same reasons they cannot be aluminum sheets.

A-Look and A-Look EX are classifiable as other articles of aluminum in heading 7616, HTSUS. EN 76.16, pg. 1070, states that this heading covers all articles of aluminum other than those covered by the preceding headings of this Chapter, or by Note 1 of section XV, or by Chapter 82 or 83, or more specifically defined by the Nomenclature. These articles are not covered by another heading of this chapter as discussed above, they are not listed in Note 1 of Section XV or in Chapter 82 or 83, and they are not more specifically defined by the Nomenclature.

HOLDING:

A-Look and A-Look EX are classifiable as other articles of aluminum in heading 7616.90.00, HTSUS. They are subject to a column one rate of duty of 5.7% ad valorem.

Sincerely,

JOHN DURANT,
Director

N284130
September 15, 2017
CLA-2–68:OT:RR:NC:N1:428
CATEGORY: Classification
TARIFF NO.: 6802.10.0000; 7016.90.1050;
7616.99.5190

MR. CHARLES F. MCFEETERS JR.
AXXESS INTERNATIONAL INC.
141 HIGH STREET, P.O. BOX 1594
ST. ALBANS, VT 05478

RE: The tariff classification and country of origin marking of stone tiles, glass tiles, and aluminum tiles from China.

DEAR MR. MCFEETERS:

In your letter dated March 1, 2017, you requested a tariff classification ruling on behalf of your client, Inoxia. Samples were submitted with your ruling request and were forwarded to the Customs and Border Protection Laboratory for analysis. This analysis has been completed.

The merchandise under consideration are four styles of what is referred to as "Speed Tiles," namely Grizzly, Bengal, Glass, and ACP. They all feature adhesive backings, and are designed to be applied to walls.

Grizzly consists of stone tiles which measure approximately 3.5 centimeters long by 1.2 centimeters wide by .5 centimeters thick. The faces of the tiles are smooth, but not polished. Bengal consists of stone tiles of various sizes, some of which are polished, and the largest of which measures approximately 6.5 centimeters long by 1.4 centimeters wide by .5 centimeters thick.

Laboratory analysis has determined that both Grizzly and Bengal are composed of non-agglomerated limestone which is capable of taking a polish.

Glass consists of 54 soda-lime glass tiles which have been surface painted. 18 of the tiles measure approximately 4.3 centimeters long by 1.4 centimeters wide; 18 of the tiles measure approximately 8.9 centimeters long by 1.4 centiemeters wide; and the remaining 18 measure approximately 13.6 centimeters long by 1.4 centimeters wide. All of the tiles measure approximately .4 centimeters thick.

Laboratory analysis has determined the the Glass Speed Tiles are composed of molded glass.

The Inoxia/ID618–1 Aluminum Composite Panel (ACP) Speed Tile consists of chips of metal, and measures approximately 12 inches in length by 12 inches in width by 0.175 inches in depth. The subject tile is a metal mosaic that is comprised of many square silvered colored pieces with self-adhesive pads on the back.

Laboratory analysis has determined that the silver colored metal is laminated aluminum, and that each piece is composed of two aluminum covers and a black plastic piece in the middle.

Therefore, the Inoxia/ID618–1 ACP Speed Tile is a composite good comprised of aluminum and plastic. As the ACP Speed Tile is a composite good, we must apply rule GRI 3(b), which provides that composite goods are to be classified according to the component that gives the goods their essential character. It is the opinion of this office that the aluminum components impart the essential character to the ACP Speed Tile. In accordance with GRI 3(b), the ACP Speed Tile will be classifiable in heading 7616, HTSUS, which provides for other articles of aluminum.

The applicable subheading for the Grizzly and Bengal style Speed Tiles will be 6802.10.0000, Harmonized Tariff Schedule of the United States (HTSUS), which provides for "Worked monumental or building stone (except slate) and articles thereof, other than goods of heading 6801; mosaic cubes and the like, of natural stone (including slate), whether or not on a backing...: Tiles, cubes and similar articles, whether or not rectangular (including square), the largest surface area of which is capable of being enclosed in a square the side of which is less than 7 cm..." The general rate of duty will be 4.8 percent ad valorem.

The applicable subheading for the Glass style Speed Tiles will be 7016.90.1050, HTSUS, which provides for "Paving blocks, slabs, bricks, squares, tiles and other articles of pressed or molded glass, whether or not wired, of a kind used for building or construction purposes...: Other: Paving blocks, slabs, bricks, squares, tiles and other articles of pressed and molded glass: Other." The general rate of duty will be 8 percent ad valorem.

The applicable subheading for the Inoxia/ID618–1 ACP Speed Tile will be 7616.99.5190, HTSUS, which provides for "Other articles of aluminum: Other: Other: Other: Other: Other: Other." The general rate of duty will be 2.5 percent ad valorem.

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

You have also asked for a ruling on the marking of this merchandise. Marked samples of the Grizzly, Bengal, and ACP Speed Tiles were submitted with your letter for review. A marked sample of the Glass Speed Tile was not submitted.

The packaging in which the Grizzly, Bengal, and ACP Speed Tiles are contained are all marked "Made in China."

The marking statute, section 304, Tariff Act of 1930, as amended (19 U.S.C. 1304), provides that, unless excepted, every article of foreign origin (or its container) imported into the U.S. shall be marked in a conspicuous place as legibly, indelibly and permanently as the nature of the article (or its container) will permit, in such a manner as to indicate to the ultimate purchaser in the U.S. the English name of the country of origin of the article.

As provided in section 134.41(b), Customs Regulations (19 CFR 134.41(b)), the country of origin marking is considered conspicuous if the ultimate purchaser in the U.S. is able to find the marking easily and read it without strain.

With regard to the permanency of a marking, section 134.41(a), Customs Regulations (19 CFR 134.41(a)), provides that as a general rule marking requirements are best met by marking worked into the article at the time of manufacture. For example, it is suggested that the country of origin on metal articles be die sunk, molded in, or etched. However, section 134.44, Customs Regulations (19 CFR 134.44), generally provides that any marking that is sufficiently permanent so that it will remain on the article until it reaches the ultimate purchaser unless deliberately removed is acceptable.

The phrase "Made in China" conspicuously, legibly and permanently marked on the Grizzly and Bengal Speed Tiles in satisfaction of the marking requirements of 19 U.S.C. 1304 and 19 CFR Part 134 is an acceptable country of origin marking for the imported product.

The words "China" or "Made in China" conspicuously, legibly and permanently marked on the Inoxia/ID618–1 ACP Speed Tile in satisfaction of the

marking requirements of 19 U.S.C. 1304 and 19 CFR Part 134 is an acceptable country of origin marking for the imported product.

As you did not provide a sample of the Glass Speed Tile's packaging marked as it will be upon importation, and the submitted photograph of the Glass Speed Tile's packaging is too small to distinguish the country of origin marking, we are unable to determine whether the Glass Speed Tile is marked in accordance with the marking requirements of 19 U.S.C. 1304 and 19 CFR Part 134 as an acceptable country of origin marking for the imported product.

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

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

Sincerely,

STEVEN A. MACK
Director
National Commodity Specialist Division

HQ H320936
OT:RR:CTF:CPMMA H320936 ACA
CATEGORY: Classification
TARIFF NO: 7606; 7607

MR. JOHN M. PETERSON, ESQ.
NEVILLE PETERSON LLP
55 BROADWAY, SUITE 2602
NEW YORK, NEW YORK 10006

RE: Revocation of HQ 953138; Modification of NY N284130; Tariff classification of reflective aluminum composite panels

DEAR MR. PETERSON:

This letter is to inform you that U.S. Customs and Border Protection (CBP) has reconsidered Headquarters Ruling Letter (HQ) 953138, dated March 18, 1993, regarding the classification, under the Harmonized Tariff Schedule of the United States (HTSUS), of the A-Look and A-Look EX, which are described as reflective aluminum composite panels. In HQ 953138, CBP classified the subject reflective aluminum panels in heading 7616, HTSUS, and specifically in subheading 7616.90.00, HTSUS (1993), which provides for "Other articles of aluminum: Other."[1] After reviewing HQ 953138 in its entirety, we find it to be in error.

We have also reviewed New York Ruling Letter (NY) N284130, dated September 15, 2017, regarding the classification, under the HTSUS, of reflective aluminum composite panels identified as the Inoxia/ID618–1 Aluminum Composite Panel (ACP) Speed Tile. In NY N284130, CBP classified the subject reflective aluminum composite panels in heading 7616, and specifically in subheading 7616.99.5190, HTSUS (2017), which provides for "Other articles of aluminum: Other: Other: Other: Other: Other: Other." After reviewing NY N284130 in its entirety, we find it to be in error with respect to the classification of the reflective aluminum composite panels. For the reasons set forth below, we are revoking HQ 953138 and modifying NY N284130.

FACTS:

In HQ 953138, CBP described the subject merchandise as follows:

> A-Look is a composite material made by laminating a polyethylene core between two sheets of aluminum alloy. The silver colored surface is electroplated with a layer of nickel and chromium, the bronze colored surface is electroplated with nickel alloy, and the gold colored surface is electroplated with brass. The back of A-Look is coated with an acrylic resin. A-Look EX is also a composite material made by laminating a polyethylene core between two sheets of aluminum alloy with a backing of fluoride resin. A-Look EX is specially designed for use outdoors and in locations exposed to high humidity.
>
> Both articles are imported in standard sizes ranging from 2 feet square to 4 feet by 10 feet square, however they can be manufactured in any size

[1] Subheading 7616.90.00, HTSUS (1993), has been deleted, and the merchandise classified therein has been moved to subheading 7616.99.51, HTSUS (2022). In 1993, the column one, general rate of duty on merchandise classified in subheading 7616.90.00, HTSUS, was 5.7% *ad valorem*. When the merchandise in subheading 7616.90.00, HTSUS (1993) was moved to subheading 7616.99.51, HTSUS (2022), the column one, general rate of duty was 2.5% *ad valorem.*

and are advertised as an unbreakable, light weight, flexible, metallic mirror. Both products' reflective exterior surface may be etched or inscribed with decorative patterns. Both can be bent and applied to curved surfaces, machined to different sizes and shapes, and mechanically worked (e.g., by cutting, punching, grooving and bending). Both articles are used in a variety of places such as ceilings, walls, columns, furniture, displays, and as trims and accents.

The articles are sold in two different thicknesses, 3 millimeters (mm) and 2 millimeters (mm). The amount of polyethylene creates the difference in thickness. Polyethylene is the heaviest component of the 3 mm thick sample weighing 0.49 of a pound (lb.) per square foot (sq. ft.). The aluminum sheets weigh 0.28 lb. per sq. ft. The polyethylene costs $0.20 per sq. ft. and the aluminum sheets cost $0.34 per sq.ft. For the 2 mm sample, polyethylene predominates by weight, weighing 0.29 lb. per sq.ft., compared to the aluminum sheets which weigh 0.28 lb. per sq. ft. Aluminum costs $0.34 per sq.ft., while the polyethylene costs $0.12 per sq. ft. Trace amounts of nickel, brass, or chromium are electroplated onto the front aluminum sheet to give the different articles their varying colors.

In NY N284130, CBP described the subject merchandise as follows:

The Inoxia/ID618–1 Aluminum Composite Panel (ACP) Speed Tile consists of chips of metal, and measures approximately 12 inches in length by 12 inches in width by 0.175 inches in depth. The subject tile is a metal mosaic that is comprised of many square silvered colored pieces with self-adhesive pads on the back.

Laboratory analysis has determined that the silver colored metal is laminated aluminum, and that each piece is composed of two aluminum covers and a black plastic piece in the middle.

ISSUE:

Whether the subject reflective aluminum composite panels are classified in heading 7606, HTSUS, as aluminum sheets; heading 7607, HTSUS, as aluminum foil; or in heading 7616, HTSUS, as other articles of aluminum.

LAW AND ANALYSIS:

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

The 2023 HTSUS provisions at issue are as follows:

7606 Aluminum plates, sheets and strip, of a thickness exceeding 0.2 mm:

7607 Aluminum foil (whether or not printed, or backed with paper, paperboard, plastics or similar backing materials) of a thickness (excluding any backing) not exceeding 0.2 mm:

7616 Other articles of aluminum:

* * * * * *

Note 9(d) to section XV provides as follows:

> 9. For the purposes of chapters 74 to 76 and 78 to 81, the following expressions have the meanings hereby assigned to them:
>
> . . .
>
> (d) Plates, sheets, strip and foil
>
> Flat-surfaced products (other than the unwrought products), coiled or not, of solid rectangular (other than square) cross section with or without rounded corners (including "modified rectangles" of which two opposite sides are convex arcs, the other two sides being straight, of equal length and parallel) of a uniform thickness, which are:
>
> - of rectangular (including square) shape with a thickness not exceeding one-tenth of the width;
>
> - of a shape other than rectangular or square, of any size, provided that they do not assume the character of articles or products of other headings.
>
> Headings for plates, sheets, strip, and foil apply, *inter alia*, to plates, sheets, strip, and foil with patterns (for example, grooves, ribs, checkers, tears, buttons, lozenges) and to such products which have been perforated, corrugated, polished or coated, provided that they do not thereby assume the character of articles or products of other headings.

* * * * * *

The Harmonized Commodity Description and Coding System Explanatory Notes (ENs) constitute the official interpretation of the Harmonized System at the international level. While not legally binding, the ENs provide a commentary on the scope of each heading of the HS and are thus useful in ascertaining the proper classification of merchandise. *See* T.D. 89–80, 54 Fed. Reg. 35127, 35128 (August 23, 1989).

EN 76.06 provides as follows:

> These products, which are defined in Note 9 (d) to Section XV, correspond to similar goods made of copper. The provisions of the Explanatory Note to heading 74.09 apply therefore, *mutatis mutandis*, to this heading.
>
> The heading does not cover :
>
> (a) Foil of a thickness not exceeding 0.2 mm (heading 76.07).
>
> (b) Expanded metal (heading 76.16).

EN 74.09, in turn, provides:

> This heading covers the products defined in Chapter Note 1 (g) when of a thickness exceeding 0.15 mm.
>
> Plates and sheets are usually obtained by the hot- or cold-rolling of certain products of heading 74.03; copper strip may be rolled, or obtained by slitting sheets.
>
> All such goods remain in the heading if worked (e.g., cut to shape, perforated, corrugated, ribbed, channelled, polished, coated, embossed or rounded at the edges) provided they do not thereby assume the character of articles or of products of other headings (see Chapter Note 1 (g)).

The limiting thickness of 0.15 mm includes coatings of varnish, etc.

EN 76.07 states as follows:

This heading covers the products defined in Note 9 (d) to Section XV, when of a thickness not exceeding 0.2 mm.

The provisions of the Explanatory Note to heading 74.10 relating to copper foil apply, *mutatis mutandis*, to this heading.

Aluminium foil is used in the manufacture of bottle caps and capsules, for packing foodstuffs, cigars, cigarettes, tobacco, etc. Aluminium foil is also used for the manufacture of the finely divided powder of heading 76.03, in crinkled sheets for thermal insulation, for artificial silvering, and as a wound dressing in veterinary surgery.

The heading does not cover :

(a) Stamping foils (also known as blocking foils) composed of aluminium powder agglomerated with gelatin, glue or other binder, or of aluminium deposited on paper, plastics or other support, and used for printing book covers, hat bands, etc. (heading 32.12).

(b) Paper and paperboard for the manufacture of containers for milk, fruit juice or other food products and lined with aluminium foil (i.e., on the face which will form the inside of the containers) provided they retain the essential character of paper or paperboard (heading 48.11).

(c) Printed aluminium foil labels being identifiable individual articles by virtue of the printing (heading 49.11).

(d) Plates, sheets and strip, of a thickness exceeding 0.2 mm (heading 76.06). . .

EN 74.10 provides:

This heading covers the products defined in Note 9 (d) to Section XV when of a thickness not exceeding 0.15 mm.

Foil classified in this heading is obtained by rolling, hammering or electrolysis. It is in very thin sheets (in any case, not exceeding 0.15 mm in thickness). The thinnest foils, used for imitation gilding, etc., are very flimsy; they are generally interleaved with sheets of paper and put up in booklet form. Other foil, such as that used for making fancy goods, is often backed with paper, paperboard, plastics or similar backing materials, either for convenience of handling or transport, or in order to facilitate subsequent treatment, etc. Foil remains in the heading whether or not it has been embossed, cut to shape (rectangular or otherwise), perforated, coated (gilded, silvered, varnished, etc.), or printed.

The limiting thickness of 0.15 mm includes coatings of varnish, etc., but, on the other hand, backings of paper, etc., are excluded.

* * * * * *

In HQ 953138 and NY N284130, CBP determined that the reflective aluminum composite panels were classified in heading 7616, HTSUS, as other articles of aluminum. In so holding, CBP concluded in both rulings that the subject merchandise are composite goods under GRI 3(b). Accordingly, the reflective aluminum composite panels were classified based upon the mate-

rial that imparted the essential character, which was the aluminum. Furthermore, CBP determined that the subject merchandise do not conform with ENs 76.06 and 76.07, and are instead classified in heading 7616, HTSUS.

When merchandise consists of multiple components that are described in more than one heading, they are considered composite goods pursuant to GRI 3(b). GRI 3 states that when, by application of rule 2(b) or for any other reason, goods are, prima facie, classifiable under two or more headings, classification shall be effected as follows:

> ...
>
> (b) Mixtures, composite goods consisting of different materials or made up of different components, and goods put up for retail sale, which cannot be classified by reference to 3(a), shall be classified as if they consisted of the material or component which gives them their essential character, insofar as this criterion is applicable.

EN VIII to GRI 3(b), pg. 4, states that:

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

Here, we agree with the finding in HQ 953138 and NY N284130 that the aluminum component imparts the essential character of these articles. The A-Look and A-Look EX in HQ 953138 are described as reflective aluminum composite panels made of polyethylene cores between two sheets of aluminum alloy. The Aluminum Composite Panel (ACP) Speed Tiles in NY N284130 are described as square aluminum pieces with self-adhesive pads on the back. The CBP Laboratory determined that the silver colored metal used in the ACP Speed Tiles was laminated aluminum, and that each piece was composed of two aluminum covers and a plastic piece in the middle. We note that aluminum costs more than polyethylene. In addition, while the merchandise consists of a plastic middle component, both the front and back of the reflective aluminum composite panels are composed of aluminum. Furthermore, while polyethylene weighs more, it costs less and serves only as support for the aluminum.

After establishing in HQ 953138 that the aluminum component imparts the essential character, CBP determined that the subject merchandise is not classified as aluminum sheets or aluminum foil because it does not meet the descriptions outlined in the ENs. In so holding, CBP concluded that the A-Look and A-Look EX aluminum composite panels fell within heading 7616, HTSUS, as the subject merchandise is not covered by another heading of the chapter. Additionally, in NY N284130, CBP concluded that the ACP Speed Tiles are classifiable in heading 7616, HTSUS. We now find both these conclusions to be in error.

To determine which heading properly describes the aluminum component of the reflective aluminum composite panels for purposes of classifying the entire article under GRI 3(b), we turn to note 9(d) to section XV, which defines plates, sheets, strip and foil as: "Flat-surfaced products... coiled or not, of solid rectangular (other than square) cross section with or without rounded corners...of a uniform thickness" that are "of rectangular (including square) shape with a thickness not exceeding one-tenth of the width." The ENs to heading 7606 and heading 7607 further clarify the scope of the two headings. EN 76.06 (and the corresponding EN 74.09) notes that "sheets" of aluminum

remain in the heading if worked (e.g., cut to shape, perforated, corrugated, ribbed, channeled, polished, coated, embossed, or rounded at the edges), provided they do not thereby assume the character of articles or of products of other headings. Similarly, EN 76.07 (and the corresponding EN 74.10) states that foil of aluminum remains in the heading whether or not it has been embossed, cut to shape (rectangular or otherwise), perforated, coated (gilded, silvered, varnished, etc.), or printed.

Pursuant to GRI 3(b), the entire article must be classified as if it consisted only of the single component which imparts the essential character of the whole—in this case, the aluminum component. Accordingly, the reflective aluminum composite panels are classified based on the thickness of the aluminum component. Where the aluminum component has a thickness exceeding 0.2 mm, the entire article is classified in heading 7606, HTSUS, as aluminum sheets. On the other hand, where the aluminum component has a thickness not exceeding 0.2 mm, the entire article is classified in heading 7607, HTSUS, as aluminum foil. Not enough information was provided to CBP to determine the thickness of the individual layers of the reflective aluminum composite panels in HQ 953138 and NY N284130.

Where the reflective aluminum composite panels meet the criteria for sheets of aluminum of heading 7606, HTSUS, as described in note 9(d) to section XV and the ENs, and where the thickness of the aluminum component exceeds 0.2 mm, we find that they are properly classified as sheets of aluminum of heading 7606, HTSUS, under GRI 3(b). Classification at the subheading level by GRI 6 is dependent upon the shape of the aluminum composite panels and whether or not the panels are alloyed. Additionally, where the reflective aluminum composite panels meet the criteria for aluminum foil of heading 7607, HTSUS, as described in note 9(d) to section XV and the ENs, and where the thickness of the aluminum component does not exceed 0.2 mm, we find that they are properly classified as aluminum foil of heading 7607, HTSUS, under GRI 3(b). Classification at the subheading level by GRI 6 is dependent upon whether the aluminum composite panels are backed, and if not, whether or not they are rolled but not further worked.

HOLDING:

By application of GRI 3(b), the subject reflective aluminum composite panels with an aluminum component thickness exceeding 0.2 mm are classified in heading 7606, HTSUS, which provides for "Aluminum plates, sheets and strip, of a thickness exceeding 0.2 mm."

By application of GRI 3(b), the subject reflective aluminum composite panels with an aluminum component thickness not exceeding 0.2 mm are classified in heading 7607, HTSUS, which provides for "Aluminum foil (whether or not printed, or backed with paper, paperboard, plastics or similar backing materials) of a thickness (excluding any backing) not exceeding 0.2 mm."

In order to provide duty rates for the merchandise at issue, each item must be specifically described and identified for purposes of classification. The text of the most recent HTSUS and the accompanying duty rates are provided at https://hts.usitc.gov/current.

On March 8, 2018, Presidential proclamations 9704 and 9705 imposed additional tariffs and quotas on a number of steel and aluminum mill products. Exemptions have been made on a temporary basis for some countries. Quantitative limitations or quotas may apply for certain exempted countries

and can also be found in Chapter 99. Additional duties for steel of 25 percent and for aluminum of 10 percent are reflected in Chapter 99, subheading 9903.80.01 for steel and subheading 9903.85.01 for aluminum. Products classified under heading 7606 and 7607, HTSUS, may be subject to additional duties or quota. At the time of importation, you must report the Chapter 99 subheading applicable to your product classification in addition to the Chapter 76 subheading listed above. The Proclamations are subject to periodic amendment of the exclusions, so you should exercise reasonable care in monitoring the status of goods covered by the Proclamations and the applicable Chapter 99 subheadings.

EFFECT ON OTHER RULINGS:

HQ 953138, dated March 18, 1993, is hereby revoked; and NY N284130, dated September 15, 2017, is hereby modified.

Sincerely,

YULIYA A. GULIS,
Director
Commercial and Trade Facilitation Division

19 CFR PART 177

MODIFICATION OF ONE RULING LETTER AND REVOCATION OF TREATMENT RELATING TO THE TARIFF CLASSIFICATION OF POLYMER PRODUCTS, A312A-9010-W AND A312A-NP-W

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

ACTION: Notice of modification of one ruling letter and of revocation of treatment relating to the tariff classification of Polymer Products, A312A-9010-W and A312A-NP-W.

SUMMARY: Pursuant to section 625(c), Tariff Act of 1930 (19 U.S.C. §1625(c)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that U.S. Customs and Border Protection (CBP) is modifying one ruling letter concerning tariff classification of Polymer Products, A312A-9010-W and A312A-NP-W. under the Harmonized Tariff Schedule of the United States (HTSUS). Similarly, CBP is revoking any treatment previously accorded by CBP to substantially identical transactions. Notice of the proposed action was published in the *Customs Bulletin*, Vol. 54, No. 49, on December 16, 2020. No comments were received in response to that notice.

EFFECTIVE DATE: This action is effective for merchandise entered or withdrawn from warehouse for consumption on or after **[60 DAYS FROM PUBLICATION DATE].**

FOR FURTHER INFORMATION CONTACT: Elizabeth Doyle, Chemicals, Petroleum, Metals, and Miscellaneous Articles Branch, Regulations and Rulings, Office of Trade, at (202) 325–0053.

SUPPLEMENTARY INFORMATION:

BACKGROUND

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

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

Pursuant to 19 U.S.C. §1625(c)(1), a notice was published in the *Customs Bulletin*, Vol. 54, No. 49, on December 16, 2020, proposing to modify one ruling letter pertaining to the tariff classification of Polymer Products, A312A-9010-W and A312A-NP-W. Any party who has received an interpretive ruling or decision (i.e., a ruling letter, internal advice memorandum or decision, or protest review decision) on the merchandise subject to this notice should have advised CBP during the comment period.

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

In New York Ruling Letter ("NY") N278871, dated September 29, 2016, CBP classified Polymer Products, A312A-9010-W and A312A-NP-W in heading 3903, HTSUS, specifically in subheading 3903.30.00, HTSUS, which provides for "Polymers of styrene, in primary forms: Acrylonitrile-butadiene-styrene ('ABS') copolymers." CBP has reviewed NY N278871 and has determined the ruling letter to be in error. It is now CBP's position that A312A-9010-W and A312A-NP-W are properly classified in heading 3903, HTSUS, specifically in subheading 3903.90.50, HTSUS, which provides for "Polymers of styrene, in primary forms: Other: Other."

Pursuant to 19 U.S.C. §1625(c)(1), CBP is modifying NY N278871 and revoking or modifying any other ruling not specifically identified to reflect the analysis contained in Headquarters Ruling Letter ("HQ") H287193, set forth as an attachment to this notice. Additionally, pursuant to 19 U.S.C. §1625(c)(2), CBP is revoking any treatment previously accorded by CBP to substantially identical transactions.

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

YULIYA A. GULIS,
Director
Commercial and Trade Facilitation Division

Attachment

HQ H287193
January 19, 2023
OT:RR:CTF:CPMMA H287193 SMS/ECD
CATEGORY: Classification
TARIFF NO.: 3903.30.0000; 3903.90.5000

MS. RACHEL LEE, ATTORNEY IN FACT
FNS CUSTOMS BROKER, INC.
1545 FRANCISCO ST.
TORRANCE, CA, 90501

RE: Modification of NY N278871; Classification of: Various Polymer Products

DEAR MS. LEE:

This is in response to your request sent on behalf of your client LG Chem America, Inc. ("LGCAI") on May 31, 2017, in reference to New York Ruling Letter ("NY") N278871, dated September 29, 2016, regarding the classification, under the Harmonized Tariff Schedule of the United States ("HTSUS"), of eleven polymer products.

In NY N278871, U.S. Customs and Border Protection ("CBP") classified eleven products. CBP classified nine products, A121H-NP-G, A220–8C657-W, A220-NP-W, A650–8F075-K, A610A-NP-K, A121R-92885-L, A121-NP-K, A312A-9010-W, and A312A-NP-W, in subheading 3903.30.00, HTSUS, which provides for: "Polymers of styrene, in primary forms: Acrylonitrile-butadiene-styrene ('ABS') copolymers." The general rate of duty is 6.5% *ad valorem*. CBP classified the remaining two products, A401–9001F-K and A401-NP-W, in subheading 3903.90.50, HTSUS, which provides for: "Polymers of styrene, in primary forms: Other: Other." The general rate of duty is also 6.5% *ad valorem*. You requested a modification to the finding in the first nine products in favor of subheading 3903.90.50, HTSUS. We have reviewed NY N278871 and find it to be in error with respect to only two of those products, namely A312A-9010-W and A312A-NP-W.

Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. § 1625(c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act, Pub. L. No. 103–182, 107 Stat. 2057, 2186 (1993), notice of the proposed action was published on December 16, 2020, in Volume 54, Number 49, of the *Customs Bulletin*. No comments were received in response to this notice.

FACTS:

NY N278871 describes the instant merchandise as follows:

> A121H-NP-G; A220–8C657-W; A220-NP-W; A650–8F075-K; A610A-NP-K; A121R-92885-L; A121-NP-K; A312A-9010-W; and A312A-NP-W are described as molding resins consisting of acrylonitrile-butadiene-styrene (ABS) copolymer CAS-9003–56–9 that will be imported in pellet form for use in the manufacture of plastic products. A312A-9010-W and A312A-NP-W will also contain flame-retardant additives.
>
> ....
>
> A401–9001F-K and A401-NP-W are described as molding resins each consisting of a copolymer blend of methylstyrene-acrylonitrile-styrene

copolymer CAS-9010–96–2 and acrylonitrile-butadiene-styrene (ABS) copolymer CAS-9003–56–9 that will be imported in pellet form for use in the manufacture of plastic products.

NY N278871 (Sept 29, 2016).

The percentage totals for the monomer composition reported in the Material Safety Data Sheets ("MSDS"), for each product is captured as follows:

	Final Product Monomer Content Total %		
	% Acrylonitrile	% Butadiene	% Styrene
A121H-NP-G	21.2	14.3	66.1
A312A-9010-W	14.5	5.7	48.9
A312A-NP-W	14.5	5.7	48.9
A220–8C657-W	25.6	10.9	60.2
A220-NP-W	25.9	11.1	60.7
A650–8F075-K	23.5	16.7	58.3
A610A-NP-K	22.6	26.3	57.2
A121R-92885-L	24.3	18.0	56.0
A121-NP-K	22.4	19.0	57.9

You note that one of the starting materials in producing the ABS copolymer at issue is Styrene Acrylonitrile (SAN).

ISSUE:

Whether A121H-NP-G, A312A-9010-W, A312A-NP-W, A220–8C657-W, A220-NP-W, A650–8F075-K, A610A-NP-K, A121R-92885-L, and A121-NP-K are classified as copolymers under subheading 3903.30.00, HTSUS, or as copolymer blends of subheading 3903.90.50, HTSUS.

LAW AND ANALYSIS:

Merchandise imported into the United States is classified under the Harmonized Tariff Schedule of the United States. Classification under the HTSUS is made in accordance with the General Rules of Interpretation ("GRI"). GRI 1 provides that the classification of goods shall be determined according to the terms of the headings of the tariff schedule and any relative Section or Chapter Notes. In the event that the goods cannot be classified solely on the basis of GRI 1, and if the headings and legal notes do not otherwise require, the remaining GRIs, 2 through 6, may then be applied in order.

The Harmonized Commodity Description and Coding System Explanatory Notes ("ENs") constitute the official interpretation of the Harmonized System at the international level. When interpreting and implementing the HTSUS, the ENs may be utilized. The ENs, while neither legally binding nor dispositive, provide a guiding commentary on the scope of each heading, and are generally indicative of the proper interpretation of the HTSUS.

The following HTSUS provisions are relevant to the classification of these products:

3903:		Polymers of styrene, in primary forms:
3903.30.00		Acrylonitrile-butadiene-styrene (ABS) copolymers
*	*	* * *
3903.90		Other
3903.90.50		Other

Chapter 39, Note 4, states, in pertinent part, the following:

> The expression "copolymers" covers all polymers in which no single monomer contributes 95 percent or more by weight to the total polymer content.
>
> For the purposes of this chapter, except where the context otherwise requires, copolymers (including co-polycondensates, co-polyaddition products, block copolymers and graft copolymers) and polymer blends are to be classified in the heading covering polymers of that comonomer unit which predominates by weight over every other single comonomer unit. For the purposes of this note, constituent comonomer units of polymers falling in the same heading shall be taken together.

Subheading Note 1 to Chapter 39 further provides, in pertinent part:

> 1. Within any one heading of this chapter, polymers (including copolymers) are to be classified according to the following provisions:
>
> (a) Where there is a subheading named "Other" in the same series:
>
> (1) The designation in a subheading of a polymer by the prefix "poly" (for example, polyethylene and polyamide-6, 6) means that the constituent monomer unit or monomer units of the named polymer taken together must contribute 95 percent or more by weight of the total polymer content.
>
> (2) The copolymers named in subheadings 3901.30, 3901.40, 3903.20, 3903.30 and 3904.30 are to be classified in those subheadings, provided that the comonomer units of the named copolymers contribute 95 percent or more by weight of the total polymer content. . . .
>
> (3) Chemically modified polymers are to be classified in the subheading named "Other", provided that the chemically modified polymers are not more specifically covered by another subheading.
>
> (4) Polymers not meeting (1), (2), or (3), above, are to be classified in the subheading, among the remaining subheadings in the series, covering polymers of that monomer unit which predominates by weight over every other single comonomer unit. For this purpose, constituent monomer units of polymers falling in the same subheading shall be taken together. Only the constituent comonomer units of the polymers in the series of subheadings under consideration are to be compared.
>
> ...
>
> Polymer blends are to be classified in the same subheading as polymers of the same monomer units in the same proportions.

The General EN to Chapter 39 further states, in pertinent part:

> **Polymers**
>
> Polymers consist of molecules which are characterised by the repetition of one or more types of monomer units.

Polymers may be formed by reaction between several molecules of the same or of different chemical constitution. The process by which polymers are formed is termed polymerisation.

* * *

> The relative amounts of monomer units in a polymer need not be in the same order as that represented by its abbreviation (e.g., acrylonitrile-butadiene-styrene (ABS) copolymer containing styrene as the predominant monomer unit). Polymer abbreviations should therefore be used only as a guide. Classification, in all cases, should be by application of the relevant Chapter Note and Subheading Note and on the basis of the relative composition of the monomer units in a polymer (see Note 4 and Subheading Note 1 to this Chapter).

The ENs further provide guidance of the Subheading Notes to Chapter 39:

> Subparagraph (a) (2) of Subheading Note 1 deals with the classification of the products of subheadings 3901.30, 3901.40, 3903.20, *3903.30* and 3904.30.
>
> Copolymers classified in these four subheadings must have 95 % or more by weight of the constituent monomer units of the polymers named in the subheading
>
> Thus, for example, a copolymer consisting of 61 % vinyl chloride, 35 % vinyl acetate and 4 % maleic anhydride monomer units (being a polymer of heading 39.04) should be classified as a vinyl chloride-vinyl acetate copolymer of subheading 3904.30 because vinyl chloride and vinyl acetate monomer units taken together contribute 96 % of the total polymer content.
>
> On the other hand, a copolymer consisting of 60 % styrene, 30 % acrylonitrile and 10 % vinyl toluene monomer units (being a polymer of heading 39.03) should be classified in subheading 3903.90 (named "Other") and not in subheading 3903.20 because the styrene and acrylonitrile monomer units taken together contribute only 90 % of the total polymer content.

Based on Chapter 39 Note 4, "[t]he expression 'copolymers' covers all polymers in which no single monomer contributes 95 percent or more by weight to the total polymer content . . . and polymer blends are to be classified in the heading covering polymers of that comonomer unit which predominates by weight over every other single comonomer unit." Accordingly, there is no dispute that all nine products consist of ABS and are properly classified under heading 3903, HTSUS, which provides for "Polymers of Styrene", because styrene is the comonomer unit which predominates by weight over the other two comonomer units. *See* Chapter 39, note 4.

As to the proper subheading for the above nine listed products, Subheading Note 1(a)(2) to Chapter 39 and the corresponding subheading Explanatory Note require that the constituent monomer units of the polymers named in the subheading contribute 95 percent or more by weight of the total polymer content. The percent by weight of each acrylonitrile, butadiene and styrene monomer for the nine products at issue are as follows:

	Final Product Monomer Content Total %			**Total %**
	% Acrylonitrile	% Butadiene	% Styrene	
A121H-NP-G	21.2	14.3	66.1	**101.6**[1]
A312A-9010-W	14.5	5.7	48.9	**69.1**
A312A-NP-W	14.5	5.7	48.9	**69.1**
A220–8C657-W	25.6	10.9	60.2	**96.7**
A220-NP-W	25.9	11.1	60.7	**97.7**
A650–8F075-K	23.5	16.7	58.3	**98.5**
A610A-NP-K	22.6	26.3	57.2	**106.1**[2]
A121R-92885-L	24.3	18	56	**98.3**
A121-NP-K	22.4	19	57.9	**99.3**

As such, the above listed products containing a total of 95 percent or more of the monomers, acrylonitrile, butadiene, and styrene, A121H-NP-G, A220–8C657-W, A220-NP-W, A650–8F075-K, A610A-NP-K, A121R-92885-L, and A121-NP-K, are properly classified in subheading 3903.30.00, HTSUS, as Acrylonitrile-butadiene-styrene (ABS) copolymers. As neither of the remaining two products, A312A-9010-W and A312A-NP-W, contain 95 percent or more of the monomers acrylonitrile, butadiene, and styrene, they are properly classified in subheading 3903.90.50, HTSUS, which provides for: "Polymers of styrene, other than ABS." We note that certain products falling within these provisions may be eligible for preferential tariff treatment under the United States-Korea Free Trade Agreement.

LGCAI contends that these products should be classified in accordance with Chapter 39 Subheading Note 1(a)(4), instead of 1(a)(2), because "[i]n the blending process there is no polymerization process in which the intermolecular chemical reaction . . .occurs and only a simple mixing process occurs." *i.e.*, that no bonding has occurred and thus should not count towards the total composition amount. However, the fact that the ABS and SAN polymers are physically blended and not themselves bonded into a single polymer does not in any way preclude classification in subheading 3903.30.00, HTSUS. Subheading Note 1 to Chapter 39 specifically notes that "Polymer blends are to be classified in the same subheading as polymers of the same monomer units in the same proportions". The same subheading note, as stated above, requires that copolymers named in subheading 3903.30, HTSUS, are to be classified therein, "provided that the comonomer units of the named copolymers contribute 95 percent or more by weight of the total polymer content." As the ABS copolymer contributes 95 percent or more by weight of the total polymer content of products A121H-NP-G, A220-8C657-W, A220- NP-W, A650-8F075-K, A610A-NP-K, A121R-92885-L, and A121-NP-K, these are correctly classified in subheading 3903.30.00, HTSUS, whereas the correct classification of products A312A-9010-W and A312A-NP-W is subheading 3903.90, HTSUS, because the ABS constitutes less than 95 percent of the total polymer content.

[1] Figures provided by the importer.

[2] Figures provided by the importer.

HOLDING:

By application of GRIs 1 and 6, the classification of A121H-NP-G, A220–8C657-W, A220-NP-W, A650–8F075-K, A610A-NP-K, A121R-92885-L, and A121-NP-K, is in heading 3903, HTSUS, specifically, 3903.30.0000, HTSUSA (Annotated), which provides for "Polymers of styrene, in primary forms: Acrylonitrile-butadiene-styrene ('ABS') copolymers."

By application of GRIs 1 and 6, the classification of A312A-9010-W and A312A-NP-W is in heading 3903, HTSUS, specifically, 3903.90.5000, HTSUSA, which provides for: "Polymers of styrene, in primary forms: Other: Other." The general rate of duty for both subheadings will be 6.5% *ad valorem*.

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

EFFECT ON OTHER RULINGS:

This ruling modifies NY N278871, dated September 29, 2016, with respect to the classification of A312A-9010-W and A312A-NP-W.

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

Sincerely,

YULIYA A. GULIS,
Director
Commercial and Trade Facilitation Division

19 CFR PART 177

REVOCATION OF ONE RULING LETTER, MODIFICATION OF FIVE RULING LETTERS, AND REVOCATION OF TREATMENT RELATING TO THE TARIFF CLASSIFICATION OF VARIOUS PIPE FITTINGS

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

ACTION: Notice of revocation of one ruling letter, modification of five ruling letters, and of revocation of treatment relating to the tariff classification of various pipe fittings.

SUMMARY: Pursuant to section 625(c), Tariff Act of 1930 (19 U.S.C. § 1625(c)), as amended by section 623 of title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that U.S. Customs and Border Protection (CBP) is revoking one ruling letter and modifying five ruling letters concerning tariff classification of various pipe fittings under the Harmonized Tariff Schedule of the United States (HTSUS). Similarly, CBP is revoking any treatment previously accorded by CBP to substantially identical transactions. Notice of the proposed action was published in the *Customs Bulletin*, Vol. 56, No. 36, on September 14, 2022. No comments were received in response to that notice.

EFFECTIVE DATE: This action is effective for merchandise entered or withdrawn from warehouse for consumption on or after April 9, 2023.

FOR FURTHER INFORMATION CONTACT: Reema Bogin, Chemicals, Petroleum, Metals and Miscellaneous Articles Classification Branch, Regulations and Rulings, Office of Trade, at (202) 325–7703.

SUPPLEMENTARY INFORMATION:

BACKGROUND

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

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

Pursuant to 19 U.S.C. § 1625(c)(1), a notice was published in the *Customs Bulletin*, Vol. 56, No. 36, on September 14, 2022, proposing to revoke one ruling letter and to modify five ruling letters pertaining to the tariff classification of various pipe fittings. Any party who has received an interpretive ruling or decision (i.e., a ruling letter, internal advice memorandum or decision, or protest review decision) on the merchandise subject to this notice should have advised CBP during the comment period.

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

In New York Ruling Letter ("NY") B87364, dated July 15, 1997; NY 898504, dated June 9, 1994; NY N118077, dated August 18, 2010; and NY B85728, dated June 12, 1997, CBP classified various pipe fittings in heading 7325, HTSUS, specifically in subheading 7325.99.10, HTSUS, which provides for "[o]ther cast articles of iron or steel: [o]ther: [o]ther: [o]f cast iron." In Headquarters Ruling Letter ("HQ") 967490, dated November 14, 2005, and NY J82246, dated April 9, 2003, CBP classified various pipe fittings in heading 7326, HTSUS, specifically in subheading 7326.90.85, HTSUS, which provides for "[o]ther articles of iron or steel: [o]ther: [o]ther: [o]ther: [o]ther."[1] CBP has reviewed NY B87364, NY 898504, NY N118077, NY B85728, HQ 967490 and NY J82246, and has determined the ruling letters to be in error. It is now CBP's position that the subject pipe fittings are properly classified, in heading 7307, HTSUS, specifically in subheading 7307.19.30, HTSUS, which provides for "[t]ube or pipe fittings (for example, couplings, elbows, sleeves), of iron or steel: [c]ast fittings: [o]ther: [d]uctile fittings."

Pursuant to 19 U.S.C. § 1625(c)(1), CBP is revoking NY B87364, modifying NY 898504, NY N118077, HQ 967490, NY J82246, and NY B85728, and revoking or modifying any other ruling not specifically

[1] Merchandise previously classified in subheading 7326.90.85, HTSUS, has been moved to subheading 7326.90.86, HTSUS, in the 2022 version of the Harmonized Tariff Schedule of the United States.

identified to reflect the analysis contained in HQ H320950, set forth as an attachment to this notice. Additionally, pursuant to 19 U.S.C. § 1625(c)(2), CBP is revoking any treatment previously accorded by CBP to substantially identical transactions.

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

YULIYA A. GULIS,
Director
Commercial and Trade Facilitation Division

Attachment

HQ H320950
January 23, 2023
OT:RR:CTF:CPMMA H320950 RRB
CATEGORY: Classification
TARIFF NO.: 7307.19.90

MR. JAMES D. GILLISON
FORD METER BOX CO, INC.
815 MILES PARKWAY
PELL CITY, ALABAMA 35125

RE: Revocation of NY B87364; Modification of NY 898504, NY N118077, HQ 967490, NY J82246, and NY B85728; Tariff classification of various pipe fittings

DEAR MR. GILLISON:

This is to inform you that U.S. Customs and Border Protection ("CBP") has reconsidered New York Ruling Letter ("NY") B87364, dated July 15, 1997, regarding the classification of pipe fittings described as cast iron retainer glands. We have also reconsidered NY 898504[1] , dated June 9, 1994; NY N118077[2] , dated August 18, 2010; NY B85728[3] , dated June 12, 1997; NY J82246[4] , dated April 9, 2003; and Headquarters Ruling Letter ("HQ")[5] , dated November 14, 2005, regarding substantially similar merchandise. The pipe fittings in NY B87364, NY 898504, NY N118077, and NY B85728 were classified under subheading 7325.99.10, Harmonized Tariff Schedule of the United States ("HTSUS"), as "[o]ther cast articles of iron or steel: [o]ther: [o]ther: [o]f cast iron." Additionally, the pipe fittings in HQ 967490 and NY J82246 were classified under subheading 7326.90.85, HTSUS, as "[o]ther articles of iron or steel: [o]ther: [o]ther: [o]ther." For the reasons set forth below, we hereby revoke NY B87364, and modify NY 898504, NY N118077, HQ 967490, NY J82246, and NY B85728 with respect to the classification of certain pipe fittings of iron or steel.

Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. §1625(c)(1)), as amended by section 623 of Title VI, notice proposing to revoke NY B87364 and to modify NY 898504, NY N118077, HQ 967490, NY J82246, and NY B85728 was published on September 14, 2022, in Volume 56, Number 36 of the Customs Bulletin. No comments were received in response to the notice.

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[1] NY 898504 classified mechanical joint gland packs, retainer glands, and retainer gland accessories in subheading 7325.99.10, HTSUS. This proposed modification is with respect to the retainer glands and retainer gland accessories only.

[2] NY N118077 determined that China is the country of origin of imported glands cast from ductile iron and used as a subcomponent of a RomaGrip product to complete the joint between a pipe and fitting, and that the proper classification of the merchandise is in heading 7235, HTSUS. This proposed modification is with respect to the classification of the glands only and does not affect the country of origin determination.

[3] NY B85728 classified a ductile cast iron retainer gland in subheading 7325.99.10, HTSUS.

[4] 4 NY J82246 classified stainless steel glands, collars, and plugs used in conjunction with tubing, valves, and fittings in subheading 7326.90.85, HTSUS.

[5] HQ 967490 classified a back ferrule component of a "Bi-Lok"(r) pipe fitting system in subheading 7326.90.85, HTSUS.

FACTS:

In NY B87364, we described the product as follows:

> The products to be imported are cast ductile iron retainer glands for ductile iron mechanical joints. The retainer glands are made to ASTM Specification A536, Grade 65–45–12. ASTM Spec A536 is the Standard Specification for Ductile Iron Castings. Sizes range from 3 inches to 24 inches. All sizes meet ANSI/AWWA C111/A21.11.

ISSUE:

> Whether the subject pipe fittings are classified in heading 7307, HTSUS, as "tube or pipe fittings"; or in heading 7325, HTSUS, as "other cast articles of iron or steel"; or in heading 7326, HTSUS, as "other articles of iron or steel."

LAW AND ANALYSIS:

The classification of merchandise under the HTSUS is governed by the General Rules of Interpretation ("GRIs"). GRI 1 provides, in part, that "for legal purposes, classification shall be determined according to terms of the headings and any relative section or chapter notes..." In the event that the goods cannot be classified solely on the basis of GRI 1, and if the headings and legal notes do not otherwise require, the remaining GRIs may then be applied in order.

The HTSUS headings under consideration are as follows:

7307	Tube or pipe fittings (for example, couplings, elbows, sleeves), of iron or steel:
7325	Other cast articles of iron or steel:
7326	Other articles of iron or steel:

* * * *

The Harmonized Commodity Description and Coding System Explanatory Notes ("EN") constitute the official interpretation of the Harmonized System at the international level. While neither legally binding nor dispositive, the ENs provide a commentary on the scope of each heading of the HTSUS and are generally indicative of the proper interpretation of the headings. It is CBP's practice to consult, whenever possible, the terms of the ENs when interpreting the HTSUS. *See* T.D. 89–80, 54 Fed. Reg. 35127, 35128 (August 23, 1989).

As a preliminary matter, the pipe fittings can only be classified in heading 7325 or heading 7326, HTSUS, if they are not more specifically classifiable in heading 7307, HTSUS. *See* EN 73.25 ("This heading covers all cast articles of iron or steel, not elsewhere specified or included."); *see also* EN 73.26 ("This heading covers all iron or steel articles...other than articles included in the preceding headings of this Chapter."). We therefore begin our analysis with heading 7307, HTSUS.

Heading 7307 applies to pipe fittings of iron or steel, including, *inter alia*, couplings. Neither "pipe fitting" nor "coupling" are defined in the HTSUS. As such, they are to be construed in accordance with their common meanings, which may be ascertained by reference to "standard lexicographic and scientific authorities," to the pertinent ENs, and to industry standards. *GRK Can.,*

Ltd. v. United States, 761 F.3d 1354, 1357 (Fed. Cir. 2014); *see also Rocknel Fastener, Inc. v. United States*, 267 F.3d 1354, 1361 (Fed. Cir. 2001) ("Standards promulgated by industry groups such as ANSI, ASME, and others are often used to define tariff terms.").

To this end, EN 73.07 states, in pertinent part, as follows with respect to "pipe fittings" of heading 7307, HTSUS:

> This heading covers fittings of iron or steel, mainly used for connecting the bores of two tubes together, or for connecting a tube to some other apparatus, or for closing the tube aperture. This heading **does not** however **cover** articles used for installing pipes and tubes but which do not form an integral part of the bore (e.g., hangers, stays and similar supports which merely fix or support the tubes and pipes on walls, clamping or tightening bands or collars (hose clips) used for clamping flexible tubing or hose to rigid piping, taps, connecting pieces, etc.) (**heading 73.25** or **73.26**).
>
> The connection is obtained:
>
> - by screwing, when using cast iron or steel threaded fittings;
> - or by welding, when using butt-welding or socket-welding steel fittings. In the case of butt-welding, the ends of the fittings and of the tubes are square cut or chamfered;
> - or by contact, when using removable steel fittings.
>
> This heading therefore includes flat flanges and flanges with forged collars, elbows and bends and return bends, reducers, tees, crosses, caps and plugs, lap joint stub-ends, fittings for tubular railings and structural elements, off sets, multi-branch pieces, couplings or sleeves, clean out traps, nipples, unions, clamps and collars.

We have previously determined, upon reference to both the above EN description and various technical authorities, that pipe fittings are defined in part as articles used to connect separate pipes to each other. *See* HQ H282297, dated July 6, 2017 (discussing commonalities among EN 73.07 and technical definitions cited in court cases). Both the plain language of the heading and EN 73.07 make clear that articles of this type include "couplings." The term "coupling," like "pipe fitting," is not defined in the HTSUS. According to AWWA C219–11, a technical source promulgated by the American Water Works Association, couplings include "transition couplings" made up of "center sleeves" or "center rings," "end rings," and "gaskets." *See* AMER. WATER WORKS ASS'N, AWWA STANDARD: BOLTED, SLEEVE-TYPE COUPLINGS FOR PLAIN-END PIPE 4–6 (2011) [hereinafter AWWA C219–11]. Insofar as they are used to "join plain-end pipe," we consider transition couplings to be "pipe fittings" of heading 7307, HTSUS. *See id.* at ix, 1.

At issue in NY B87364 and NY B85728 are cast ductile iron retainer glands for ductile iron mechanical joints. NY N118077 covers cast ductile iron glands used to complete the joint between a pipe and fitting, similar to the cast ductile iron retainer glands in NY B87364 and NY B85728. At issue in NY J82246 are stainless steel glands, collars, and plugs used in conjunction with tubing, valves, and other fittings. Similarly, the merchandise in HQ 867490 consists of unthreaded narrow, stainless steel rings known as "back ferrules" that assist with the connection of the fitting by providing a tight seal. The various fittings described in the above-mentioned rulings are each combined

with another component or components to form a complete coupling assembly. Like the coupling glands and Powermax glands in HQ H311162, dated June 13, 2022, the various glands, rings and other fittings at issue in these rulings function like end rings to fit over gaskets in a coupling assembly to compress them when the nuts/bolts are installed and tightened. The purpose of these types of fittings are to join and secure separate pipe segments into various types of coupling assemblies.

As we stated in HQ H311162, the language in EN 73.07 is rather broad regarding what constitutes a pipe fitting of heading 7307, HTSUS. It states the "heading covers fittings of iron or steel, *mainly used* for connecting the bores of two tubes together, or for connecting a tube to some other apparatus, or for closing the tube aperture" (emphasis added). EN 73.07 includes a wide range of articles used in piping, such as "flat flanges and flanges with forged collars, elbows and bends and return bends, reducers, tees, crosses, caps and plugs, lap joint stub-ends, fittings for tubular railings and structural elements, off sets, multi-branch pieces, couplings or sleeves, clean out traps, nipples, unions, clamps and collars." The use of the word "mainly" in the EN language implies that the heading may also cover other uses beyond connecting. The only exclusionary language regarding articles that should be classified in heading 7325 or heading 7326 instead of heading 7307 deals with "articles used for installing pipes and tubes but which do not form an integral part of the bore (e.g., hangers, stays and similar supports which merely fix or support the tubes and pipes on walls, clamping or tightening bands or collars (hose clips) used for clamping flexible tubing or hose to rigid piping, taps, connecting pieces, etc.) (heading 73.25 or 73.26)." This means that only articles like hangers and stays—which are used both to install pipes, *and* which do not form an integral part of the bore—are excluded from classification in heading 7307, HTSUS, and are instead, classified in heading 7325 or 7326, HTSUS. Thus, the exclusionary language in EN 73.07 makes a clear distinction between fittings used for *installing* piping/tubing, which are excluded from heading 7307, HTSUS, and all other fittings, which are included in heading 7307, HTSUS.

Even if the glands, rings and other fittings in these rulings do not directly make a connection between pipe, connecting pipe is not required under the language of EN 73.07. Thus, pursuant to the broad language of EN 73.07, and based on the use of the glands, rings, and other fittings in joining and securing pipe segments into coupling assemblies, we find that the subject merchandise was wrongly classified in headings 7325 and 7326, HTSUS, are instead classified in heading 7307, HTSUS, pursuant to GRI 1.

We further incorporate, by reference, the arguments made in HQ H311162 that would alternatively classify the subject merchandise in heading 7307, HTSUS, pursuant to GRI 2(a), which provides that an unfinished or incomplete article with the essential character of a complete or finished article is to be treated as the latter for classification purposes. *See also*, HQ H284443, dated May 8, 2019, concerning the classification of substantially similar ductile iron castings imported separately from other parts that are joined together to form a complete fitting.[6] The "identity" or "essence" of all of the pipe fittings at issue, including the merchandise in HQ H284443 and HQ

[6] HQ H284443 revoked two earlier rulings involving the classification of certain center sleeves and end rings for coupling assemblies that had been wrongly classified in heading 7325 or 7326, HTSUS.

H311162, is their ability to join and secure separate pipe segments into various types of coupling assemblies. Specifically, the glands and rings are used to stabilize and secure the coupling assembly connection by fitting and compressing a gasket when the nuts or bolts are installed and tightened. Thus, like the merchandise in HQ H284444 and HQ H311162, the subject pipe fittings are also classifiable in heading 7307, pursuant to GRI 2(a).

HOLDING:

By application of GRIs 1 and 2(a), the subject pipe fittings are classified in heading 7307, HTSUS, specifically under subheading 7307.19.3085, HTSUSA ("Annotated"), which provides for: "Tube or pipe fittings of iron or steel: Cast fittings: Other: Ductile fittings: Other." The 2022 column one general rate of duty for subheading 7307.19.3085, HTSUSA, is 5.6% *ad valorem*.

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

The merchandise in question may be subject to antidumping duties or countervailing duties (AD/CVD). We note that the International Trade Administration in the Department of Commerce is not necessarily bound by a country of origin or classification determination issued by CBP, with regard to the scope of antidumping or countervailing duty orders. Written decisions regarding the scope of AD/CVD orders are issued by the International Trade Administration and are separate from tariff classification and origin rulings issued by CBP. The International Trade Administration can be contacted at http://www.trade.gov/ia/. A list of current AD/CVD investigations at the United States International Trade Commission can be viewed on its website at http://www.usitc.gov. AD/CVD cash deposit and liquidation messages can be searched using ACE, the system of record for AD/CVD messages, or the AD/CVD Search tool at http://addcvd.cbp.gov/index.asp?ac=home.

EFFECT ON OTHER RULINGS:

NY B87364, dated July 15, 1997, is hereby REVOKED.

NY 898504, dated June 9, 1994; NY N118077, dated August 18, 2010; NY B85728, dated June 12, 1997; NY J82246, dated April 9, 2003, and HQ 967490, dated November 14, 2005, are hereby MODIFIED with respect to the classification of the pipe glands, rings, and related pipe fittings discussed in this ruling.

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

Sincerely,

YULIYA A. GULIS,
Director
Commercial and Trade Facilitation Division

Cc: Mr. Robert T. Givens
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Ms. Shelley Vybiral
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Port Director
Customs and Border Protection
610 S. Canal Street
Room 306
Chicago, Illinois 60607

19 CFR PART 177

MODIFICATION OF THREE RULING LETTERS AND REVOCATION OF TREATMENT RELATING TO THE TARIFF CLASSIFICATION OF CANOPIES FOR CHILD SAFETY SEATS

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

ACTION: Notice of modification of three ruling letters, and revocation of treatment relating to the tariff classification of canopies for child safety seats.

SUMMARY: Pursuant to section 625(c), Tariff Act of 1930 (19 U.S.C. § 1625(c)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that U.S. Customs and Border Protection (CBP) is modifying three ruling letters concerning tariff classification of canopies for child safety seats under the Harmonized Tariff Schedule of the United States (HTSUS). Similarly, CBP is revoking any treatment previously accorded by CBP to substantially identical transactions. Notice of the proposed action was published in the *Customs Bulletin*, Vol. 56, No. 11, on March 23, 2022. One comment was received in response to that notice.

EFFECTIVE DATE: This action is effective for merchandise entered or withdrawn from warehouse for consumption on or after April 9, 2023.

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

SUPPLEMENTARY INFORMATION:

BACKGROUND

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

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

Pursuant to 19 U.S.C. § 1625(c)(1), a notice was published in the *Customs Bulletin*, Vol. 56, No. 11, on March 23, 2022, proposing to modify two ruling letters pertaining to the tariff classification of canopies for child safety seats. Any party who has received an interpretive ruling or decision (*i.e.*, a ruling letter, internal advice memorandum or decision, or protest review decision) on the merchandise subject to this notice should have advised CBP during the comment period.

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

In Headquarters Ruling Letter (HQ) 953673, dated October 6, 1993, and New York Ruling Letter (NY) 882039, dated February 4, 1993, CBP classified canopies for child car safety seats in heading 6307, HTSUS, specifically in subheading 6307.90.99, HTSUS, which provides for "Other made up articles, including dress patterns: Other: Other: Other." CBP has reviewed HQ 953673 and NY 882039, and has determined the ruling letters to be in error. It is now CBP's position that canopies for child car safety seats are properly classified in heading 9401, HTSUS, specifically in subheading 9401.99.90, HTSUS, which provides for "Seats (other than those of heading 9402), whether or not convertible into beds, and parts thereof: Parts: Other: Other."

After publication of the notice of the proposed action in the *Customs Bulletin*, Vol. 56, No. 11, on March 23, 2022, we received one responsive comment, which notified us of an additional ruling, NY N113743, dated July 26, 2010, concerning the tariff classification of merchandise that is substantially similar to the canopies for child car safety seats in HQ 953673 and NY 882039. Therefore, pursuant to 19 U.S.C. § 1625(c)(2), NY N113743 is hereby modified in accordance with the same analysis applicable to HQ 953673 and NY 882039.

Pursuant to 19 U.S.C. § 1625(c)(1), CBP is modifying HQ 953673, NY 882039, and NY N113743, and revoking or modifying any other ruling not specifically identified to reflect the analysis contained in HQ H321952, set forth as an attachment to this notice. Additionally,

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

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

YULIYA A. GULIS,
Director
Commercial and Trade Facilitation Division

Attachment

HQ H321952
January 24, 2023
OT:RR:CTF:CPMMA H321952 AJK
CATEGORY: Classification
TARIFF NO: 9401.99.90

MR. RAYMUNDO GONZALEZ
DANIEL B. HASTINGS INC.
P.O. BOX 673
LAREDO, TX 78042

RE: Modification of HQ 953673, NY 882039, and NY N113743[1] by Operation of Law; Classification of Canopies for Child Safety Seats

DEAR MR. GONZALEZ:

This letter is in reference to New York Ruling Letter (NY) 882039, dated February 4, 1993, concerning the tariff classification of canopies for child safety seats under the Harmonized Tariff Schedule of the United States (HTSUS). We have reviewed NY 822039, classifying the canopies in subheading 6307.90.9986, HTSUSA (Annotated), as other made up articles, and have determined that the classification of the canopies was incorrect due to the holding in *Bauerhin Techs. Ltd. Pshp. v. United States*, 110 F.3d 774 (Fed. Cir. 1997), *aff'g*, 19 C.I.T. 1441 (1995) (hereinafter, "*Bauerhin*"), and the publication of Additional U.S. Note (AUSN) 1 to chapter 94, HTSUS, in 2007. Accordingly, NY 882039 is modified by operation of law with respect to the classification of the canopies.

We have also reviewed Headquarters Ruling Letter (HQ) 953673, dated October 6, 1993, which was the subject of *Bauerhin*. As HQ 953673 classified substantially similar canopies in subheading 6307.90.9986, HTSUSA, and was also issued before the decision in *Bauerhin* and the publication of AUSN 1 to chapter 94, HTSUS, it is likewise modified by operation of law with respect to the classification of the canopies.

Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. § 1625(c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), a notice of the proposed action was published in the *Customs Bulletin*, Vol. 56, No. 11, on March 23, 2022. One comment was received in response to this notice.

FACTS:

The canopies for child safety seats were described in HQ 953673 as follows:

> The canopies are made of a woven blend of 50% polyester and 50% cotton fabric and have two elastic straps.

[1] After publication of this proposed ruling in the *Customs Bulletin*, Volume 56, No. 11, on March 23, 2022, one commenter notified CBP of an additional ruling—NY N113743, dated July 26, 2010—concerning the tariff classification of a hood that snaps into an infant safety seat. Similar to the canopies for child safety seats in HQ 953673 and NY 882039, the merchandise in NY N113743 is made from 100 percent polyester woven fabric and is designed for and can only be used with an infant safety seat. As stated in the notice of this final ruling, this modification covers any rulings on substantially similar merchandise that may exist but have not yet been identified at the time of the publication. Therefore, pursuant to 19 U.S.C. § 1625(c)(2), NY N113743 is hereby modified in accordance with the analysis prescribed herein.

The canopy for child safety seats in NY 882039 is described as follows:

> The canopy is made in a woven blend of 50 percent polyester/50% cotton fabric. It measures approximately 19–3/4 inches by 28–1/2 inches exclusive of a 15/16 inch ruffle and has two elastic straps.

ISSUE:

Whether the canopies for child safety seats are classified in heading 6307, HTSUS, as other made up articles, or in heading 9401, HTSUS, as parts of seats.

LAW AND ANALYSIS:

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

The HTSUS provisions at issue are as follows:

> 6307 Other made up articles, including dress patterns
>
> 9401 Seats (other than those of heading 9402), whether or not convertible into beds, and parts thereof

Additional U.S. Note 1 to chapter 94, HTSUS, which was added in 2007, states as follows:

> 1. For the purposes of subheading 9401.20.00, "seats of a kind used for motor vehicles" does not include child safety seats.

* * * *

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

The General Subheading EN 9401.80 provides as follows:

> This subheading also covers safety seats suitable for use for the carriage of infants and toddlers in motor vehicles or other means of transport. They are removable and are attached to the vehicle's seats by means of the seat belt and a tether strap.

* * * *

In *Bauerhin*, the U.S. Court of Appeals for the Federal Circuit reviewed canopies for child safety seats, and classified them in heading 9401, HTSUS, as parts of seats for motor vehicles. 110 F.3d at 775–6, 777–780. Similar to the canopies for child safety seats in NY 882039, the canopies discussed in *Bauerhin*—which were the protested merchandise in HQ 953673—were designed to fit over the child safety seats, were sold as parts of the seats to which they are attached, and were imported separately from those seats. *See id.* at 776. The Federal Circuit held that the canopies constitute parts of child safety seats, because they "serve[] no function or purpose that is independent of the child car safety seat" and they are "undisputedly designed, marketed,

and sold to be attached to the child safety seats." *Id.* at 779. Thus, the Federal Circuit affirmed the Court of International Trade's (CIT) holding that the canopies are properly classified in subheading 9401.90.10, HTSUS (1997), which provided for "Seats (other than those of heading 9402), whether or not convertible into beds, and parts thereof: Parts: Of seats of a kind used for motor vehicles." By classifying the canopies in subheading 9401.90.10, HTSUS, as parts of seats for motor vehicles, *Bauerhin* directed that child safety seats are properly classified in subheading 9401.20.0010, HTSUSA (1997), which provided for "Seats (other than those of heading 9402), whether or not convertible into beds, and parts thereof: Seats of a kind used for motor vehicles: Child safety seats." A decade after the issuance of *Bauerhin*, however, the HTSUS added AUSN 1 to chapter 94, HTSUS, in 2007, stating that "[f]or the purposes of subheading 9401.20.00, 'seats of a kind used for motor vehicles' does not include child safety seats." Accordingly, in 2008, the HTSUS was updated to incorporate AUSN 1 to chapter 94, HTSUS, by carving out a provision for child safety seats in subheading 9401.80.6020, HTSUSA (2008), as other seats. This change precipitated the reclassification of parts of child safety seats from subheading 9401.90.10, HTSUS, as parts of seats for motor vehicles, to subheading 9401.90.50, HTSUS (2008), as parts of other seats.

The 2022 HTSUS continues to identify child safety seats in subheading 9401.80.60, HTSUS (2022), as other seats.[2] The HTSUS, however, was updated in 2022 to move the provision for parts of other seats from subheading 9401.90.50, HTSUS (2008), to subheading 9401.99.90, HTSUS (2022). Based on the aforementioned reasoning, the classification of canopies for child safety seats in HQ 953673 and NY 882039 is modified by operation of law to reflect the above analysis.

As noted above, we received one comment in response to the notice of the proposed revocation. The commenter contends that the subject canopies for child safety seats are properly classified under subheading 9401.99.10, HTSUS, as other parts of seats of a kind used for motor vehicles. First, pursuant to *Blakley Corp. v. United States*, 15 F. Supp. 2d 865 (Ct. Int'l Trade 1998), the commenter asserts that AUSN 1 to chapter 94, HTSUS, is not applicable to subheading 9401.99.10, HTSUS, which provides for parts of seats for motor vehicles, because the introductory clause cites to subheading 9401.20.00, HTSUS, which provides for seats of a kind used for motor vehicles, and thus, illustrates Congressional intent to limit the descriptions contained in AUSN 1 to chapter 94, HTSUS. In addition, the commenter contends that CBP's assertion in the proposed ruling—that child safety seats cannot be classified in subheading 9401.20.00, HTSUS—is inaccurate. The commenter states that while child safety seats may no longer be classified in subheading 9401.20.00, HTSUS, due to the changes in the HTSUS, such change does not negate the fact that child safety seats are seats of a kind used in motor vehicles, because the Federal Circuit held that the subject canopies are classified in heading 9401, HTSUS, as parts of car seats. *See also Bauerhin*, 914 F.3d at 779. The commenter also argues that subheading 9401.99.10, HTSUS, is a use provision, and that the Carborundum factors support that the canopies are parts of seats principally used in motor vehicles. *See United States v. Carborundum Co.*, 536 F.2d 373 (C.C.P.A. 1976).

[2] Since the publication of AUSN 1 to chapter 94, HTSUS, CBP has classified child safety seats in subheading 9401.80.60, HTSUS. *See e.g.*, NY N044078, dated Nov. 24, 2008; NY N014874, dated Aug. 6, 2007.

We disagree. Having determined that child safety seats are precluded from subheading 9401.20.00, HTSUS, due to the change in the HTSUS in 2007, the next step is to determine the correct subheading for child safety seats. As explained above, the HTSUS was updated after the *Bauerhin* decision in 2007, resulting in the removal of subheading 9401.20.0010, HTSUSA, which previously provided for child safety seats, and the addition of subheading 9401.80.6020, HTSUSA, as the new provision for child safety seats. Moreover, the General Subheading EN 9401.80 provides that "subheading [9401.80, HTSUS,] also covers safety seats suitable for use for the carriage of infants and toddlers in motor vehicles or other means of transport." Accordingly, an overview of the disputed subheadings clearly indicates that seats for motor vehicles in subheading 9401.20.00, HTSUS, and other seats in subheading 9401.80.60, HTSUS, are mutually exclusive. By application of GRI 6, the same analysis correspondingly applies to the parts provisions within heading 9401, HTSUS. A simple causal analysis demonstrates that a part of merchandise, which no longer constitutes a specific type of a commodity, would not be upheld as a part of such commodity. In essence, because child safety seats are precluded from subheading 9401.20.00, HTSUS, parts of those seats are consequently excluded from subheading 9401.90.10, HTSUS, which provides for parts of seats for motor vehicle. Therefore, according to the classification of child safety seats in subheading 9401.80.60, HTSUS, which provides for "Seats ... : Other Seats: Other," the parts of child safety seats are accordingly classified in subheading 9401.99.90, HTSUS, which provides for "Seats ... : Parts: Other: Other."

Moreover, in *Blakley Corp.*, where the issue was whether AUSN 1 and 2 to chapter 68, HTSUS, which specifically cite to headings 6802 and 6810, HTSUS, respectively, can be applied throughout the chapter, the CIT held that AUSN 1 and 2 to chapter 68, HTSUS, are limited to the headings described in each AUSN because "the language utilized in Notes 1 and 2 clearly and decisively expresses a Congressional intent the descriptions contained therein be applied only with respect to headings 6802 and 6810, respectively." 15 F. Supp. 2d at 869–70. Our analysis herein is not inconsistent with the holding in *Blakley Corp*. While we recognize that the applicability of the AUSN is limited to certain headings described therein, we find that AUSN 1 to chapter 94, HTSUS, is simultaneously triggered when classifying parts of child safety seats under GRI 6 because the note specifically directs that child safety seats do not constitute seats for motor vehicles. Applying the rationale behind AUSN 1's exclusion of child safety seats from the provision for "seats of a kind used for motor vehicles" in subheading 9401.20.00, HTSUS, we find that this note can be specifically referenced when classifying parts of child safety seats as other than "seats of kind used for motor vehicles." Lastly, while we agree that subheading 9401.99.10, HTSUS, is indeed a use provision, CBP is restricted from conducting a use analysis in the instant case because CBP is bound by the holding in *Bauerhin*. Analyzing whether parts of child safety seats constitute parts of seats for motor vehicles, in contradiction of the *Bauerhin* holding, would effectively result in unlawful encroachment of judicial power.

HOLDING:

In accordance with the holding in Bauerhin and the publication of Additional U.S. Note 1 to chapter 94, HTSUS, the classification of the canopies for child safety seats has been modified by operation of law. Accordingly, the

canopies for child safety seats are classified in heading 9401, HTSUS, specifically in subheading 9401.99.90, HTSUS, which provides for "Seats (other than those of heading 9402), whether or not convertible into beds, and parts thereof: Parts: Other: Other." The 2022 column one, general rate of duty is free.

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

EFFECT ON OTHER RULINGS:

HQ 953673, dated October 6, 1993; NY 882039, dated February 4, 1993; and NY N113743, dated July 26, 2010, are modified by operation of law with respect to the classification of the canopies for child safety seats.

This ruling will become effective 60 days from the date of publication in the Customs Bulletin.

Sincerely,

YULIYA A. GULIS,
Director
Commercial and Trade Facilitation Division

DATES AND DRAFT AGENDA OF THE SEVENTY-FIRST SESSION OF THE HARMONIZED SYSTEM COMMITTEE OF THE WORLD CUSTOMS ORGANIZATION

AGENCIES: U.S. Customs and Border Protection, Department of Homeland Security, and U.S. International Trade Commission.

ACTION: Publication of the dates and draft agenda for the 71st session of the Harmonized System Committee of the World Customs Organization.

SUMMARY: This notice sets forth the dates and draft agenda for the next session of the Harmonized System Committee of the World Customs Organization.

FOR FURTHER INFORMATION CONTACT: Claudia K. Garver, *Claudia.K.Garver@cbp.dhs.gov*, Attorney-Advisor, Tom P. Beris *Tom.P.Beris@cbp.dhs.gov*, Attorney-Advisor, Office of Trade, Regulations and Ruling, U.S. Customs and Border Protection (202–325–0743), or Daniel Shepherdson, *daniel.shepherdson @usitc.gov*, Senior Attorney Advisor, Office of Tariff Affairs and Trade Agreements, U.S. International Trade Commission (202–205–2598).

SUPPLEMENTARY INFORMATION:

BACKGROUND

The United States is a contracting party to the International Convention on the Harmonized Commodity Description and Coding System ("Harmonized System Convention"). The Harmonized Commodity Description and Coding System ("Harmonized System"), an international nomenclature system, forms the core of the U.S. tariff, the Harmonized Tariff Schedule of the United States. The Harmonized System Convention is under the jurisdiction of the World Customs Organization (established as the Customs Cooperation Council).

Article 6 of the Harmonized System Convention establishes a Harmonized System Committee ("HSC"). The HSC is composed of representatives from each of the contracting parties to the Harmonized System Convention. The HSC's responsibilities include issuing classification decisions on the interpretation of the Harmonized System. Those decisions may take the form of published tariff classification opinions concerning the classification of an article under the Harmonized System or amendments to the Explanatory Notes to the Harmonized System. The HSC also considers amendments to the legal text of the Harmonized System. The HSC meets twice a year in

Brussels, Belgium. The next session of the HSC will be the 71st, commencing and it will be held from Monday March 13, to Friday March 24, 2023.

In accordance with section 1210 of the Omnibus Trade and Competitiveness Act of 1988 (Pub. L. 100–418), the Department of Homeland Security, represented by U.S. Customs and Border Protection, the Department of Commerce, represented by the Census Bureau, and the U.S. International Trade Commission ("ITC"), jointly represent the U.S. The Customs and Border Protection representative serves as the head of the delegation at the sessions of the HSC.

Set forth below is the draft agenda for the next session of the HSC. Copies of available agenda-item documents may be obtained from either U.S. Customs and Border Protection or the ITC. Comments on agenda items may be directed to the above-listed individuals.

GREGORY CONNOR
Chief,
Electronics, Machinery, Automotive, and
International Nomenclature Branch

Attachment

WORLD CUSTOMS ORGANIZATION
ORGANISATION MONDIALE DES DOUANES

Established in 1952 as the Customs Co-operation Council
Créée en 1952 sous le nom de Conseil de coopération douanière

HARMONIZED SYSTEM
COMMITTEE
-
71st Session
-

NC3016Ea

Brussels, 13 January 2023.

DRAFT AGENDA FOR THE 71ST SESSION OF THE HARMONIZED SYSTEM COMMITTEE

From: 13 to 25 March 2023.

N.B.: The Presessional Working Party (to examine the questions under Agenda Item VII) will be held from Wednesday 8 to Friday 10 March 2023.

13 March 2023: Adoption of the Report of the 61st Session of the HS Review Sub-Committee.

I.	**ADOPTION OF THE AGENDA**	
	1. Draft Agenda	NC3016Ea
	2. Draft Timetable	NC3017Ba
II.	**REPORT BY THE SECRETARIAT**	
	1. Position regarding Contracting Parties to the HS Convention, HS Recommendations and related matters; progress report on the implementation of HS 2022 - status and challenges	NC3018
	2. Report on the last meeting of the Policy Commission (87th Session)	NC3019
	3. Approval of decisions taken by the Harmonized System Committee at its 70th Session	NG0280Fb NG0280Eb NC3015Eb
	4. Capacity building activities of the Nomenclature and Classification Sub-Directorate	NC3020
	5. Co-operation with other international organizations	NC3021
	6. New information provided on the WCO Web site	NC3022
	7. Progress report on the use of working languages for HS-related matters	NC3023
	8. Other	
III.	**GENERAL QUESTIONS**	

	1. Information on the Exploratory Study on a possible strategic review of the HS	NC3024
	2. Report o the Green HS Symposia	NC3025
	3. Possible amendment of the Rules of Procedure to reflect gender neutral language (proposal by the Secretariat)	NC3026
	4. Possible changes of threshold values for the next Harmonized System review cycles	NC3027
	5. Template for Work Programmes of WCO Working Bodies	NC3028
	6. Draft corrigendum amendments to the Explanatory Notes	NC3029
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U.S. Court of International Trade

Slip Op. 23–7

NLMK Pennsylvania, LLC, Plaintiff, v. United States, Defendant.

Before: Claire R. Kelly, Judge
Court No. 21–00507

[Remanding the U.S. Department of Commerce's determinations with respect to Plaintiff NLMK Pennsylvania, LLC's 2020–2021 Section 232 exclusion requests.]

Dated: January 23, 2023

Sanford Litvack, Chaffetz Lindsey LLP, of New York, NY, argued for plaintiff. With him on the brief were *Andrew L. Poplinger* and *R. Matthew Burke*.

Meen Geu Oh, Senior Trial Counsel, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, D.C., argued for defendant. Also on the brief were *Kyle S. Beckrich*, Trial Attorney, *Tara K. Hogan*, Assistant Director, *Brian Boynton*, Principal Deputy Assistant Attorney General, and *Patricia M. McCarthy,* Director.

OPINION AND ORDER

Kelly, Judge:

Before the court is Plaintiff NLMK Pennsylvania, LLC's ("NLMK") motion for judgment on the agency record. *See* Pl.'s Mot. J. Agency Rec., July 22, 2022, ECF No. 76. The motion challenges the U.S. Department of Commerce's ("Commerce") denial of NLMK's requests for certain steel slabs to be excluded from tariffs imposed pursuant to Section 232 of the Trade Expansion Act of 1962, as amended, Pub. L. 87–794, § 232, 76 Stat. 872, 877 (1962) ("Section 232"), codified at 19 U.S.C. § 1862 (2018). *Id.* For the reasons that follow, Commerce's determinations are remanded for further explanation or reconsideration.

BACKGROUND

NLMK produces coil steel by heating and rolling semi-finished steel slab in a conversion mill. *See* Request for Exclusion from Remedies: Section 232 National Security Investigation of Steel Imports ("Exclusion Request"), AR 111695–017, June 16, 2022, ECF No. 64–1.[1] The vast majority of coil sold by NLMK is rolled from 250mm slab, which

[1] Commerce assigns each exclusion request and associated documents an individual request number followed by a page number—for example, AR 111695–001. The court identifies each exclusion request, including decision memoranda and all underlying documentation that appears in the administrative record pertaining to the cited request by the request numbers assigned by Commerce. All exclusion request citations are to the confidential administrative record unless otherwise noted.

produces large coils. *Id.* A smaller percentage of NLMK's coil is produced from 200mm slab, which produces smaller coils. *Id.* at AR 111695–018. NLMK imports both 250mm and 200mm slab from the Russian Federation. *Id.* at AR 111695–012.

In March 2018, acting pursuant to Section 232 of the Trade Expansion Act of 1962, the President issued Proclamation 9705, which imposed a 25% tariff on steel imports.[2] *Proclamation 9705 of March 8, 2018*, 83 Fed. Reg. 11,625, 11,627 (March 15, 2018) (Adjusting Imports of Steel into the United States) ("Proclamation 9705").[3] The President also instructed Commerce to consider affected parties' requests for exclusions from the Section 232 tariffs. *Id.* at Cl. 3. Commerce subsequently published rules for requesting Section 232 exclusions, which are codified in 15 C.F.R. § 705, Supp. 1(c)–(d) (2020). The regulations specify "[a]n exclusion will only be granted if an article is not produced in the United States in a sufficient, reasonably available amount, and of a satisfactory quality, or for specific national security considerations." *Id.* at Supp. 1(c)(5)(i).

Between July 2020 and November 2021, NLMK submitted 58 exclusion requests for steel slab, all of which were rejected. Second Am. Compl., ¶¶ 11–17, April 27, 2022, ECF No. 51 ("Compl.") In total, 56 of the requests were for 250mm slab, and 2 requests were for 200mm slab.[4] *Id.* Domestic steel producers United States Steel Corporation ("U.S. Steel"), AK Steel Corporation (now Cleveland-Cliffs, Inc.) ("Cleveland-Cliffs") and Nucor Corporation ("Nucor") (collectively, "Objectors") objected to all of the exclusion requests, and Commerce subsequently denied all of the requests. *Id.* ¶¶ 11–15. Commerce denied 55 of the requests on the basis that Objectors could supply slab which was either identical or a suitable substitute. *Id.* ¶¶ 11–13. It denied the remaining 3 requests on the basis that the requests were "ambiguously defined." *Id.* ¶¶ 14–16.[5] Commerce requested a remand for several July 2020 denials, which the court granted in *NLMK Pennsylvania LLC v. United States*, 558 F. Supp. 3d 1401 (Ct. Int'l Tr.

[2] Pursuant to 19 U.S.C. § 1862, the President may impose tariffs on imports of an article upon a finding by the Secretary of Commerce that such imports threaten to impair national security. 19 U.S.C. § 1862.

[3] The President issued Proclamation 9705 in accordance with 19 U.S.C. § 1862(c)(1)(A), and directed Commerce to impose an additional 25% tariff on steel imports. *Proclamation 9705*, 83 Fed. Reg. at 11,627. The proclamation contained instructions for Commerce to develop procedures for requesting exclusions. *Id.* at Cl. 3.

[4] In July 2020, NLMK made 26 requests for 250mm slab; in March & April 2021, NLMK made 26 requests for 250mm slab and 2 requests for 200mm slab; in September 2021, NLMK made 2 more requests for 250mm slab; in November 2021, NLMK made 2 more requests for 250mm slab. Compl. ¶¶ 11–13.

[5] Defendant asks that the court remand these three ambiguous requests for reconsideration in light of NLMK's submissions. *See* Def.'s Corr. Resp. Pl.'s Mot., 33–35, Sept. 26, 2022, ECF No. 83.

2022). Commerce denied these requests again on remand. *See, e.g.*, Exclusion Request AR 111695. NLMK challenges Commerce's denials of its exclusion requests as arbitrary, capricious, and not in accordance with law under the Administrative Procedure Act, 5 U.S.C. § 706, and moves the court for judgment on the agency record. *See* Compl. ¶ 145; *see also* Pl.'s Mot. J. Agency Rec., July 22, 2022, ECF No. 76 and accompanying Memo. L. Suppt. Mot. J. Agency Rec., July 22, 2022, ECF No. 77 ("Pl.'s Br.").

JURISDICTION AND STANDARD OF REVIEW

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

> (2) hold unlawful and set aside agency action, findings and conclusions found to be—
>
> (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law . . .
>
> (F) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute.

5 U.S.C. § 706(2)(A), (F).

Under the arbitrary and capricious standard, courts consider whether the agency "entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or [the decision] is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *Alabama Aircraft Indus., Inc. v. United States*, 586 F.3d 1372, 1375 (Fed. Cir. 2009) (quoting *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)).

DISCUSSION

NLMK argues that Commerce's denials of its exclusion requests were arbitrary and capricious under 5 U.S.C. § 706, because the denials "are devoid of any analysis or reasoning." Pl.'s Br. at 44–45. Specifically, NLMK claims that Commerce does not explain why Objectors' smaller offerings were suitable substitutes for 250mm slab, and whether Objectors could produce sufficient quantities of slab to meet NLMK's needs. *Id.* at 13–45. Defendant counters that Commerce reasonably explains the basis for its denials: that Objectors

could timely produce substitute slab in sufficient quantity and quality. Def.'s Corr. Resp. Pl.'s Mot., 13–33, Sept. 26, 2022, ECF No. 83 ("Def.'s Br."). NLMK also asks the court to refund the $255 million it has paid in Section 232 tariffs, Pl.'s Br. at 3, while Defendant argues that, assuming NLMK arguments are successful, the appropriate remedy would be a remand. Def.'s Br. at 40. For the following reasons, the court remands Commerce's determinations, because Commerce acted arbitrarily and capriciously when it denied NLMK's requests without sufficient explanation in light of record evidence.

I. Suitable Substitute

For all of NLMK's July 2020 requests, Commerce concludes that Objectors could produce steel slab which was a suitable substitute for the 250mm slab NLMK requested.[6] NLMK argues that the thinner slabs offered by Objectors were not suitable substitutes within the meaning of the regulations, and that Commerce fails to explain the basis of its determinations or address contradictory evidence. Pl.'s Br. at 13–27. Defendant argues Commerce reasonably concludes that Objectors' slab offerings were suitable substitutes, because the coil produced by Objectors' slabs would be substantially the same, and NLMK simply disagrees with how Commerce weighed the evidence. Def.'s Br. at 15–26, 31–33. For the reasons that follow, Commerce's determination that Objectors offered a suitable substitute fails to address record evidence which undermines its conclusion, and is remanded for further explanation or reconsideration.

Commerce's Section 232 regulations specify that "[a]n exclusion will only be granted if an article is not produced in the United States in a sufficient, reasonably available amount, and of a satisfactory quality, or for specific national security considerations." 15 C.F.R. § 705, Supp. 1(c)(5)(i). "Not produced in the United States in a satisfactory quality" means that an article needs to be "equivalent as a substitute product," although it need not be "identical." *Id.* at Supp. 1(c)(6)(ii). A "substitute product" must meet "the quality (e.g., industry specs or internal company quality controls or standards), regulatory, or testing standards" necessary for that end user." *Id.* Thus, whether a substitute is suitable depends on the needs of the end user. The "end user" is the party seeking the exclusion. The terminology and examples in the regulations refer to the needs and requirements of the requestor's "business activity"—not the demands of the requestor's clients.

[6] Exclusion Requests AR 111695, 697, 698, 701, 709, 713, 718, 725, 729, 731, 734, 740, 745, 748, 752, 758, 762, 767, 771, 773, 775, 776, 779, 780, 781, 782, June 16, 2022, ECF Nos. 64–1–66–6.

Commerce reviews an end user's exclusion request based on the information included in the request, as well as any objections to the request. *Id.* at Supp. 1(c)(6)(i). Domestic steel manufacturers may object to exclusion requests on the grounds that they can provide a suitable substitute meeting the end user's quality requirements. *Id.* at Supp. 1(d)(1). The fillable objection form requires that an objector: (1) indicate whether the objector currently manufactures or can immediately manufacture the product, (2) state time period within which the objector can produce the product, (3) state whether the objector manufactures, or can immediately manufacture, a substitute product, (4) discuss the suitability of the objector's product, (5) provide a technical description of the product's characteristics, (6) state what percentage of the requested tonnage the objector can manufacture, and (7) detail the total delivery time. *See, e.g.,* Exclusion Request AR 111695–032–039 When an objector opposes an exclusion request and demonstrates that it can produce a product with "similar form, fit, function, and performance" to the requested product, Commerce will deny a request for exclusion. *Submissions of Exclusion Requests and Objections to Submitted Requests for Steel and Aluminum*, 83 Fed. Reg. 46,026, 46,036 (Sept. 11, 2018) (Commerce response to Cmt. (f)(5)(iv)).

When assessing exclusion requests Commerce must compare the quality of the substitute product with that of the requested product. Although the regulations lack specific metrics to compare quality, they provide several examples of what might be considered a "quality" standard under the regulations. Steel plate would not be a suitable substitute if it failed to conform to military testing specifications for combat vehicles. 15 C.F.R. § 705, Supp. 1(c)(6)(ii)(A). Likewise, steel tubing for use in medical devices would not be a substitute if it failed to gain Food and Drug Administration approval. *Id.* Similarly, a can used for fruit juice would need tin plate approval from the U.S. Department of Agriculture to be considered a suitable substitute. *Id.*

Here, Commerce denies NLMK's July 2020 requests in three groups, for similar reasons, finding that Cleveland-Cliffs and U.S. Steel could produce suitable substitutes for the 250mm slab requested by NLMK. *See, e.g.*, Exclusion Requests AR 11679, 734, 695, June 16, 2022, ECF Nos. 69–5–7.[7] Objectors responded to all 26 exclusion requests stating that they could not produce an identical

[7] These three requests are the lowest numerical examples of the three distinct versions of Commerce's reasoning. Exclusion Request AR 11679 represents 10 requests, AR 11734 represents 1 request, and AR 11695 (modified following court remand per *NLMK Pennsylvania, LLC v. United States*, 558 F. Supp. 3d 1401 (Ct. Int'l Trade 2022)) represents 15 requests. The court considers the reasoning expressed in these representative requests as applicable to the corresponding group.

product, but that they could produce a suitable substitute. *See, e.g.*, Exclusion Request AR 111697–003 (Objectors replying "no" to fields 1.c and 1.d, but "yes" to 1.e or 1.f). For the first group of requests, Commerce concludes that offerings by U.S. Steel and Cleveland-Cliffs "meet the quality criterion because they can manufacture an identical product matching the chemical, mechanical, and technical specifications provided in the exclusion request." *Id.*[8] Commerce offers a longer explanation in the second group of requests, relying on subject matter expert ("SME") analysis, to which U.S. Steel and Cleveland-Cliffs responded that they could produce a suitable substitute, but not an identical product. *See* Exclusion Request AR 111734–003. Commerce reasoned that:

> Per the SME analysis, the [Cleveland-Cliffs] and U.S. Steel objection offerings are for slabs that are thinner than the request. Given the reported constraints of the furnace and other facilities at the requestor's manufacturing site, the slabs from these objectors would produce smaller coils than the requestor states their customers "generally" want; however, the SME found that parts made from sheet coil utilize a portion of the coil for each part, so the result of a smaller coil is that the end-user would need to swap out the coils more frequently and it could result in more by-cuts and scrap. The SME found, however, that these are issues of efficiency and economic factors. These factors are outside of ITA's analysis. In addition, the SME found that the smaller slabs can make coils, albeit shorter ones, that can make the end products. Based on technical factors, the SME found the [Cleveland-Cliffs] and U.S. Steel objection offerings to be suitable substitutes.

Exclusion Request AR 11734–004. In the third group of requests, Commerce again finds that Cleveland-Cliffs' and U.S. Steel's offerings were suitable substitutes. Exclusion Request AR 111695–119. Specifically, Commerce states Cleveland-Cliffs could produce 230mm slab, and U.S. Steel could produce 202.2, 222.25, 231.84, 243.84, and 304.8mm slab. *Id.* Commerce reasons that, because its SME found that it was "technologically impossible to mass produce semi-finished slab with a thickness tolerance of less than one millimeter," it would be unrealistic to hold Objectors to exactly match NLMK's request for 250mm slab. *Id.* Relying on the SME's analysis, Commerce explained that:

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[8] Commerce also concludes that Nucor's offerings were not a substitute, because the offerings were for coil—not slab. *See, e.g.*, Exclusion Requests AR 11697, AR 11734, AR 11695, AR 260914.

> the thinner slabs offered by AK Steel and U.S. Steel would produce a slightly smaller coil, but that smaller coil can be used to produce the same end products as a larger coil. . . . . NLMK does not state its end use products require coil of a certain length but rather identifies generic end use products which can be produced from a portion of the coil length.

Exclusion Request AR 111695–119. The common element in Commerce's explanations is that it considers smaller coils to be essentially the same as larger coils for the purposes of producing steel coil products. *Compare id. with* Exclusion Request AR 111734–004. Thus, Commerce reasons that from the coil user's perspective, it may be possible to use different coil sizes interchangeably, because the steel itself is compositionally identical.

For each group of denials Commerce conflates the needs of NLMK, as the end user, with those of NLMK's customers. This mistake alone warrants a remand because the regulations make clear, and Defendant concedes, that the requestor is the end user and Commerce must assess the substitute with reference to the quality needs of the end user. *See* 15 C.F.R. § 705, Supp. 1(c)(6)(i)–(ii); Oral Argument, 19:20–19:40, Nov. 18, 2022, ECF No. 96. Whether NLMK's customers could make their products with products made by NLMK using substitute coil is immaterial. NLMK rolls coil, and thus its "business activity" for the purposes of the regulations is selling coil. *See* 15 C.F.R. § Pt. 705, Supp. 1(c)(6)(i). Assuming for the sake of argument that NLMK's customers would view extra by-cuts and scrap as economic or efficiency factors, Commerce's analysis confuses NLMK's end use with its customers' end use, and what may be an efficiency factor for a customer may translate as a requirement for a seller.[9] NLMK asserts that its customers will not buy smaller coils, *see, e.g.,* Exclusion Request AR 111695–018, and Commerce's explanations do not engage with this essential issue. Thus, the court remands Commerce's determinations so that it can assess whether the end user, NLMK, will be able to make coil using a substitute product.

Commerce's reasoning for the first group of denials does not engage with the issue of suitability. It simply states that U.S. Steel and Cleveland-Cliffs "can manufacture an identical product," despite both companies' indications that they cannot manufacture an identical product by answering "no" in fields 1.c and 1.d. Exclusion Request AR 111697–003. To the extent that Commerce means "suitable substi-

[9] Without support, Defendant argues that NLMK contrived a quality-based exclusion. Def.'s Br. at 23. Commerce does not make this assertion, and the court need not and does not address it.

tute" instead of "identical product," this single-sentence analysis would still be conclusory, as it only states that Objector's offerings are acceptable, without addressing any of the issues raised in NLMK's Requests, Rebuttals, or Sur-Rebuttals.

Moreover, Commerce does not reach its own conclusion, but adopts the opinion of an unidentified SME. *Id.* at AR 111697–004 ("The SME also concluded that the [Cleveland-Cliffs] and U.S. Steel objection offerings are suitable substitutes"). At oral argument Defendant, in response to the court's question, indicated that SMEs are non-lawyer agency contractors who provide technical advice to Commerce's recommenders, but do not interpret Commerce's regulations. Oral Argument, 2:50–5:00, Nov. 18, 2022, ECF No. 96. Although neither the court nor NLMK are privy to the identity, functioning, or methodology of these SMEs, it would appear that these individuals offer their opinion as to the ultimate question of suitability. *See, e.g.*, Exclusion Request AR 111697–004 ("the SME also concluded that the . . . offerings are suitable substitutes"). The court is unaware of whether the SME provided a report to Commerce, or simply the conclusion it reached. Either way, it would appear that the SME is offering an opinion as evidence. Without the underlying report, if such a report exists, the court has no basis by which to assess the foundation or reasonableness of that opinion. NLMK has had no opportunity to question or rebut the foundation or reasonableness of the SMEs' conclusions. Defendant claims that the SMEs are qualified experts; however at this point the SMEs' qualifications, assumptions, and for the most part, rationales, are secret. Commerce cannot contract around its broader obligation to explain the basis for its determinations, nor can it rely upon conclusory statements of unidentified experts. *See Bowman Transp., Inc. v. Ark.-Best Freight Sys., Inc.*, 419 U.S. 281, 286 (1974) (basis for agency's decisions must be reasonably discernable). Therefore, the court cannot identify a "rational connection between the facts found and the choice made" when it is unclear what factors the SME weighed, and who made the decision that Objectors' offerings were suitable. *See Burlington Truck Lines v. United States*, 371 U.S. 156, 168 (1962).

In the second group of denials, Commerce recognizes that coils made from Objectors' slabs would be smaller than what NLMK's customers would "generally want." Exclusion Request AR 111734–004. Commerce again relies on the opinion of an SME, who determined the "end user" would need to swap out coils more frequently, which could result in more "by-cuts and scrap." *Id.* The SME also states that the smaller coils "can make the end products." *Id.* Finally, the SME concludes that these problems are "issues of effi-

ciency and economic factors," which are "outside of ITA's analysis." *Id.* As discussed, this explanation assumes that the end user is not NLMK, but NLMK's customer. Because NLMK is the end user, *see* 15 C.F.R. § 705, Supp. 1(c)(6)(i)–(ii), Commerce's explanation that NLMK's customers can simply swap out coils more frequently runs counter to the evidence on the record. *See Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 43.

Again, it is unclear whether the SME is only opining on technical subjects, or drawing conclusions for the agency. In either case, the record does not reveal the SME's methodology, and thus the basis for Commerce's determination is not reasonably discernable. *See Bowman*, 419 U.S. at 286. Finally, as discussed above, the court is unable to credit the conclusions of an unidentified expert, especially in the absence of an opportunity for NLMK to rebut the evidence offered by that SME.

Commerce's third group of denials repeats the previous reasoning that the "end use products" made from NLMK's coil are generic and can be produced with a coil of any length. *See, e.g.*, Exclusion Request AR 111695–119. It also adds that NLMK's requirement of exactly 250mm slab is unrealistic according to the SME.[10] *Id.* Unlike in previous denials, here the SME is only credited with technical conclusions, such as concluding that Objectors' offerings would produce a compositionally identical but smaller coil. *See id.* However, as previously discussed, because NLMK is the end user, the question is not whether NLMK's customers could use smaller coils, but whether NLMK will still be able to sell coil using smaller slab. Again, the court is unable to credit the SME's conclusions. Even if these conclusions are only technical, there is still no foundation for the SME's qualifications and methodology, and NLMK has had no opportunity to rebut the SME's evidence.

Defendant attempts to expand on Commerce's explanations, arguing that the "quality criterion" (i.e. whether a product is a suitable substitute) focuses on the "technical and compositional qualities of the material itself." Def.'s Br. at 18. Defendant argues that "industry specs," "internal company quality controls or standards," and "regulatory, or testing standards" would meet this standard, but "non-quality-based preferences" such as packaging would not. *Id.* at 19. Defendant points to Commerce's response to a comment, in which it stated that "form, fit, function, and performance" were relevant fac-

[10] The SME's observation that it is "technologically impossible" to produce slab with a tolerance of less than 1mm requires further explanation. Assuming the SME's statement refers to the tolerance for error, it is unclear why in the same paragraph Commerce seems to credit Objectors' claims that they can produce 222.25mm, 231.84mm, and 243.84mm slabs—suggesting a 1/100thmm tolerance is possible. Exclusion Request AR 111695–119.

tors in determining a product's suitability. *Id.* ; 83 Fed. Reg. at 46,036 (Commerce response to Cmt. (f)(5)(iv)).

Defendant's argument cannot cure deficiencies in Commerce's explanation. *Gemtron Corp. v. Saint-Gobain Corp.*, 572 F.3d 1371, 1380 (Fed. Cir. 2009) (attorney argument is not evidence); *SEC v. Chenery Corp.*, 332 U.S. 194, 196 (1947) (courts review agency action solely on the grounds invoked by the agency). To the extent that Defendant's argument elaborates on Commerce's reasoning, it is still not clear why the size of a product is not "quality-based" and does not fall under "form, fit, or function" within the meaning of the regulations. It is unclear why the terms "form" and "fit" are limited to compositional qualities, when the ordinary use of those terms seems to encompass size as well.[11] *See* Pl.'s Reply Memo. L. Suppt. Mot. J. Agency Rec., 5–7, Oct. 10, 2022, ECF No. 85 ("Pl.'s Reply"). Moreover, as NLMK points out in its reply, "dimensional specifications" is an option listed on Commerce's standard rebuttal form as a basis for opposing an objector's assertions of quality. *Id.* at 6. Listing "dimensional specifications" under "quality" suggests Commerce considers size to be a relevant factor in its suitable substitute analysis. Therefore, for the above reasons, Commerce must further explain why it considers Objectors' slab a substitute product.

II. Reasonably Available

Commerce determined that Objectors could provide a sufficient quantity of both 250mm and 200mm slab to meet all of NLMK's requests.[12] NLMK argues that Commerce ignored evidence on the record that Objectors could not, in fact, supply the requested quantities of slab due to idled production facilities and preexisting sales commitments.[13] Pl.'s Br. at 28–30, 35–38, 40–44; Pl.'s Reply at 9–19. Defendant counters that Commerce may rely on Objectors' certified statements, citing *Allied Tech Grp., Inc. v. United States*, 649 F.3d 1320, 1330 (Fed. Cir. 2011). Def.'s Br. at 23–33, and argues that the record contains ample evidence supporting a finding that Objectors

[11] Form, Merriam-Webster's Dictionary, available at https://www.merriam-webster.com/dictionary/form (last accessed Jan. 18, 2023) (defining "form" as "the shape and structure of something as distinguished from its material"); Fit, Merriam-Webster's Dictionary, available at https://www.merriam-webster.com/dictionary/fit (last accessed Jan. 18, 2023) (defining "fit" as "to conform to a particular shape or size").

[12] Commerce made this finding in all of its 2020 and 2021 denial letters, with the exception of the three requests which it deemed ambiguous (Exclusion Requests AR 248733, AR 248740 and AR 260912).

[13] NLMK also argues, in a footnote, that U.S. Steel has provided no timeline as to when it can restart its idled Great Lakes Works facility, which U.S. Steel claims can produce suitable slab. Pl.'s Br. at 24 n.68. It indicates that objectors are required by regulation to provide a timeline for bringing idled capacity online. *Id.* (citing 15 C.F.R. § 705, Supp. 1(d)(4)).

can provide NLMK with slab. *Id.* For the reasons that follow, Commerce's determination that Objectors could provide NLMK with sufficient quantities of slab is remanded for further explanation or reconsideration.

As previously explained "[a]n exclusion will only be granted if an article is not produced in the United States in a sufficient, reasonably available amount, and of a satisfactory quality, or for specific national security considerations." 15 C.F.R. § 705 at Supp. 1(c)(5)(i). Commerce must also consider whether a suitable substitute is available immediately. *Id.* at Supp. 1(c)(6)(i). "Available 'immediately' means that a product . . . can be delivered by a U.S. producer 'within eight weeks', or, if that is not possible, by a date earlier than the time required for the requester to obtain the entire quantity of the product from the requester's foreign supplier." *Id.*

Commerce denies all of NLMK's requests, finding that one or more Objectors can produce 100% of the slab quantity requested. *See* Exclusion Request AR 111695 et seq. For NLMK's 2020 requests, Commerce finds that Cleveland-Cliffs and U.S. Steel can supply the entire quantity requested. *See, e.g.*, Exclusion Request AR 111697–004. For NLMK's March-April 2021 requests for 250mm slab, Commerce finds that only Cleveland-Cliffs could supply the entire quantity. *See, e.g.*, Exclusion Request AR 194445–004. For NLMK's two 2021 requests for 200mm slab, Commerce finds that only U.S. Steel could supply the entire quantity. *See* Exclusion Requests AR 198055–004 and AR 198056–004. For NLMK's lone November 2021 request, Commerce finds that only Cleveland-Cliffs could supply the quantity. *See* Exclusion Request AR 260914–004.

The reasoning in all Commerce's denials is identical, as are the filled-out fields in the denial letters. *See* Exclusion Request AR 111695 et seq. The field marked "3.a"[14] in each instance is filled with "100%" with respect to either U.S. Steel, Cleveland-Cliffs, or both.[15] *Id.* Below field 3.a there is a second field, which reads: "Does anything in the request, rebuttal, or surrebuttal, including attachments, provide evidence to contradict the objector's claims?" *Id.* These fields are all filled out "No." *Id.* The text of Commerce's explanation is substantially the same in all cases, and reads: "[Objector/s] can produce 100 percent of the requested volume. As such, [Objector/s] meet the quan-

[14] The field definition for box 3.a on the objection form states: "What percentage of the total product tonnage requirement covered under the Exclusion Request that is the subject of this Objection Filing can your organization manufacture at its U.S. plants on a timely basis?" Exclusion Request AR 111695–122.

[15] Nucor variously indicates that it can supply 60% or 100% of the quantity requested in field 3.a, but Commerce consistently finds that Nucor cannot meet the requested quantity, as Nucor does not sell slab. *See, e.g.*, Exclusion Request AR 111695.

tity criterion." *Id.* Commerce does not offer any further explanation.

Commerce provides no reasoning in its denials, and does not engage with evidence which runs contrary to its decision. For example, with respect to Exclusion Request AR 194445, NLMK submitted comments asserting that both of Cleveland-Cliffs' facilities capable of producing 250mm slab had not, in fact, sold any such slab on the market over the last ten years. Exclusion Request AR 194445–059. NLMK pointed out that Cleveland-Cliffs does not publicly advertise 250mm slab for sale. *Id.* It also stated that as a condition of purchasing the two facilities in question, Cleveland-Cliffs committed itself to supplying ArcelorMittal (a steel producer) with 1.5 million tons of slab per year, which would allegedly consume all of its available slab supply. *Id.* Defendant's argument that Cleveland-Cliffs adequately addressed these concerns is a post hoc rationalization, as Commerce does not reference Cleveland-Cliffs' statements in its explanation.[16] Thus, it is not reasonably discernable that Commerce considered or adopted the explanation given by Defendant. *See Bowman Transp.*, 419 U.S. at 286 (agency action will be sustained if grounds are "reasonably discernable"); *see also Chenery Corp.*, 332 U.S. at 196.

It is unclear whether Commerce considered NLMK's contrary evidence, as required by the statute, or what weight it accorded Cleveland-Cliffs' replies. *See Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 43. Commerce must address evidence that runs contrary to its decision. *See id.*; *Allied Tech Grp.*, 649 F.3d at 1330–31 (agency entitled to rely on certifications "where there is no significant countervailing evidence reasonably known to the agency evaluators that should create doubt . . . ."). Therefore, for the above reasons, Commerce must further explain why it considers Objectors' slab to be "reasonably available" in sufficient quantities in light of any evidence on the record to the contrary.

III. Remedy

NLMK requests the court order a refund of over $255 million in tariffs. Pl.'s Br. at 3, 47. NLMK argues Commerce did not change its approach following the first remand and predicts Commerce will deny its exclusion requests again upon a second remand. *Id.* NLMK's request for a refund is denied.

Where record evidence is insufficient, the court may order further administrative or adjudicative procedures necessary to reach the correct decision. 28 U.S.C. § 2643(b). The court may order any form of

[16] Cleveland-Cliffs stated in its sur-rebuttal that its slab products were not advertised publicly because of the "limited market population" for such sales, and that it could "adjust product mix accordingly" to meet NLMK's needs. Exclusion Request AR 194445–67–68.

appropriate relief, including a remand. *Id.* § 2643(c)(1); *Fla. Power & Light Co. v. Lorion*, 470 U.S. 729, 744 (1985). However, a "judicial judgment cannot be made to do service for an administrative judgment." *I.N.S. v. Orlando Ventura*, 537 U.S. 12, 16 (2002) (citing *SEC v. Chenery Corp.*, 318 U.S. 80, 88 (1943). The agency brings expertise to bear, evaluates evidence, and makes initial determinations through informed analysis. *Id.* at 16–17. Further, remand presents an opportunity for the agency to enlarge the record and to make and explain new findings. *Nippon Steel Corp. v. Int'l Trade Comm'n*, 345 F.3d 1379, 1380–82 (Fed. Cir. 2003).

The appropriate remedy in this case is a remand. NMLK's argument that a remand would be futile is without merit. *See Nexteel Co., Ltd. v. United States*, 28 F.4th 1226, 1238 (Fed. Cir. 2022) (reversing the Court of International Trade's order to Commerce to reverse its particular market situation finding). There has been a single remand in this case which Commerce requested. *See NLMK Pennsylvania*, 558 F. Supp. 3d 1401. There is no showing here that Commerce could reach only one possible conclusion from the record on a second remand. *See Nexteel*, 28 F.4th at 1238. Therefore, the matter is remanded to Commerce for further explanation or reconsideration.[17]

CONCLUSION

For the foregoing reasons, Commerce's denials of NLMK's 2020 and 2021 Section 232 exclusion requests are remanded. In accordance with the foregoing, it is

ORDERED that Commerce's denials of NLMK's exclusion requests, specifically Exclusion Requests AR 111695, 111697, 111698, 111701, 111709, 111713, 111718, 111725, 111729, 111731, 111734, 111740, 111745, 111748, 111752, 111758, 111762, 111767, 111771, 111773, 111775, 111776, 111779, 111780, 111781, 111782 194445, 194449, 194452, 194455, 194458, 194460, 194463, 194482, 194511, 194515, 194516, 194518, 194521, 194525, 194529, 194532, 194535, 194536, 194547, 194553, 194560, 194562, 194566, 194571, 194573, 194883, 198055, 198056, 248733, 248740, 260912, and 260914 are remanded for further explanation or reconsideration; and it is further

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

[17] Defendant requests a remand for Commerce to reconsider its determinations with respect to Exclusion Requests AR 248733, AR 248740 and AR 260912). Def.'s Br. at 33–35. The court has discretion to grant such a request when Commerce has substantial and legitimate concerns, and wishes to reconsider its previous position without confessing error. *SKF USA Inc. v. United States*, 254 F.3d 1022, 1029 (Fed. Cir. 2001). Here, Defendant's concerns are substantial, because Commerce may revise its position on the denial of three exclusion requests on ambiguity grounds, and legitimate, as there is no indication that the request is frivolous or in bad faith.

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

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

ORDERED that the parties shall file the Joint Appendix within 14 days after the filing of replies to the comments on the remand redetermination; and it is further

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

Dated: January 23, 2023
New York, New York

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

Slip Op. 23–9

GUJARAT FLUOROCHEMICALS LIMITED, Plaintiff, v. UNITED STATES, Defendant, and DAIKIN AMERICA, INC., Defendant-Intervenor.

Before: Timothy C. Stanceu, Judge
Court No. 22–00120

[Remanding to the issuing agency a determination in a countervailing duty investigation on granular polytetrafluoroethylene from India]

Dated: January 24, 2023

John M. Gurley and *Diana Dimitriuc-Quaia*, ArentFox Schiff LLP, of Washington, D.C., argued for plaintiff. With them on the briefs was *Jessica R. DiPietro*.

Daniel F. Roland, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, D.C., argued for defendant United States. With him on the briefs were *Brian M. Boynton*, Principal Deputy Assistant Attorney General, *Patricia M. McCarthy*, Director, and *Claudia Burke*, Assistant Director. Of counsel on the briefs was *Paul K. Keith*, Assistant Chief Counsel, Office of the Chief Counsel for Trade Enforcement & Compliance, U.S. Department of Commerce.

Elizabeth J. Drake, Shagrin Associates, of Washington, D.C., argued for defendant-intervenor. With her on the briefs were *Roger B. Shagrin*, *Luke A. Meisner*, and *Justin M. Neuman*.

OPINION AND ORDER

Plaintiff Gujarat Fluorochemicals Limited ("Gujarat Fluorochemicals" or "GFCL"), an Indian producer of granular polytetrafluoroethylene ("PTFE") resin, brought this action to contest a final affirmative countervailing duty ("CVD") determination (the "Final Determination") issued by the International Trade Administration, U.S. Department of Commerce ("Commerce" or the "Department"). Concluding that the Final Determination is contrary to law, the court remands the decision to Commerce for expeditious corrective action.

I. BACKGROUND

A. The Contested Determination

Commerce published the Final Determination as *Granular Polytetrafluoroethylene Resin From India: Final Affirmative Countervailing Duty Determination and Final Affirmative Critical Circumstances Determination*, 87 Fed. Reg. 3,765 (Int'l Trade Admin. Jan. 25, 2022), in which Commerce determined for GFCL an estimated total countervailable subsidy rate of 31.89%. The estimated total countervailable subsidy rate was the sum of ten individual estimated countervailable subsidy rates, which Commerce described in the "Final Issues and Decision Memorandum" and incorporated into the Final

Determination by reference. *Issues and Decision Memorandum for the Final Affirmative Determination of the Countervailing Duty Investigation of Granular Polytetrafluoroethylene Resin from India* (Int'l Trade Admin. Jan. 18, 2022), P.R. 248 ("*Final I&D Mem.*").[1]

B. The Parties

Plaintiff is an Indian producer and exporter of PTFE resin. Defendant is the United States. Defendant intervenor Daikin America, Inc. ("Daikin") is a U.S. domestic producer of PTFE resin that was the petitioner in the countervailing duty investigation.

C. Proceedings before Commerce

On January 27, 2021, Daikin filed antidumping and countervailing duty petitions on imports of granular PTFE resin from India and Russia. *Daikin Antidumping and Countervailing Duty Petitions*, P.R. 1. On February 23, 2021, Commerce initiated a countervailing duty investigation of imports of this product during a time period (the "period of investigation" or "POI") of April 1, 2019 through March 31, 2020. *Granular Polytetrafluoroethylene Resin From India and the Russian Federation: Initiation of Countervailing Duty Investigations*, 86 Fed. Reg. 10,931. Gujarat Fluorochemicals was selected as the sole mandatory respondent in this investigation with respect to imports of granular PTFE from India (the "subject merchandise"). *Countervailing Duty Investigation of Granular Polytetrafluoroethylene Resin from India: Respondent Selection* at 4 (Int'l Trade Admin. March 9, 2021), P.R. 42.

Commerce issued a "Preliminary Determination" for the investigation on July 6, 2021. *Granular Polytetrafluoroethylene Resin From India: Preliminary Affirmative Countervailing Duty Determination, Preliminary Affirmative Critical Circumstances Determination, and Alignment of Final Determination With Final Antidumping Duty Determination*, 86 Fed. Reg. 35,479. The Preliminary Determination incorporated by reference a "Preliminary Decision Memorandum." *Decision Memorandum for the Preliminary Determination of the Countervailing Duty Investigation of Granular Polytetrafluoroethylene Resin from India* (Int'l Trade Admin. June 28, 2021), P.R. 173 ("*Prelim. Decision Mem.*").

After issuing the Final Determination, Commerce made no change in the 31.89% estimated countervailing duty rate when, following an affirmative injury determination of the U.S. International Trade Commission (the "Commission"), Commerce issued a countervailing

[1] Documents in the Joint Appendix are cited as "P.R. __."

duty order on PTFE resin from India. *Granular Polytetrafluoroethylene Resin From India and the Russian Federation: Countervailing Duty Orders*, 87 Fed. Reg. 14,509 (Int'l Trade Admin. Mar. 15, 2022).

D. Proceedings before the Court

Plaintiff brought this action on April 12, 2022. Summons, ECF No. 1; Compl., ECF No. 6. Plaintiff filed under USCIT Rule 56.2 the motion now before the court, which is a motion for judgment on the agency record. Pl.'s Rule 56.2 Mot. for J. on the Agency R. (July 21, 2022), ECF Nos. 38 (conf.), 39 (public) ("Pl.'s Mot."); Pl.'s Mem. of Law in Supp. of its Mot. for J. on the Agency R. (July 21, 2022), ECF Nos. 38–1 (conf.), 391 (public) ("Pl.'s Br."). Defendant and defendant-intervenor responded. Def.'s Resp. in Partial Opp'n to Pl.'s Mot. for J. on the Agency R. (Sept. 30, 2022), ECF No. 46 ("Def.'s Resp."); Resp. in Opp'n to Pl. Gujarat Fluorochemicals Limited's Rule 56.2 Mot. for J. on the Agency R. of Def.-Int. Daikin America Inc. (Sept. 30, 2022), ECF Nos. 47 (conf.), 48 (public) ("Def.-Int.'s Resp."). Plaintiff filed a brief in reply. Pl. Gujarat Fluorochemicals Limited's Reply Br. (Oct. 28, 2022), ECF No. 51 ("Pl.'s Reply").

The court held oral argument on January 11, 2023. In response to defendant-intervenor's motion, the court allowed additional briefing on the proper interpretation of a provision in the Department's regulations, 19 C.F.R. § 351.525(b)(6)(iv), which the parties submitted on January 20, 2023. Suppl. Br. of Def.-Int. Daikin America Inc., ECF No. 58 ("Def.-Int.'s Suppl. Br."); Def.'s Suppl. Br. on the Interpretation of 19 C.F.R. § 351.525(b)(6)(iv), ECF No. 59 ("Def.'s Suppl. Br."); Pl. Gujarat Fluorochemicals Limited's Suppl. Br. on the Interpretation of Regulation 351.525(b)(6)(iv), ECF No. 60.

II. DISCUSSION

A. Jurisdiction and Standard of Review

The court exercises jurisdiction according to section 201 of the Customs Courts Act of 1980, 28 U.S.C. § 1581(c),[2] pursuant to which the court reviews actions commenced under section 516A of the Tariff Act of 1930, *as amended* ("Tariff Act"), 19 U.S.C. § 1516a, including an action contesting a final affirmative determination by Commerce of whether or not a countervailable subsidy is being provided with respect to merchandise subject to a countervailing duty investigation. *See id*. §§ 1516a(a)(2)(B)(i), 1671d(a)(1).

[2] All citations herein to the United States Code are to the 2018 edition. All citations to the Code of Federal Regulations are to the 2022 edition.

In reviewing an agency determination, the court "shall hold unlawful any determination, finding, or conclusion found . . . to be unsupported by substantial evidence on the record, or otherwise not in accordance with law." *Id*. § 1516a(b)(1). Substantial evidence refers to "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *SKF USA, Inc. v. United States*, 537 F.3d 1373, 1378 (Fed. Cir. 2008) (quoting *Consol. Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)).

B. Countervailing Duties under the Tariff Act

When certain conditions are met, the Tariff Act provides for a countervailing duty to be imposed on imported merchandise to redress the effect of a subsidy provided by the government of the exporting country. Section 701(a) of the Tariff Act, 19 U.S.C. § 1671(a), directs generally that Commerce is to impose a countervailing duty if: (1) Commerce determines that an "authority," defined as either the government of a country or any public entity within the territory of the country, *id*. § 1677(5)(B), "is providing, directly or indirectly, a countervailable subsidy with respect to the manufacture, production, or export of a class or kind of merchandise imported, or sold (or likely to be sold) for importation, into the United States"; and (2) the Commission determines that an industry in the United States is materially injured or threatened with material injury by reason of the subsidized imports.

A "countervailable subsidy" exists, generally, where an authority provides a financial contribution to a "person" and a "benefit is thereby conferred" and where the subsidy meets the requirement of "specificity," as determined according to various rules set forth in the statute. *Id.* §§ 1677(5), (5A). When subsidies consist of the provision of goods or services rather than the provision of monies directly, a benefit is conferred if those goods or services are provided for "less than adequate remuneration" ("LTAR"). *Id.* § 1677(5)(E)(iv).

C. Estimated Subsidy Rates in the Final Determination

For the Final Determination, Commerce calculated the 31.89% estimated total subsidy rate by combining the individual estimated subsidy rates it determined for ten government programs in India, two of which plaintiff is contesting before the court. Plaintiff contests the Department's including in the total a 26.50% subsidy rate based on a 30-year lease of a tract of land by a governmental entity, the State Industrial Development Corporation ("SIDC"), to Inox Wind Limited ("IWL"), an affiliate of Gujarat Fluorochemicals. Plaintiff also contests the Department's including a 0.12% subsidy rate for the

provision of land to GFCL by another government entity, the Gujarat Industrial Development Corporation.[3]

D. Inclusion of a Subsidy Rate for the Lease of Land by the State Industrial Development Corporation

Commerce determined the 26.50% SIDC estimated subsidy rate by attributing to Gujarat Fluorochemicals what Commerce considered to be a subsidy to IWL, an Indian producer of wind turbines. Several findings resulted in this determination.

Commerce found that the 30-year lease, which dated back to 2015 and pertained to land to be used for the construction of manufacturing facilities, was for less than adequate remuneration. Gujarat Fluorochemicals contests the finding that the lease was for LTAR, arguing, in effect, that no subsidy or financial benefit was provided to IWL. Plaintiff argues that Commerce arrived at the LTAR conclusion by valuing the land according to "benchmark" prices that were far higher than the value of the leased tract. Gujarat Fluorochemicals maintains that the record evidence shows that these benchmarks were not comparable to that tract because, *inter alia*, they pertained to parcels of urban land located in the centers of the Indian cities of Mumbai and Ahmedabad. *See* Pl.'s Br. 31–48.

Commerce found, further, that GFCL and IWL not only were affiliated but were "cross-owned" within the meaning of § 351.525(b)(6)(vi) of the Department's regulations.[4] Before the court, plaintiff does not contest the Department's determination of cross-ownership.

Commerce included the 26.50% estimated subsidy rate upon finding that during the period of investigation, IWL sold electrical power to GFCL, and exclusively to GFCL, and that this electricity was used as an input for all products GFCL manufactured at its industrial complex, including PTFE resin. Commerce concluded from these factual findings, which plaintiff does not contest, that what Commerce

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[3] The other eight subsidy programs and rates were as follows: Export Promotion of Capital Goods Scheme, 0.09%; Advanced Authorization Program, 2.76%; Duty Drawback Program, 0.17%; Status Holders Incentive Scrip, 0.07%; Merchandise Export from India Scheme, 0.46%; Renewable Energy Certificate, 0.41%; GDIC Preferential Water Rates, 0.60%; and State Government of Gujarat Exemption from Electricity Duty, 0.71%. *Issues and Decision Memorandum for the Final Affirmative Determination of the Countervailing Duty Investigation of Granular Polytetrafluoroethylene Resin from India* at 6–7 (Int'l Trade Admin. Jan. 18, 2022), P.R. 248.

[4] Per the regulations:

> Cross-ownership exists between two or more corporations where one corporation can use or direct the individual assets of the other corporation(s) in essentially the same ways it can use its own assets. Normally, this standard will be met where there is a majority voting ownership interest between the two corporations or through common ownership of two (or more) corporations.

19 C.F.R. § 351.525(b)(6)(vi).

considered to be a subsidy to IWL should be attributed to the combined sales of the downstream products of both corporations, according to an "attribution of subsidies" provision set forth in its regulations. 19 C.F.R. § 351.525(b)(6)(iv). While not contesting that IWL sold electrical power to GFCL, and only GFCL, during the period of investigation, and while not contesting that the power was used in producing the downstream products at GFCL's production facility (which included numerous products other than PTFE resin), plaintiff argues that this regulation does not apply in the situation presented. The court agrees.

1. The Department's Conclusion that 19 C.F.R. § 351.525(b)(6)(iv) Applied with Respect to the SIDC Land Lease

The court's analysis begins with the statute. Section 701(a) of the Tariff Act requires "the administering authority," i.e., Commerce, to impose a countervailing duty if a governmental entity "is providing, directly or *indirectly*, a countervailable subsidy *with respect to the manufacture*, *production*, or export of a class or kind of merchandise [i.e., the merchandise subject to the investigation] imported, or sold (or likely to be sold) for importation, into the United States" and the Commission reaches an affirmative determination of injury or threat to the domestic industry by reason of sales of that merchandise. 19 U.S.C. § 1671(a) (emphasis added). Here, what Commerce identified as a subsidy was a domestic, not export, subsidy, and it was provided to IWL, not GFCL, the producer of the subject merchandise. Thus, any subsidy was provided, if at all, only "indirectly" with respect to the manufacture of the imported PTFE resin.

Section 701(e) of the Tariff Act provides, further, that "[w]henever the administering authority has reasonable grounds to believe or suspect that an upstream subsidy, as defined in section 771A(a)(1), is being paid or bestowed, the administering authority shall investigate whether an upstream subsidy has in fact been paid or bestowed, and if so, shall include the amount of the upstream subsidy as provided in section 771A(a)(3)." 19 U.S.C. § 1671(e). In pertinent part, section 771A(a) defines an "upstream subsidy" as a countervailable subsidy other than an export subsidy that "is paid or bestowed by an authority . . . with respect to a product (hereafter in this section referred to as an 'input product') that is used in the same country as the authority in the manufacture or production of merchandise which is the subject of a countervailing duty proceeding," that "bestows a competitive benefit on the merchandise," and that "has a significant effect on the cost of manufacturing or producing the merchandise." *Id*. § 1677–1(a).

Commerce did not conduct an upstream subsidy investigation of the electricity input. Certain record evidence would have been relevant had it done so. This includes evidence that during the period of investigation, Inox Wind Limited sold to Gujarat Fluorochemicals only the electricity produced by two wind turbines that were being tested prior to GFCL's purchase of these two wind turbines during the last month of the POI, March 2020. *Questionnaire Response to Section III Identifying Affiliated Companies of Gujarat Fluorochemicals Limited* at 8, J.A. at 31 (Mar. 26, 2021), P.R. 52. Measured by kilowatt hours, the electrical power so provided, which was commingled with other power supplied on the grid to GFCL's production facilities, was 1.03% of the total power consumed by those facilities during the period of investigation. *See Section III Questionnaire Response (Part I) of Inox Wind Limited* at 6, J.A. at 508 (May 24, 2021), P.R. 121. Plaintiff estimated that 7.44% of the total power supplied to the facilities was used to produce granular PTFE resin (one of a number of products GFCL made there), *id*. at 7 (citing *Supplemental Questionnaire Response to Section III Identifying Affiliated Companies (Questions 3–7) of Gujarat Fluorochemicals Limited* at Ex. S-5b, J.A. at 392 (Apr. 15, 2021), P.R. 84), such that only approximately 0.07% of the electricity supplied by IWL went to the production of the merchandise subject to the investigation.[5] *See* 19 U.S.C. § 1677–1(a)(3) (requiring for a finding of an upstream subsidy that the input product "has a significant effect on the cost of manufacturing or producing the merchandise"). There is also uncontradicted record evidence that IWL sold the electrical power to GFCL at market prices and at arm's length. *Questionnaire Response to Section III* at 7, J.A. at 30 (Mar. 26, 2021), P.R. 52 (reporting that "IWL has sold power to GFCL at market rates" and that "these transactions were at 'arm's length.'"). *See* 19 U.S.C. § 1677–1(b)(1) (providing generally that "a competitive benefit has been bestowed when the price for the input product . . . is lower than the price that the manufacturer or producer of merchandise which is the subject of a countervailing duty proceeding would otherwise pay for the product in obtaining it from another seller in an arms-length transaction.").

Commerce declined to conduct an upstream subsidy investigation even though Section 701(e) provides that Commerce "*shall* investigate whether an upstream subsidy is being paid or bestowed" when it

[5] The court has used only public record information throughout this Opinion and Order. At oral argument, plaintiff waived a previous claim of confidentiality for the data appearing in this paragraph. *See* Oral Argument at 9:46 (waiving confidentiality for the 1.03% figure), 13:38 (waiving confidentiality for the 7.44% figure); *see also* Gujarat Fluorochemicals Limited's Suppl. Br. on the Interpretation of Regulation 351.525(b)(6)(iv) 17, ECF No. 60 (disclosing both the 1.03% and 7.44% figures publicly).

"has reasonable grounds to believe or suspect" that such a subsidy is being provided. 19 U.S.C. § 1671(e) (emphasis added). Instead, Commerce resorted to an alternate methodology when it included, in the overall estimated subsidy rate, a rate for IWL's provision of the electrical power input to Gujarat Fluorochemicals. This alternate methodology, set forth in 19 C.F.R. § 351.525(b)(6)(iv), is not mentioned in the Tariff Act and thus is entirely a creation of the Department's regulations.

This case does not present the issue of whether § 351.525(b)(6)(iv) accords with the statute. Plaintiff does not make a facial challenge to this regulation and instead claims that the regulation was impermissibly applied in the CVD investigation. The regulation at issue in this case consists of a single sentence, as follows:

> *Input suppliers.* If there is cross-ownership between an input supplier and a downstream producer, and production of the input product is primarily dedicated to production of the downstream product, the Secretary will attribute subsidies received by the input producer to the combined sales of the input and downstream products produced by both corporations (excluding the sales between the two corporations).

19 C.F.R. § 351.525(b)(6)(iv). The question this case presents, then, is whether Commerce correctly interpreted its regulation to conclude that the condition precedent for invoking the procedure in the regulation existed here, i.e., whether "production of the input product is primarily dedicated to production of the downstream product." *Id.* Commerce concluded that the condition was satisfied because IWL did not provide electrical power to any persons other than GFCL during the period of investigation, with the result that all of the electricity IWL supplied was used in powering the Dahej industrial facilities, the location of the production of the PTFE resin and the other products that GFCL manufactured there. *Final I&D Mem.* at 12 (". . . IWL did not have any other energy customers and . . . all wind power generated at IWL's wind farm was to be used in GFCL's production facilities in Dahej.").

As discussed earlier, there is record evidence that only 0.07% of the electricity IWL provided was used in producing the subject merchandise, granular PTFE resin, which was only one of a number of products that Gujarat Fluorochemicals made at the Dahej industrial facilities. Commerce reasoned that "[t]he regulations do not specify whether the downstream product must be subject or non-subject

merchandise," *Final I&D Mem.* at 11, but there is also the issue of whether the regulation requires "the downstream product" to be a specific, identified product. That is at least an implication from the use of the term "*the* downstream product." In this instance, Commerce interpreted the term "the downstream product" not to refer to any downstream product in particular but instead to refer to all of the products GFCL made at those facilities (which, other than granular PTFE resin, Commerce did not identify or analyze). The use of the particularized, singular reference to "the downstream product" calls the Department's interpretation into question. Nevertheless, it is unnecessary for the court to decide whether the term "the downstream product" as used in the regulation plausibly could refer to a group consisting of all downstream products made by the producer. For even if it were assumed, *arguendo*, that the term may be interpreted so broadly in some context, the court still could not agree with the Department's conclusion that the "primarily dedicated" standard is satisfied here.

Commerce relied on the fact that Gujarat Fluorochemicals was the only customer to whom Inox Wind Limited sold power during the POI, but that is not sufficient to meet the "primarily dedicated" standard imposed by the regulation. As the court will explain, a determination of whether an input is "primarily dedicated to the production of the downstream product" does not hinge on whether the input is primarily sold to the producer of that product and depends instead on the role the input performs as a "link" in the production chain.

Commerce promulgated 19 C.F.R. § 351.525(b)(6)(iv) in 1998 as part of a comprehensive revision of countervailing duty regulations following enactment of the Uruguay Round Agreements Act. The preamble to the 1998 promulgation ("Preamble") identified as the main concern addressed in § 351.525(b)(6)(iv) "the situation where a subsidy is provided to an input producer whose production is dedicated almost exclusively to the production of a higher value added product—the type of input product that is merely a link in the overall production chain." *Countervailing Duties*, 63 Fed. Reg. 65,348, 65,401 (Int'l Trade Admin. Nov. 25, 1998). Commerce explained that "[w]e believe that in situations such as these, the purpose of the subsidy provided to the input producer is to benefit the production of both the input and downstream products." *Id*. Commerce summarized the discussion as follows:

> Accordingly, where the input and downstream production takes place in separately incorporated companies with cross-ownership . . . and the production of the input product is primarily dedicated to the production of the downstream product,

> paragraph (b)(6)(iv) requires the Department to attribute the subsidies received by the input producer to the combined sales of the input and downstream products (excluding the sales between the two corporations).

Id. The Preamble provided three examples that illustrate the intended meaning of the term "primarily dedicated to the production of the downstream product" as used in § 351.525(b)(6)(iv). Together, they clarify that the term pertains to the role the input performed, in the physical sense, in the production of the downstream product rather than whether the input was provided "primarily" to the producer of that product.

As examples of products that are merely links "in the overall production chain," Commerce identified "stumpage subsidies on timber that was primarily dedicated to lumber production and subsidies to semolina primarily dedicated to pasta production." *Id*. (citing *Certain Softwood Lumber Products from Canada*, 57 Fed. Reg. 22,570, 22,578 (Int'l Trade Admin. May 28, 1992) and *Certain Pasta from Italy*, 61 Fed. Reg. 30,287–309 (Int'l Trade Admin. June 14, 1996)). In both of these examples, the input was an upstream product that bore a close physical relationship to the downstream product. As an example of an input that Commerce considered not to be primarily dedicated to the production of the downstream product, Commerce explained as follows:

> Where we are dealing with input products that are not primarily dedicated to the downstream products, however, it is not reasonable to assume that the purpose of a subsidy to the input product is to benefit the downstream product. For example, it would not be appropriate to attribute subsidies to a plastics company to the production of cross-owned corporations producing appliances and automobiles. Where we are investigating products such as appliances and automobiles, we will rely on the upstream subsidy provision of the statute to capture any plastics benefits which are passed to the downstream producer.

Id. The three examples show that Commerce considered the universal role of plastics in the manufacturing of different downstream products as reason enough to conclude that plastics are not "primarily dedicated" to the production of automobiles or appliances in the way timber is primarily dedicated to lumber production and semolina is primarily dedicated to making pasta. Both the timber and the semolina are dedicated in the production chain to production of a related, higher value-added product. Notably, in all three examples "the

downstream product" is a specific, individually-identified product, and nowhere in the three examples does Commerce mention, as a pertinent factor in determining whether the input is "primarily dedicated," whether the producer is the sole or primary purchaser of the upstream product.

The electricity used to power GFCL's manufacturing facilities might be described as an "input," but its role in the manufacturing of the finished products at the GFCL facilities is not analogous to the role timber performed in producing lumber or the role semolina performed in pasta making. Electricity used to power an entire production plant cannot fairly be characterized as "merely a link in the overall production chain" of the finished products that are made there. *Id*. It is energy, and, being of universal application, is not remotely describable as an upstream product that is "primarily dedicated to the production of the downstream product" as is required by § 351.525(b)(6)(iv). Ignoring the distinction the Preamble draws between an upstream product that is merely a link in the production chain of a higher value-added product and one that is not, Commerce mistakenly thought it sufficient that "IWL's wind energy generation during the POI was provided expressly for the purpose of providing electrical energy to GFCL and had no other purpose outside of GFCL's overall production chain." *Final I&D Mem*. at 12. That error in the interpretation of § 351.525(b)(6)(iv) led Commerce to the wrong conclusion.

The distinction the Preamble draws in discussing the plastics example is particularly instructive in this case. Commerce stated that where the input is not "primarily dedicated" to the production of the downstream product, it will not invoke 19 C.F.R. § 351.525(b)(6)(iv) and instead "will rely on the upstream subsidy provision of the statute to capture" any benefits provided to the input "which are passed to the downstream producer." *Countervailing Duties*, 63 Fed. Reg. at 65,401. In the investigation at issue, Commerce decided not to do so and instead relied exclusively on § 351.525(b)(6)(iv) in attributing to Gujarat Fluorochemicals what it considered to be a subsidy to Inox Wind Limited.

The plastics example in the Preamble language instructs, further, that Commerce will apply 19 C.F.R. § 351.525(b)(6)(iv), as opposed to an upstream subsidy analysis, when the physical relationship between the input and the downstream product makes it "reasonable to assume that the purpose of a subsidy to the input product is to benefit the downstream product." *Id.* Because electricity could not have been found on this record to be "dedicated to the production" of any down-

stream product in the way the regulation contemplates, that condition is missing from the factual scenario in this case.

In summary, Commerce applied § 351.525(b)(6)(iv) contrary to the intent of the term "primarily dedicated to the production of the downstream product." By overlooking the type of physical relationship the regulation requires between the input and the particular downstream product in the production chain, and by defining the term as satisfied because the input is not sold to persons other than the producer of the subject merchandise, Commerce assigned the term a different meaning and purpose than those intended for this regulation.

2. Defendant's and Defendant-Intervenor's Arguments that Commerce Reasonably Applied 19 C.F.R. § 351.525(b)(6)(iv) in the Investigation

Defendant and defendant-intervenor offer various arguments on why the court should conclude that the Department's interpretation of § 351.525(b)(6)(iv) was reasonable. But in none of their arguments do they confront the basic flaw affecting that interpretation, which is that electricity cannot plausibly be said to have been "primarily dedicated to the production of the downstream product" in the sense in which Commerce intended that term to be interpreted when promulgating the regulation.

Defendant advances three arguments in its supplemental brief. It argues, first, that "the term 'downstream product' should not be strictly construed to mean 'subject merchandise' but instead should be interpreted to include both subject and non-subject merchandise" and that "Commerce has long applied the regulation" in this way. Def.'s Suppl. Br. 2. Defendant followed this argument with a discussion of how Commerce has interpreted the term to mean both subject and non-subject merchandise in other administrative decisions. *Id*. at 2–5.

Defendant's argument, even if presumed, *arguendo*, to be correct, is unavailing as to whether Commerce permissibly applied its regulation in the CVD investigation. As the Preamble examples show, typically "the downstream product" will be the merchandise under investigation, but the court need not presume that such is necessarily the case. The salient point is that there is no indication on the record of this investigation, and nothing in the Department's analysis, to support a notion that electricity was "primarily dedicated"—in the sense in which that term was intended in § 351.525(b)(6)(iv)—to the "production" of any specific "downstream product" Gujarat Fluorochemicals made at its facilities, or even to all of the downstream products considered collectively.

Defendant argues, next, that "Commerce's interpretation of the

regulation is consistent with the *CVD Preamble*," maintaining that Commerce did not intend for the terms "downstream product(s)" and "subject merchandise" to be interchangeable. *Id*. at 5. This argument also misses the mark.

The Department's interpretation of the regulation is *not* consistent with the Preamble in the sense that matters: the meaning of the term "primarily dedicated." For the reasons the court has explained, the meaning the Preamble gives to this term is not the one Commerce attributed to it in this CVD investigation.

Defendant's third argument is that "Commerce's interpretation of the regulation is consistent with the principle in 19 U.S.C. §1671(a) that any countervailable subsidy be provided 'with respect to . . . the manufacture, production, or export' of the subject merchandise." *Id*. at 6. According to defendant, plaintiff's view of the statute and regulation would undermine the goals served by the statute and the regulation, referring, as to the statute, to the offsetting of the unfair competitive advantage foreign producers otherwise would enjoy from government subsidies and, as to the regulation, to recognizing that "benefits provided to upstream input suppliers benefit *all downstream products* in the line of production." *Id*. (citations omitted). Defendant further argues:

> Accepting the narrow reading proffered by GFCL would undermine these goals by allowing companies to avoid countervailing-duty exposure merely by dedicating the input product to something in addition to subject merchandise, or, like here, commingling the input product (wind power) with other resources such that its use cannot be linked solely to subject merchandise.

Id. Defendant adds, "[t]hat is not the outcome Commerce envisioned when declaring that it is 'extremely sensitive to potential circumvention of the countervailing duty law.'" *Id*. at 6–7 (quoting *Countervailing Duties*, 63 Fed. Reg. at 65,400).

By speaking only in generalities, and engaging in discussion as to "circumvention" that is irrelevant to the record facts of this case, defendant's third argument fails to take into account how the statute and § 351.525(b)(6)(iv) address the particular situation presented by the electrical energy input provided to GFCL by Inox Wind Limited. In 19 U.S.C. § 1671(e), the statute addresses upstream subsidies by directing Commerce to perform an upstream subsidy analysis when there is reason to believe or suspect that an upstream subsidy is being provided. The plastics example in the Preamble, which illustrates the limitations under which Commerce will resort to § 351.525(b)(6)(iv),

recognizes that the regulation is an exception to the general statutory rule. Defendant's argument overlooks the pertinent discussion in the Preamble clarifying that where, as here, the input is not primarily dedicated to the production of the downstream product, Commerce "will rely on the upstream subsidy provision in the statute" to capture any benefits that are passed to the downstream producer. *Countervailing Duties*, 63 Fed. Reg. at 65,401.

Defendant-intervenor's arguments are also misguided. Daikin relies upon a decision of this Court, *Icdas Celik Enerji Tersane ve Ulasim Sanayi A.S. v. United States*, 45 CIT __, 498 F. Supp. 3d 1345 (2021) ("*Icdas*"), to support its position that the Department's interpretation of 19 C.F.R. § 351.525(b)(6)(iv) was permissible. Def.-Int.'s Resp. 15–16; Def.-Int.'s Suppl. Br. 13. This case is not on point. In *Icdas*, this Court sustained a factual finding that the input supplied by a cross-owned affiliate (scrap) was "primarily dedicated" to the production of the subject merchandise (steel rebar). *Icdas*, 45 CIT at __, 498 F. Supp. 3d at 1363. An analogous finding was not made, and on the record evidence could not have been made, with respect to the electricity input in the investigation at issue here.

Defendant-intervenor argues that the terms "downstream product" and "downstream products" as used in § 351.525(b)(6)(iv) "should be interpreted to be interchangeable, with the singular term including the plural and the plural including the singular." Def.-Int.'s Suppl. Br. 3. Daikin makes the related argument that had Commerce intended for "the downstream product" to refer only to subject merchandise, it would have so provided. *Id*. at 5.

Neither of these arguments is convincing. For the reasons the court has explained, they do not address the central problem with the action Commerce took in this case, which stemmed from a misinterpretation of the regulation. The reference in the regulation to "the downstream product" is not only singular, it is also a reference to a *specific* product. Daikin seems to acknowledge this point in stating that "[w]hile the 'downstream product' may be 'subject merchandise' based on the facts in some cases, it may be defined more broadly than 'subject merchandise' in others." *Id*. The point is, "the downstream product" has to be "defined" by Commerce in some way so that the "link in the overall production chain" analysis directed by the Preamble can be performed. In this case, the Department's interpretation of § 351.525(b)(6)(iv) failed to identify any specific downstream product and thus failed to consider the role electricity performed in the production of such a product. Daikin discusses the Preamble examples on lumber and pasta, *id*. at 8–9, but its discussion misses the essential problem by failing to address the lack of any specific

relationship between electricity and the downstream product (whatever Commerce considered it to be) in the production chain. In summary, the problem is that electricity cannot be shown on this record to be "primarily dedicated" either to Gujarat Fluorochemicals's PTFE resin or to the production of any of the other (unidentified) products made at GFCL's facilities, when the term "primarily dedicated" is given its correct meaning.

Defendant-intervenor argues, further, that the court should defer to the Department's interpretation of an ambiguous regulation. *Id*. at 1–2, 14 (citing *Auer v. Robbins*, 519 U.S. 452 (1997) and *Kisor v. Wilkie*, 139 S. Ct. 2400 (2019)). The court does not agree that deference is owed to the interpretation Commerce applied to § 351.525(b)(6)(iv) in the investigation.

Ambiguity concerning the intended meaning of the term "primarily dedicated to the production of the downstream product" is resolved by the detailed discussion in the Preamble, which as a statement of general applicability must be regarded as the interpretation that is "the agency's authoritative or official position." *Kisor*, 139 S. Ct. at 2406 (2019). An interpretation inconsistent with a prior one ordinarily will not be accorded deference upon judicial review. *See id*. at 2418 (citing *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 515 (1994)).

Daikin's final point is that on the record before it, Commerce did not have the discretion to refuse to apply a countervailing duty with respect to the SIDC land lease. Def.-Int.'s Suppl. Br. 17 ("In short, there is no latitude in the statute or regulations for Commerce to exempt GFCL from countervailing duties once the required elements of a countervailable subsidy and attributable benefit have been found."). This argument wrongly presumes that Commerce validly attributed to Gujarat Fluorochemicals any "benefit" that may have been provided to Inox Wind Limited by the SIDC land lease. The statute provides an "upstream subsidy" procedure, which Commerce declined to follow, and the procedure in § 351.525(b)(6)(iv), which is separate from the statutory procedure, had no application in this case due to the absence of the type of physical relationship between electricity and the production chain for the downstream product that the regulation requires for attribution.

3. The Inclusion of the 26.50% Estimated Subsidy Rate with Respect to the SIDC Land Lease Was Unlawful

In summary, the inclusion of the 26.50% estimated subsidy rate was unauthorized by 19 C.F.R. § 351.525(b)(6)(iv) and therefore contrary to law. The countervailing duty investigation is completed and its outcome reviewed judicially as a final determination on the agency

record.[6] Moreover, the 26.50% estimated subsidy rate is being collected contrary to law, with prejudice to this plaintiff, and must cease. In the remand it is ordering, the court will direct Commerce to delete the 26.50% estimated subsidy rate from the overall estimated subsidy rate in the redetermination it files in this case.

E. Inclusion of a 0.12% Estimated Subsidy Rate for the Provision of Land by the Gujarat Industrial Development Corporation

In the Preliminary Decision Memorandum, Commerce stated a preliminary finding with respect to three leases of land to Gujarat Fluorochemicals from the Gujarat Industrial Development Corporation ("GIDC") used for manufacturing facilities. Commerce stated that "[w]e preliminarily determined that the following program did not confer a measurable benefit during the POI. Therefore, we do not reach a preliminary determination as to whether there is a financial contribution or specificity for this program: 1. GIDC's Provision of Land for LTAR." *Prelim. Decision Mem.* at 26. Commerce made no mention of a countervailable subsidy for land leased to Gujarat Fluorochemicals by GIDC in a post-preliminary analysis. Nor is there any mention of it in the published Final Determination, which does not address the individual estimated countervailable subsidy rates.

In the Final Issues and Decision Memorandum, under a heading titled "*GIDC's Provision of Land for LTAR*," Commerce stated that it "corrected the unit price for the land transaction in Ahmedabad Gujarat. The final subsidy rate for this program is 0.12 percent *ad valorem* for GFCL." *Final I&D Mem*. at 7. The reference to "the land transaction in Ahmedabad Gujarat" is a reference to a benchmark value Commerce used with respect to the land leased by the GIDC. *Id*. at 20–22.

The Final Issues and Decision Memorandum contains no analysis of a "financial benefit" or "specificity" for the 0.12% estimated subsidy rate. Defendant concedes this point: "In the Final Determination, as in the PDM [Preliminary Decision Memorandum] and post-preliminary analysis, Commerce did not determine that the GIDC's provision of land for LTAR constitutes a financial contribution or is specific." Def.'s Resp. 29. From the reference to the Ahmedabad Gujarat benchmark, the court can surmise that for the Preliminary Determination Commerce did not find a financial contribution but impliedly presumed one after it performed a revised benchmark analysis.

[6] Defendant has not requested that the court grant the agency the opportunity to conduct an upstream subsidy analysis or to reopen the record for this purpose.

In its response to GFCL's Rule 56.2 motion, "[d]efendant respectfully requests a voluntary remand of the final determination so that Commerce may consider further its analysis with respect to the GIDC's provision of land for LTAR." *Id.* Plaintiff does not oppose a remand on that issue but states that "[t]his Court should not delay its opinion on the merits with respect to Commerce's benchmark and attribution determinations." Pl.'s Reply 23 (citation omitted). Plaintiff's claim, summarily stated, is that Commerce reached an erroneous determination of less than adequate remuneration based on a flawed analysis of benchmark data.

The court does not agree with defendant that the court should order a "remand of the final determination so that Commerce may consider further its analysis with respect to the GIDC's provision of land for LTAR." This formulation of the issue might be interpreted to presume that the land leases by GIDC were for less than adequate remuneration, a determination plaintiff is contesting. The court notes, further, that the discussion of this issue in the Final Issues and Decision Memorandum is inadequate to explain an LTAR and subsidy determination and fails to state critical findings on which it could have been based, including findings associated with a benchmark analysis. The court, therefore, will order Commerce to reconsider in the entirety the decision to include the 0.12% estimated subsidy rate on the GIDC issue.

The court recognizes plaintiff's concern with possible delay. At oral argument, defendant informed the court that Commerce would require 30 days to submit a redetermination in response to its request. The court will allow only this limited time period for Commerce to submit a new determination and will grant no extension of the deadline absent extraordinary and compelling circumstances. To further expedite this case, the court will allow only brief time periods for comments following submission of the remand redetermination.

III. CONCLUSION AND ORDER

In its motion for judgment on the agency record, plaintiff moves this Court to hold the Final Determination contrary to law, remand the Final Determination to Commerce to recalculate the estimated subsidy rate, and grant such additional relief as is just and proper. Pl.'s Mot. 5. As discussed above, Commerce upon remand must delete the 26.50% estimated subsidy rate for the provision of SIDC land from the estimated total countervailable subsidy rate. Commerce also must reconsider imposing an estimated subsidy rate for the provision of the GIDC land.

Upon consideration of plaintiff's motion for judgment on the agency record, upon consideration of all papers and proceedings had herein, and with due deliberation, it is hereby

ORDERED that plaintiff's Rule 56.2 motion for judgment on the agency record be, and hereby is, granted; it is further

ORDERED that the Final Determination be, and hereby is, ruled to be contrary to law with respect to the inclusion of a 26.50% estimated subsidy rate for the provision of land by the SIDC; it is further

ORDERED that Commerce shall submit a new determination (the "Remand Redetermination") consistent with this Opinion and Order within 30 days of the date of issuance of this Opinion and Order; it is further

ORDERED that in the Remand Redetermination Commerce shall delete from the overall rate the 26.50% estimated subsidy rate for the provision of land by the SIDC; it is further

ORDERED that Commerce shall reconsider its inclusion of an estimated 0.12% subsidy rate for the provision of land by the GIDC; it is further

ORDERED that plaintiff and defendant-intervenor may submit comments on the Remand Redetermination within 14 days of the filing of the Remand Redetermination; and it is further

ORDERED that defendant may file a response to the comments on the Remand Redetermination within 7 days of the filing of the last comment submission.

Dated: January 24, 2023
New York, New York

/s/ Timothy C. Stanceu
TIMOTHY C. STANCEU
JUDGE

Slip Op. 23–10

J.D. IRVING, LIMITED, Plaintiff, v. UNITED STATES AND U.S. DEPARTMENT OF COMMERCE, Defendants.

Before: Timothy M. Reif, Judge
Court No. 21–00641

[Granting defendants' motion to dismiss for lack of subject matter jurisdiction pursuant to U.S. Court of International Trade Rule 12(b)(1).]

Dated: January 25, 2023

Jay C. Campbell, White and Case LLP, of Washington, D.C., argued for plaintiff J.D. Irving, Limited. With him on the brief were *Walter J. Spak* and *Cristina M. Cornejo*.

Kelly A. Krystyniak, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, D.C., argued for defendants United States and the U.S. Department of Commerce. With her on the briefs were *Brian M. Boynton*, Principal Deputy Assistant Attorney General, *Patricia M. McCarthy*, Director, and *Claudia Burke*, Assistant Director. Of counsel on the briefs was *Paul K. Keith*, Senior Attorney, Office of the Chief Counsel for Trade Enforcement and Compliance, U.S. Department of Commerce, of Washington, D.C.

OPINION

* * *

Reif, Judge:

J.D. Irving, Limited ("plaintiff" or "J.D. Irving") brings the instant action to "contest[] the antidumping duty ("AD") cash deposit instructions issued by the U.S. Department of Commerce ("Commerce") to U.S. Customs and Border Protection [("Customs")] following publication of the final results of the 2019 administrative review of the AD duty order on certain softwood lumber products from Canada." Compl. ¶ 1, ECF No. 4; *see* Cash Deposit Instructions for Certain Softwood Lumber from Canada, Message No. 1343410 (A-122–857) (Dec. 9, 2021) (Compl. Attach. 1) ("Commerce's Cash Deposit Instructions"); *Certain Softwood Lumber Products from Canada: Antidumping Duty Order and Partial Amended Final Determination* ("*Softwood Lumber Order*"), 83 Fed. Reg. 350 (Dep't of Commerce Jan. 3, 2018). The United States and Commerce (collectively, "defendants") move to dismiss the instant action pursuant to Rules 12(b)(1) and 12(b)(6) of the U.S. Court of International Trade ("USCIT" or the "Court"). *See* Def.'s Mot. to Dismiss ("Defs. Br."), ECF No. 16; Def.'s Reply in Support of Its Mot. to Dismiss ("Defs. Reply Br."), ECF No. 18; *see also* Pl.'s Resp. in Opp'n to Def.'s Mot. to Dismiss ("Pl. Br."), ECF No. 17. For the reasons discussed below, the court grants defendants' motion to dismiss for lack of subject matter jurisdiction pursuant to USCIT Rule 12(b)(1).

BACKGROUND

J.D. Irving is a Canadian producer and exporter of merchandise subject to the Softwood Lumber Order, as well as the importer of record of that merchandise. Compl. ¶ 8. Commerce published the Softwood Lumber Order on January 3, 2018. *See Softwood Lumber Order*, 83 Fed. Reg. 350.

On April 1, 2019, Commerce initiated a first administrative review ("AR 1") of the Softwood Lumber Order. *Certain Softwood Lumber Products from Canada: Initiation of Antidumping and Countervailing Duty Administrative Reviews*, 84 Fed. Reg. 12,209, 12,209–10 (Dep't of Commerce Apr. 1, 2019) (initiation notice). AR 1 covered entries of subject merchandise made between June 30, 2017, and December 31, 2018. *Certain Softwood Lumber Products from Canada: Final Results of Antidumping Duty Administrative Review; 2017–2018 ("AR 1 Final Results")*, 85 Fed. Reg. 76,519, 76,51920 (Dep't of Commerce Nov. 30, 2020). J.D. Irving was not selected as a mandatory respondent in this review. Accordingly, upon the publication of the AR 1 Final Results on November 30, 2020, Commerce assigned to J.D. Irving the non-selected companies' assessment rate of 1.57%. *See id.* at 76,520–21. Pursuant to section 751(a)(2)(C) of the Tariff Act of 1930, as amended, 19 U.S.C. § 1675(a)(2)(C) (2018),[1] Commerce instructed Customs to collect at this 1.57% rate cash deposits on J.D. Irving's entries made on or after the publication date of the AR 1 Final Results. *See id.* at 76,520.

On March 10, 2020, Commerce initiated a second administrative review ("AR 2") of the Softwood Lumber Order. *Initiation of Antidumping and Countervailing Duty Administrative Reviews*, 85 Fed. Reg. 13,860, 13,862 (Dep't of Commerce Mar. 10, 2020) (initiation notice). AR 2 covered entries made between January 1, 2019, and December 31, 2019. *Certain Softwood Lumber Products from Canada: Final Results of Antidumping Duty Administrative Review; 2019 ("AR 2 Final Results")*, 86 Fed. Reg. 68,471, 68,471–73 (Dep't of Commerce Dec. 2, 2021). J.D. Irving was not selected as a mandatory respondent in this review. Upon the publication of the AR 2 Final Results on December 2, 2021, Commerce assigned to J.D. Irving the non-selected companies' assessment rate of 11.59%. *See id.* at 68,472–73. Commerce instructed Customs to collect at this 11.59% rate cash deposits on J.D. Irving's entries made on or after December 2, 2021, the publication date of the AR 2 Final Results. *See id.* at 68,473; Commerce's Cash Deposit Instructions.

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

Following Commerce's initiation of an AR 2 on March 10, 2020, and *prior* to Commerce's publication of the AR 2 Final Results on December 2, 2021, Commerce initiated a third administrative review ("AR 3") of the Softwood Lumber Order. *Initiation of Antidumping and Countervailing Duty Administrative Reviews*, 86 Fed. Reg. 12,599, 12,601 (Dep't of Commerce Mar. 4, 2021) (initiation notice). On March 4, 2021, Commerce initiated an AR 3, which covered entries made between January 1, 2020, and December 31, 2020. *Id.*

In contrast with AR 1 and AR 2, no party requested that Commerce review J.D. Irving's entries that would have been subject to an AR 3. *See id.* at 12,603; Compl. ¶ 17. Accordingly, Commerce instructed Customs to liquidate J.D. Irving's entries that would have been subject to an AR 3 at the 1.57% rate then in effect, which had been assigned to J.D. Irving in the AR 1 Final Results. *See* Automatic Liquidation Instructions for Certain Softwood Lumber Products for the Period 01/01/2020 Through 12/31/2020, Message No. 1106404 (A-122–857) (Apr. 16, 2021) (Compl. Attach. 7) ("Automatic Liquidation Instructions"); *AR 1 Final Results*, 85 Fed. Reg. at 76,520; 19 C.F.R. § 351.212(c)(1)(i). In addition, Commerce instructed Customs to continue to collect cash deposits on J.D. Irving's entries at this 1.57% rate. *See* 19 C.F.R. § 351.212(c)(1)(ii) ("If [Commerce] does not receive a timely request for an administrative review . . . [Commerce] . . . will instruct [Customs] to . . . continue to collect the cash deposits previously ordered."); Automatic Liquidation Instructions; Cash Deposit Instructions for Certain Softwood Lumber Product from Canada, Message No. 0343402 (A-122–857) (Dec. 8, 2020).

On January 31, 2022, J.D. Irving requested that Commerce review J.D. Irving's entries subject to a fourth administrative review ("AR 4") of the Softwood Lumber Order. *See* Letter from White & Case LLP, to Sec'y of Commerce re: Certain Softwood Lumber Products from Canada: Request for Administrative Review for J.D. Irving, Limited, Pub. Doc. No. 4207148–01 (A-122–857) (Jan. 31, 2022). On March 9, 2022, Commerce initiated an AR 4, which covers entries made between January 1, 2021, and December 31, 2021. *Initiation of Antidumping and Countervailing Duty Administrative Reviews*, 87 Fed. Reg. 13,252, 13,252–54 (Dep't of Commerce Mar. 9, 2022) (initiation notice).

Plaintiff alleges in the instant action that "Commerce acted arbitrarily and in a manner inconsistent with Congress'[] intent when it replaced" the 1.57% cash deposit rate assigned to J.D. Irving following its decision not to request an AR 3, with the 11.59% rate assigned to J.D. Irving in connection with the earlier AR 2. Compl. ¶ 27. According to plaintiff, Commerce's decision to replace the 1.57% rate

with the 11.59% rate "calculated for an *earlier* period . . . injects uncertainty into the review-request process" and contravenes 19 U.S.C. § 1675 as well as Commerce's regulations. *Id.* ¶ 19 (emphasis in original).

Plaintiff filed its complaint on December 30, 2021, asserting that the court has subject matter jurisdiction under 28 U.S.C. § 1581(i) to hear the instant action. *Id.* ¶ 2. In its complaint, plaintiff alleges that "[n]ormally, the court would have jurisdiction to review [plaintiff's] claim — and to grant the relief [that plaintiff] seeks — under 28 U.S.C. § 1581(c)." *Id.* ¶ 4. However, on December 28, 2021 — two days prior to plaintiff's filing of the complaint — other interested parties requested binational panel review of the AR 2 Final Results pursuant to Article 10.12 of the United States–Mexico–Canada Agreement ("USMCA"),[2] thereby providing a binational panel with "exclusive review" of the AR 2 Final Results pursuant to 19 U.S.C. § 1516a(g)(2). *Id.* ¶ 5; *see* Letter from McDermott Will & Emery LLP et al., to USMCA Secretariat, U.S. Sec'y, re: Request for Panel Review of Second Affirmative Antidumping Duty Administrative Review of Certain Softwood Lumber Products from Canada (Dec. 28, 2021) (Compl. Attach. 5) ("Request for Panel Review").

On March 4, 2022, defendants moved to dismiss the instant action, to which plaintiff responded in opposition on March 14, 2022. *See generally* Defs. Br.; Pl. Br.; Defs. Reply Br. On May 2, 2022, the court denied plaintiff's motion to expedite the briefing and consideration of the instant action. *J.D. Irving, Ltd. v. United States*, 46 CIT __, 570 F. Supp. 3d 1349 (2022).

LEGAL FRAMEWORK

I. Binational panel review under the United States–Mexico–Canada Agreement

On July 1, 2020, the USMCA entered into force, superseding the North American Free Trade Agreement ("NAFTA"). *See supra* note 2; United States–Mexico–Canada Agreement Implementation Act, Pub. L. No. 116–113, 134 Stat. 11 (2020). Article 10.12 of the USMCA, "like NAFTA Article 1904, provides a dispute settlement mechanism for purposes of reviewing antidumping and countervailing duty determi-

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[2] United States–Mexico–Canada Agreement, art. 10.12 ¶¶ 2, 8, 9, July 1, 2020, OFF. OF THE U.S. TRADE REP., https://ustr.gov/trade-agreements/free-trade-agreements/unitedstates-mexico-canada-agreement/agreement-between; Annex II, Rules of Procedure for Article 10.12 (Binational Panel Reviews) ("*Art. 10.12 Rules of Procedure*"), R. 76 ¶ 1, OFF. OF THE U.S. TRADE REP., https://ustr.gov/sites/default/files/files/agreements/usmca/AnnexIIRulesProcedureUSMC ABinationalPanels.pdf (last visited Jan. 20, 2022).

nations issued by the United States, Canada, and Mexico." *Procedures and Rules for Article 10.12 of the United States–Mexico–Canada Agreement* ("*USMCA Procedures and Rules*"), 86 Fed. Reg. 70,045, 70,045 (Dep't of Commerce Dec. 9, 2021). The procedures and rules set forth in Article 10.12 of the USMCA are "virtually unchanged" from those in Article 1904 of the NAFTA. *Id.*

Article 10.12 of the USMCA provides that a binational panel "may uphold a final determination" by Commerce "or remand [the determination] for action not inconsistent with the panel's decision." USMCA, art. 10.12 ¶ 8. In addition, "[t]he decision of a panel . . . shall be binding on the involved Parties with respect to the particular matter . . . that is before the panel." *Id.* ¶ 9. Further, and pursuant to Article 10.12 ¶ 14 of the USMCA, the USMCA Free Trade Commission has adopted Rules of Procedure that are "applicable to all binational panel reviews under the USMCA." *USMCA Procedures and Rules*, 86 Fed. Reg. at 70,045; *see* USMCA, art. 10.12 ¶ 14. Rule 12 provides that "panel review shall be limited to . . . the allegations of error of fact or law . . . that are set out in the Complaints filed in the panel review . . . ." *Art. 10.12 Rules of Procedure*, R. 12(a). Rule 77 provides that subsequent to a panel decision that remands to Commerce a challenged determination, Commerce shall "give notice of the action taken pursuant to a remand of the panel by filing . . . a Determination on Remand within the time specified by the panel." *Id.* R. 77 ¶ 1.

19 U.S.C. § 1516a(g) codifies into U.S. law the binational panel review process set forth in Article 10.12 of the USMCA. 19 U.S.C. § 1516a(g)(2) provides:

> (2) EXCLUSIVE REVIEW OF DETERMINATION BY BINATIONAL PANELS. If binational panel review of a determination is requested pursuant to . . . article 10.12 of the USMCA, then . . . —
>
> (A) the determination is not reviewable under [19 U.S.C. § 1516a(a)], and
>
> (B) no court of the United States has power or jurisdiction to review the determination on any question of law or fact by an action in the nature of mandamus or otherwise.

19 U.S.C. § 1516a(g)(2)(A)-(B). "[T]he binational panel process replaces the forum — not the remedies — available to the parties." *Bldg. Sys. de Mexico, S.A. de C.V. v. United States*, 44 CIT __, __, 476 F. Supp. 3d 1401, 1410 (2020); *see* S. Rep. No. 100509, at 31 (1988), *as reprinted in* 1988 U.S.C.C.A.N. 2395, 2426 ("Because binational panels act as a substitute for U.S. courts in deciding whether a determi-

nation is consistent with U.S. law, the Committee intends binational panel decisions to be implemented in the same manner that court decisions are implemented under current law.").

Several exceptions to the exclusive review of a determination by a binational panel are set forth in 19 U.S.C. § 1516a(g)(3) and (4).[3] Further, the statute defines "determination" with reference to the "[r]eviewable determinations" enumerated in 19 U.S.C. § 1516a(a)(2)(B), as including "a final determination . . . by [Commerce] . . . under section 1675" of Title 19 of the U.S. Code — *i.e.*, Commerce's final results with respect to the administrative review of an AD or CVD order. 19 U.S.C. § 1516a(a)(2)(B)(iii); 19 U.S.C. § 1675; *cf. Shinyei Corp. of Am. v. United States*, 355 F.3d 1297, 1304, 1309–10 (Fed. Cir. 2004) (stating that reviewable determinations under 19 U.S.C. § 1516a(a)(2)(B) include Commerce's "final results" of an administrative review).

II. Subject matter jurisdiction of the Court under 28 U.S.C. § 1581(i)

Whether a court has subject matter jurisdiction to hear an action is a "threshold" inquiry. *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94 (1998). 28 U.S.C. § 1581(i) is the Court's "residual" jurisdictional provision, *Fujitsu Gen. Am., Inc. v. United States*, 283 F.3d

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[3] 19 U.S.C. § 1516a(g)(3) provides:

(3) EXCEPTION TO EXCLUSIVE BINATIONAL PANEL REVIEW

(A) In general. A determination is reviewable under [19 U.S.C. § 1516a(a)] if the determination sought to be reviewed is —

(i) a determination as to which neither the United States nor the relevant FTA country requested review by a binational panel pursuant to . . . article 10.12 of the USMCA;

(ii) a revised determination issued as a direct result of judicial review, commenced pursuant to [19 U.S.C. § 1516a(a)], if neither the United States nor the relevant FTA country requested review of the original determination;

(iii) a determination issued as a direct result of judicial review that was commenced pursuant to [19 U.S.C. § 1516a(a)] prior to the entry into force of the . . . USMCA;

(iv) a determination which a binational panel has determined is not reviewable by the binational panel;

(v) a determination as to which binational panel review has terminated pursuant to article 10.13 of the USMCA; or

(vi) a determination as to which extraordinary challenge committee review has terminated pursuant to article 10.13 of the USMCA.

19 U.S.C. § 1516a(g)(A)(i)-(vi). Further, 19 U.S.C. § 1516a(g)(4) provides for certain exceptions with respect to actions that raise constitutional issues. *See Mitsubishi Elecs. Indus. Canada, Inc. v. Brown*, 20 CIT 313, 316, 917 F. Supp. 836, 838 (1996). There is no indication — nor do the parties assert — that any of the foregoing exceptions apply with respect to the instant action.

1364, 1371 (Fed. Cir. 2002) (citing *Conoco, Inc. v. United States Foreign-Trade Zones Bd.*, 18 F.3d 1581, 1584 n.4 (Fed. Cir. 1994)), which allows the Court to "take jurisdiction over designated causes of action founded on other provisions of law." *Norcal/Crosetti Foods, Inc. v. United States*, 963 F.2d 356, 359 (Fed. Cir. 1992) (citation omitted). The Court previously has stated that 28 U.S.C. § 1581(i) constitutes "a Congressional fail-safe device" and that "[i]f the circumstances of a case are sufficiently unusual so that one may presume that Congress could not have provided for such a case under the general language of 19 U.S.C. § 1516a . . . 28 U.S.C. § 1581(i) is available to afford a means of vindication of statutory rights." *Hylsa, S.A. de C.V. v. United States*, 21 CIT 222, 227–28, 960 F. Supp. 320, 324 (1997), *aff'd sub nom. Hylsa, S.A. v. Tuberia Nat., S.A.*, 135 F.3d 778 (Fed. Cir. 1998). However, the "scope" of 28 U.S.C. § 1581(i) is "strictly limited," *Norcal/Crosetti*, 963 F.2d at 359, and jurisdiction under this provision "may not be invoked when jurisdiction under another [sub]section of § 1581 *is or could have been available*, unless the relief provided under that other subsection would be manifestly inadequate." *Consol. Bearings Co. v. United States*, 25 CIT 546, 549, 166 F. Supp. 2d 580, 583 (2001) (emphasis in original) (quoting *Ad Hoc Comm. of Fla. Producers of Gray Portland Cement v. United States*, 22 CIT 902, 906, 25 F. Supp. 2d 352, 357 (1998)) (internal quotation marks omitted).

To determine whether jurisdiction "is or could have been available" under another subsection of 28 U.S.C. § 1581, the Court is required to "look to the true nature of the action." *Hartford Fire Ins. Co. v. United States*, 544 F.3d 1289, 1292–93 (Fed. Cir. 2008); *cf. Norsk Hydro Canada, Inc. v. United States*, 472 F.3d 1347, 1355 (Fed. Cir. 2006) ("[A] party may not expand a court's jurisdiction by creative pleading."); *Sunpreme Inc. v. United States*, 892 F.3d 1186, 1191, 1193–94 (Fed. Cir. 2018) (concluding that the plaintiff's "characterization of its appeal . . . [was] unavailing" in view of the nature of the relief that the plaintiff sought in its complaint and, consequently, that the court lacked jurisdiction under 28 U.S.C. § 1581(i)). Further, to determine whether the relief provided under another subsection would be "manifestly inadequate," the Court evaluates whether such relief would constitute an "exercise in *futility*, or [would be] 'incapable of producing any result; failing utterly of the desired end through intrinsic defect; useless, ineffectual, [in] vain.'" *Hartford Fire*, 544 F.3d at 1294 (emphasis in original) (quoting OXFORD ENGLISH DICTIONARY (2d ed. 1989)). The party that seeks to invoke the Court's jurisdiction "bears the burden of demonstrating manifest inadequacy." *Intercontinental Chems., LLC v. United States*, 44 CIT __, __, 483 F. Supp. 3d

1232, 1241 (2020) (citing *Miller & Co. v. United States*, 824 F.2d 961, 964 (Fed. Cir. 1987)).

With respect to the binational review process set forth in Article 10.12 of the USMCA, 28 U.S.C. § 1581(i)(2) provides that the Court's jurisdictional statute "shall *not* confer jurisdiction over [a] . . . determination which is reviewable by . . . a binational panel under [19 U.S.C. § 1516a(g)]." 28 U.S.C. § 1581(i)(2)(B) (emphasis supplied). The legislative history of 28 U.S.C. § 1581(i)(2) indicates that Congress amended the Court's jurisdictional statute to "assure that a litigant *cannot* invoke the CIT's 'residual jurisdiction' . . . for the purpose of circumventing the binational panel system." S. Rep. 100–509, at 35 (emphasis supplied). The legislative history indicates further that Congress intended for the amendment to "clarify" the "precise scope of the 'residual jurisdiction' authority" with respect to determinations that are "reviewable" by a binational panel so that it is clear that the Court's residual jurisdiction does not apply to those determinations. *Id.*; H.R. Rep. 103–361, 86 (1993), *as reprinted in* 1993 U.S.C.C.A.N. 2552, 2636. Consequently, if a determination is reviewable by a binational panel, 28 U.S.C. § 1581(i) "shall not confer jurisdiction" over the determination. 28 U.S.C. § 1581(i)(2)(B); *see* 19 U.S.C. § 1516a(g); *Bhullar v. United States*, 27 CIT 532, 544, 259 F. Supp. 2d 1332, 1341–42 (2003), *aff'd*, 93 F. App'x 218 (Fed. Cir. 2004).

DISCUSSION

I. Positions of the parties

Defendants argue that the court lacks subject matter jurisdiction under 28 U.S.C. § 1581(i) to hear the instant action. *See* Defs. Br. at 6–10. To start, defendants contend that jurisdiction "is or could have been available" under 28 U.S.C. § 1581(c). *Id.* at 10. According to defendants, the instant action concerns a "[d]etermination that would have been properly reviewable pursuant to section 1581(c), but for a request for binational panel review of the determination." *Id.* at 1, 10; *see* Request for Panel Review. Defendants argue also that plaintiff characterizes inaccurately the instant action as involving a challenge to Commerce's Cash Deposit Instructions. *See* Defs. Reply Br. at 4. According to defendants, plaintiff "attempts to create a distinction where none exists: Commerce's instructions to [Customs] implementing Commerce's determination [in the AR 2 Final Results] are not — in and of themselves — a separate determination." *Id.*

Defendants contend further that the relief provided to plaintiff under 28 U.S.C. § 1581(c) would not be "manifestly inadequate." Defs. Br. at 9; *see* Defs. Reply Br. at 4. Defendants argue that the "true nature" of the instant action is "twofold": (1) "a challenge to the issue

[that J.D. Irving] raised in [AR 2] — that Commerce ruled upon and that is now on review with a binational panel"; and (2) "a challenge to the cash deposit rate currently being applied to [J.D. Irving's] new entries" made on or after December 2, 2021. Defs. Reply Br. at 4. Defendants maintain that plaintiff can obtain a remedy that is not manifestly inadequate through a favorable binational panel decision as to Commerce's determination in the AR 2 Final Results and "any additional administrative review challenges" with respect to the cash deposits collected on J.D. Irving's entries made on or after December 2, 2021. *Id.* Consequently, defendants argue that the court lacks subject matter jurisdiction under 28 U.S.C. § 1581(i) and should dismiss the instant action. *See* Defs. Br. at 6–10.

Plaintiff argues that the court has subject matter jurisdiction under 28 U.S.C. § 1581(i) to hear the instant action. *See* Pl. Br. at 1–2. Plaintiff argues that subject matter jurisdiction "is or could have been available" under 28 U.S.C. § 1581(c). Compl. ¶ 5; *see* Pl. Br. at 7; *Intercontinental Chems.*, 44 CIT at __, 483 F. Supp. 3d at 1236 (citation omitted). Plaintiff maintains separately that the Court has jurisdiction over the instant action because the action involves "a challenge to Commerce's 'administration and enforcement' of [the AR 2 Final Results] through its issuance of Cash Deposit Instructions to [Customs] . . . for which jurisdiction lies under 28 U.S.C. § 1581(i)(1)(D)." Pl. Br. at 9 (citations omitted).

Plaintiff contends further that any relief provided under 28 U.S.C. § 1581(c) would be "manifestly inadequate" because the binational panel "lack[s] equitable or injunctive powers" to order "Commerce to instruct [Customs] to reinstate J.D. Irving's lawful AD cash deposit rate retroactively as of December 2, 2021." *Id.* at 6 (citing Compl. ¶¶ 2–7), 13 n.4, 14; *see* Oral Arg. Tr. at 13:02–08, ECF No. 23. Consequently, plaintiff argues that it "could not obtain meaningful relief through USMCA binational panel review of the [AR 2 Final Results]," as the binational panel "would be unable to order Commerce to instruct [Customs] to reinstate J.D. Irving's [AR 3] AD cash deposit rate *retroactively*, depriving J.D. Irving of relief from Commerce's unlawful decision to replace [the AR 3] rate with an AD cash deposit rate for [AR 2]." Pl. Br. at 8 (emphasis in original). Plaintiff contends also that the relief provided through a challenge in one or more ARs to the cash deposit rate applied to J.D. Irving's entries made on or after December 2, 2021, would be manifestly inadequate because the court would be able to provide plaintiff with its requested injunctive relief while a binational panel decision would not even have precedential effect. *See id.* at 7–8; Oral Arg. Tr. at 13:02–08, 16:01–09,

21–25; *cf.* 19 U.S.C. § 1516a(b)(3). Consequently, plaintiff argues that the court has subject matter jurisdiction under 28 U.S.C. § 1581(i) and should deny defendants' motion to dismiss. *See* Pl. Br. at 1–2.

II. Analysis

The court concludes that it lacks subject matter jurisdiction under 28 U.S.C. § 1581(i) to hear the instant action and grants defendants' motion to dismiss pursuant to USCIT Rule 12(b)(1). Accordingly, the court does not address defendants' motion with respect to plaintiff's standing or defendants' motion to dismiss pursuant to USCIT Rule 12(b)(6) for failure to state a claim, as dismissal for lack of subject matter jurisdiction renders these issues moot. *See Intercontinental Chems.*, 44 CIT at __, 483 F. Supp. 3d at 1235; *MS Solar Invs., LLC v. United States*, Slip Op. 22–140, 2022 WL 17581662, at *2 (CIT Dec. 12, 2022) (quoting *Bell v. Hood*, 327 U.S. 678, 682 (1946)).

A. Whether subject matter jurisdiction to hear the instant action "is or could have been available" under 28 U.S.C. § 1581(c)

The court concludes that subject matter jurisdiction to hear the instant action "is or could have been available" under 28 U.S.C. § 1581(c), *but for* the decision by interested parties to request binational panel review of the AR 2 Final Results pursuant to Article 10.12 of the USMCA. *Intercontinental Chems.*, 44 CIT at __, 483 F. Supp. 3d at 1236 (citation omitted); *see* Request for Panel Review. 28 U.S.C. § 1581(c) provides the Court with subject matter jurisdiction with respect to "any civil action commenced under [19 U.S.C. § 1516a]." 28 U.S.C. § 1581(c). Further, 19 U.S.C. § 1516a(a)(2)(B)(iii) provides that "[a] final determination . . . by [Commerce] . . . under [19 U.S.C. § 1675]" constitutes a "[r]eviewable determination[]" under 28 U.S.C. § 1581(c). 19 U.S.C. § 1516a(a)(2)(B)(iii). Commerce published the AR 2 Final Results pursuant to 19 U.S.C. § 1675. *See AR 2 Final Results*, 86 Fed. Reg. at 68,472–73; 19 U.S.C. § 1675(a)(1). Therefore, as noted, subject matter jurisdiction to hear the instant action, which involves plaintiff's challenge to Commerce's determination in the AR 2 Final Results, not the "administration and enforcement" of that determination as those relate to Commerce's Cash Deposit Instructions — "could have been available" under 28 U.S.C. § 1581(c). *See AR 2 Final Results*, 86 Fed. Reg. 68,471 and accompanying Issues and Decision Memorandum (Dep't of Commerce Nov. 23, 2021) at 41–42; Compl. ¶ 5.

The instant action involves a challenge to Commerce's determination in the AR 2 Final Results notwithstanding plaintiff's characterization of the challenge as relating to Commerce's Cash Deposit

Instructions. *See* Pl. Br. at 8–9. The U.S. Court of Appeals for the Federal Circuit ("Federal Circuit") has stated that the Court is required to "look to the true nature of the action" to determine whether jurisdiction would be available under another subsection of 28 U.S.C. § 1581. *Hartford Fire*, 544 F.3d at 1293. The Court has applied this guidance in the context of disputes similar to that in the instant case as to whether the "true nature" of an action involves a final determination by Commerce or Commerce's instructions to Customs with respect to the "administration and enforcement" of such a determination. *See, e.g.*, *Mittal Canada, Inc. v. United States*, 30 CIT 154, 414 F. Supp. 2d 1347 (2006); *Wanxiang Am. Corp. v. United States*, 43 CIT __, 399 F. Supp. 3d 1323 (2019); *Parkdale Int'l, Ltd. v. United States*, 31 CIT 720, 725, 491 F. Supp. 2d 1262, 1269 (2007) ("The general rule appears to be that liquidation instructions lead to § 1581(i) jurisdiction *unless they directly implement* a 19 U.S.C. § 1516a determination, such as the final results of an administrative review under § 1675." (emphasis supplied)). In these decisions, the Court has concluded that the "true nature" of an action involves Commerce's instructions to Customs in circumstances in which the instructions are *inconsistent with* or *contain a legal error that is distinct from* Commerce's determination. *Compare Mittal Canada*, 30 CIT at 160–61, 414 F. Supp. 2d at 1353 (stating that the action concerned whether "Commerce's liquidation instructions contravene[d] the Final Results" and, consequently, that the plaintiff "ha[d] defined its claim such that the Court ha[d] jurisdiction" under 28 U.S.C. § 1581(i)), *with Wanxiang*, 43 CIT at __ & n.11, 399 F. Supp. 3d at 1331 & n.11 (concluding that the contested guidance of Commerce "reiterated — . . . rather than deviat[ed] from — the results of the administrative reviews" and, consequently, that the plaintiff could have brought the action under 28 U.S.C. § 1581(c)), *and Intercontinental Chems.*, 44 CIT at __, 483 F. Supp. 3d at 1240 ("Plaintiff argues that the issue is with the liquidation instructions, but these instructions are based — and not inconsistently — on the Final Results; the underlying issue is therefore not with the liquidation instructions but with the Final Results.").

No inconsistency is present here. Commerce's Cash Deposit Instructions are consistent with Commerce's determination in the AR 2 Final Results. The record does not indicate that there is any "discrepancy" between Commerce's determination in the AR 2 Final Results with respect to the cash deposit rate assigned to J.D. Irving and Commerce's instructions to Customs. *Intercontinental Chems.*, 44 CIT at __, 483 F. Supp. 3d at 1240. Rather, Commerce's instructions

implement the AR 2 Final Results in accordance with Commerce's determination. *See id.* Accordingly, the "true nature" of plaintiff's challenge in the instant action involves Commerce's determination in the AR 2 Final Results, *not* Commerce's instructions to Customs. *Hartford Fire*, 544 F.3d at 1293.

Consequently, subject matter jurisdiction for this Court to hear plaintiff's challenge with respect to the AR 2 Final Results "could have been available" under 28 U.S.C. § 1581(c), *but for* the binational panel review that now is underway. *Intercontinental Chems.*, 44 CIT at __, 483 F. Supp. 3d at 1236 (citation omitted); *see* Request for Panel Review.

B. Whether the relief provided to plaintiff would be "manifestly inadequate"

The court concludes next that plaintiff does not meet its burden to demonstrate the manifest inadequacy of the relief available "either in this court under 28 U.S.C. § 1581(c) or before a binational panel" pursuant to Article 10.12 of the USMCA. *Hylsa v. United States* (*Hylsa II*), 22 CIT 44, 46 (1998), *dismissed sub nom. HYLSA, S.A. de C.V. v. United States*, 185 F.3d 881 (Fed. Cir. 1999), *and dismissed sub nom. HYLSA, S.A. de C.V. v. United States*, 185 F.3d 881 (Fed. Cir. 1999); *see Miller & Co.*, 824 F.2d at 963 ("[T]he party asserting § 1581(i) jurisdiction has the burden to show how [the] remedy would be manifestly inadequate."); S. Rep. 100–509, at 35 (indicating that Congress "amend[ed] [28 U.S.C. § 1581(i)] to clarify that [this] section may not be used to review an antidumping or countervailing duty determination which is reviewable by the CIT under section [19 U.S.C. § 1516a(a)] or by a binational panel under [19 U.S.C. § 1516a(g)]"). In the instant action, plaintiff requests the following relief with respect to its challenge to Commerce's determination: (1) declaratory relief as to the lawfulness of the cash deposit rate assigned to J.D. Irving; and (2) the retroactive reinstatement of the 1.57% rate and the refund of excess cash deposits collected on entries made on or after December 2, 2021. See Compl. at 17. The court addresses each request in sequence.

1. Plaintiff's request for declaratory relief

The court addresses first plaintiff's request for declaratory relief. *See id.* The binational panel has the authority to reach a decision as to the lawfulness of Commerce's determination with respect to the

cash deposit rate assigned to J.D. Irving.[4] Article 10.12 ¶ 8 of the USMCA provides that "[t]he panel may uphold a final determination [by Commerce] . . . or remand it for action not inconsistent with the panel's decision." USMCA, art. 10.12 ¶ 8. Further, 19 U.S.C. § 1516a(g)(7)(A) provides that "[i]f a determination is referred to a binational panel . . . and the panel . . . makes a decision remanding the determination . . . [Commerce] . . . shall, within the period specified by the panel . . . take action not inconsistent with the decision of the panel." 19 U.S.C. § 1516a(g)(7)(A). On January 11, 2022, plaintiff filed a Notice of Appearance before the binational panel. Letter from White & Case LLP, to USMCA Secretariat, U.S. Sec'y, re: USMCA Panel Review — USA-CDA-2021–10.12–04 — Notice of Appearance (Jan. 11, 2022); *Art. 10.12 Rules of Procedure*, R. 45 ¶ 1(d)(iii). As such, plaintiff is entitled as an "interested person" to participate in the proceedings before the panel and bring the same challenge that J.D. Irving brought as a respondent before Commerce. *Art. 10.12 Rules of Procedure*, Rs. 5, 45 ¶ 1, 61 ¶¶ 1–2. Upon a favorable panel decision with respect to such a challenge to the lawfulness of Commerce's determination, the panel would have the authority to remand the determination to Commerce, which would then be required to "take action not inconsistent with" the panel's decision. *See* USMCA, art. 10.12 ¶ 8; 19 U.S.C. § 1516a(g)(7)(A). Consequently, the relief available to plaintiff through binational panel review with respect to its request for declaratory relief is not manifestly inadequate.

2. Plaintiff's request to reinstate retroactively the cash deposit rate of 1.57% and to refund excess cash deposits

The court addresses next plaintiff's request to reinstate retroactively the cash deposit rate of 1.57% and to refund excess cash deposits collected on entries made on or after December 2, 2021. *See* Compl. at 17. Plaintiff contends that only "injunctive relief" provided by this Court would constitute an adequate remedy with respect to the refund of excess cash deposits collected on entries made on or after December 2, 2021 — plaintiff's second request. Pl. Br. at 8. Plaintiff notes that binational panels lack the powers in equity that

[4] The parties do not dispute that the binational panel has the authority to reach a decision with respect to the lawfulness of Commerce's determination; plaintiff argues instead that binational panels lack powers in equity and that the panel "would be unable to order Commerce to instruct [Customs] to reinstate J.D. Irving's . . . cash deposit rate *retroactively*" should the panel reach a decision in plaintiff's favor. Pl. Br. at 8 (emphasis in original), 11 ("The USMCA's mere ability to review the same legal issue, however, does not mean the panel can provide adequate relief."); *see* Defs. Br. at 9–10.

this Court possesses and that the panel "would be unable to order Commerce to instruct [Customs] to reinstate J.D. Irving's . . . cash deposit rate *retroactively*" with respect to entries made on or after December 2, 2021. *Id.* at 8 (emphasis in original), 11.

The court does not find this argument persuasive. Plaintiff retains the recourse to obtain an adequate remedy with respect to its request, as "eventually review [of plaintiff's challenge] could be had at the conclusion of administrative proceedings, either in this court under 28 U.S.C. § 1581(c) or before a binational panel." *Hylsa II*, 22 CIT at 46; *see Sunpreme*, 892 F.3d at 1191 (stating that when adequate "relief is prospectively and realistically available under another subsection of 1581, invocation of [28 U.S.C. § 1581(i)] is incorrect" (quoting *Chemsol, LLC v. United States*, 755 F.3d 1345, 1354 (Fed. Cir. 2014)) (internal quotation marks omitted)); *Jerlian Watch Co. v. U.S. Dep't of Com.*, 597 F.2d 687, 692 (9th Cir. 1979) ("It is true that injunctive and declaratory relief [are] . . . more desirable remed[ies] in plaintiffs' view, but 'the mere fact that more desirable remedies are unavailable [due to lack of jurisdiction] does not mean that existing remedies are inadequate.'" (citation omitted)). An alternative remedy is available to plaintiff through its challenge in one or more ARs to the collection of cash deposits on plaintiff's entries made on or after December 2, 2021, at the contested rate of 11.59%.[5] *See Capella Sales*, 40 CIT __, __, 180 F. Supp. 3d 1293, 1303 (2016) ("An interested party may challenge the cash deposit rate by requesting [that] Commerce conduct an administrative review of its entries that were subject to that cash deposit rate." (citing 19 U.S.C. § 1675(a)(1))). Should plaintiff bring such a challenge (or challenges) before Commerce, following Commerce's publication of the final results of the respective AR, plaintiff would be entitled to appeal to this Court any determination with which plaintiff might disagree.[6] *See Valeo N. Am., Inc. v. United States*, 41 CIT __, __, 277 F. Supp. 3d 1361, 1365 (2017).

[5] J.D. Irving would be entitled to bring such a challenge in an AR 4 with respect to the cash deposit rate applied to J.D. Irving's entries made between December 2, 2021, and December 31, 2021, as these dates occurred during the fourth period of review of the Softwood Lumber Order. *See Softwood Lumber Order*, 83 Fed. Reg. 350; *AR 2 Final Results*, 86 Fed. Reg. 68,471. For entries made between January 1, 2022, and December 31, 2022 — the fifth period of review — J.D. Irving would be entitled to bring such a challenge in an AR 5. *See Softwood Lumber Order*, 83 Fed. Reg. 350; *AR 2 Final Results*, 86 Fed. Reg. 68,471. For entries made between January 1, 2023, and December 31, 2023 — the sixth period of review — J.D. Irving would be entitled to bring such a challenge in an AR 6. *See Softwood Lumber Order*, 83 Fed. Reg. 350; *AR 2 Final Results*, 86 Fed. Reg. 68,471.

[6] Moreover, should interested parties request binational panel review with respect to the final results of one or more such ARs pursuant to Article 10.12 of the USMCA, J.D. Irving would be entitled as an "interested person" to bring its challenge before the respective panel. *See* 19 U.S.C. § 1516a(g)(8)(A)(i); *Art. 10.12 Rules of Procedure*, Rs. 5, 38 ¶ 1(b), 45 ¶ 1.

Three considerations demonstrate that this alternative remedy would not be manifestly inadequate with respect to plaintiff's requested relief. First, the alternative remedy would "produc[e]" an adequate "result" with respect to plaintiff's challenge to the cash deposit rate applied to its entries made on or after December 2, 2021. *Hartford Fire*, 544 F.3d at 1294 (citation omitted) (internal quotation marks omitted). The Federal Circuit has held that a remedy is "manifestly inadequate" if the remedy constitutes an "exercise in futility, or [is] 'incapable of producing any result; failing utterly of the desired end through intrinsic defect; useless, ineffectual, [in] vain.'" *Id.* (emphasis omitted). Plaintiff states that its challenge concerns "[t]he deposit rate applie[d] to [J.D. Irving's] entries *going forward*" — *i.e.*, the rate applied to entries made on or after December 2, 2021. Oral Arg. Tr. at 12:17–18 (emphasis supplied); *see* Pl. Br. at 13–14; *Sunpreme*, 892 F.3d at 1193. Plaintiff is entitled to challenge in one or more ARs the cash deposit rate applied to entries made on or after December 2, 2021. *See Capella Sales*, 40 CIT at __, 180 F. Supp. 3d at 1303. Should plaintiff bring such a challenge (or challenges), plaintiff "can be made whole" and receive its requested refund "if [plaintiff's] claims are ultimately successful." *Valeo*, 41 CIT at __ n.6, 277 F. Supp. 3d at 1365 n.6. The availability to plaintiff of a refund plus interest for any overpaid cash deposits indicates that this alternative remedy neither is futile nor "incapable of producing any result" with respect to plaintiff's "desired end." *Hartford Fire*, 544 F.3d at 1294 (citation omitted) (internal quotation marks omitted); *see* 19 U.S.C. § 1673f(b)(2), 1677g(a); 19 C.F.R. § 351.212. Moreover, this alternative remedy is not manifestly inadequate notwithstanding that plaintiff would be required to participate in administrative proceedings — as well any potential appeals or panel reviews — prior to obtaining such relief. *See Valeo*, 41 CIT at __, 277 F. Supp. 3d at 1365 ("Neither the burden of participating in the administrative proceeding nor the business uncertainty caused by such a proceeding is sufficient to constitute manifest inadequacy." (citations omitted)); *MacMillan Bloedel Ltd. v. United States*, 16 CIT 331, 332 (1992); *cf. Int'l Custom Prod., Inc. v. United States*, 467 F.3d 1324, 1327 (Fed. Cir. 2007) ("[D]elays inherent in the statutory process do not render [a remedy] manifestly inadequate." (citing *Am. Air Parcel Forwarding Co. v. United States*, 718 F.2d 1546, 1551 (Fed. Cir. 1983))).

The second consideration that supports the court's conclusion is that plaintiff's payment of cash deposits at the contested rate of 11.59% while plaintiff participates in administrative proceedings — as well as any potential appeals, including panel reviews — would not

render the alternative remedy manifestly inadequate. *See Int'l Custom Prod.*, 467 F.3d at 1327 ("[M]ere allegations of financial harm . . . do not make the remedy established by Congress manifestly inadequate." (citations omitted) (internal quotation marks omitted)). This conclusion is consistent with the court's decision in *Valeo*, 41 CIT __, 277 F. Supp. 3d 1361. In *Valeo*, the court held that it lacked jurisdiction under 28 U.S.C. § 1581(i) to hear the plaintiffs' challenge to Commerce's preliminary determination in an AD investigation of certain aluminum foil from China. *See id.* at __, 277 F. Supp. 3d at 1363. The court stated that the plaintiffs sought relief through the court's exercise of jurisdiction under 28 U.S.C. § 1581(i) so that the plaintiffs' "imports [would] not [be] subject to the collection of cash deposits in the interim period between the publication of the preliminary determination and the final determination." *Id.* at __, 277 F. Supp. 3d at 1366 (citation omitted). However, the court concluded that the remedy available through the exercise of jurisdiction under 28 U.S.C. § 1581(c) *subsequent to* Commerce's publication of the final determination was not manifestly inadequate, as the plaintiffs would receive a refund for any overpaid cash deposits if they prevailed. *See id.* Further, the court explained that "exposure to cash deposits is *not a recognized harm* that would render the available relief . . . manifestly inadequate," *id.* at __ n.6, 277 F. Supp. 3d at 1365–66 n.6 (emphasis supplied) (citing *MacMillan*, 16 CIT at 333), as the payment of cash deposits "is an ordinary consequence of the statutory scheme." *Id.* at __, 277 F. Supp. 3d at 1366; *cf. Shanghai Tainai Bearing Co. v. United States*, 46 CIT __, __, 582 F. Supp. 3d 1299, 1310 (2022) ("America's retroactive system, financially inconvenient as it may be, is the course adopted by Congress and committed to Commerce and Customs to enforce." (citation omitted)).

The third consideration that supports the court's conclusion is that the alternative remedy is not manifestly inadequate notwithstanding plaintiff's assertion that this remedy would "fall[] well short of [a] remedy that this Court has the authority to provide." Oral Arg. Tr. at 13:09–10. Contrary to plaintiff's argument, that this Court possesses the powers in equity to provide plaintiff with its requested injunctive relief does not render the alternative remedy "manifestly inadequate." *Id.* ; *see* 28 U.S.C. § 2643(c)(1) ("[T]he Court of International Trade may . . . order any . . . form of relief that is appropriate in a civil action, including, but not limited to, declaratory judgments, orders of remand, injunctions, and writs of mandamus and prohibition.").

To support its argument, plaintiff points to the *Cooper Tire* decision, in which the court issued an injunction ordering Commerce to reinstate a cash deposit rate with respect to the plaintiff's entries. *See* Pl.

Br. at 7–8 (citing *Cooper Tire & Rubber Co. v. United States*, 41 CIT __, __, 217 F. Supp. 3d 1373, 1377, 1384 (2017)), 12. However, the *Cooper Tire* court exercised its discretion to issue such injunctive relief in view of the unusual circumstances presented in that case. *See generally Cooper Tire*, 41 CIT __, 217 F. Supp. 3d 1373; *Cooper Tire & Rubber Co. v. United States*, Slip Op. 17–130, 2017 WL 4250812 (CIT Sept. 25, 2017). The court concluded that Commerce assigned unlawfully to the plaintiff a cash deposit rate that "was unrelated to [the plaintiff's] future antidumping duty liability" and stated that the plaintiff was entitled to its requested remedy — *i.e.*, for the court to "order [Commerce] on remand to determine [the plaintiff's] AD cash deposit rate the same as all other separate rate respondents." *Cooper Tire*, 41 CIT at __, 217 F. Supp. 3d at 1380, 1383. Nonetheless, the court explained that the plaintiff had not yet "sought injunctive or other equitable relief as to the implementation of the remedy it is pursuing." *Id.* at __, 217 F. Supp. 3d at 1383. Accordingly, the plaintiff moved subsequently for a preliminary injunction and the court ordered the parties to "consult with the objective of producing an agreed-upon proposed injunction for the Court's consideration." *See Cooper Tire*, Ct. No. 15–00251, Pls.' Mot. for Prelim. Inj. (May 10, 2017), ECF No. 49, *and* Order (May 15, 2017), ECF No. 51. The parties complied with the court's order and filed a proposed injunction, which the court issued thereafter. *See Cooper Tire*, Ct. No. 15–00251, Order (June 1, 2017), ECF No. 53.

Plaintiff's assertion and reference to *Cooper Tire* with respect to this Court's powers in equity also do not provide a legal basis to conclude that the availability of a *preferred* or *more desirable* remedy — *i.e.*, a court-issued injunction — renders an alternative form of relief "manifestly inadequate." *See Am. Air Parcel*, 718 F.2d at 1551. This conclusion is consistent with the decision of the U.S. Court of Appeals for the Second Circuit ("Second Circuit") in *J. C. Penney Co. v. U.S. Treasury Dep't* (*J. C. Penney II*), 439 F.2d 63 (2d Cir. 1971).[7] In *J. C. Penney*, the plaintiff, an importer of television sets from Japan, sought to challenge in district court the decision of the U.S. Treasury Department to conduct an investigation as to whether the imported

[7] The Second Circuit decided *J. C. Penney* prior to the establishment of the U.S. Court of International Trade and the enactment of 28 U.S.C. § 1581(i). *See* Customs Courts Act of 1980. Pub. L. No. 96–417, 94 Stat. 1727 (1980) (codified as amended in scattered sections of 28 U.S.C.). The enactment of 28 U.S.C. § 1581(i) "transferred the subject matter jurisdiction of the district courts [with respect to the enumerated civil actions] to the Court of International Trade." *Am. Air Parcel*, 718 F.2d at 1551 n.4 (citing *United States v. Uniroyal, Inc.*, 69 CCPA 179, 187 n.9, 687 F.2d 467, 475 n.9 (1982)); *see* H.R. Rep. No. 96–1235, at 33 (1980), *as reprinted in* 1980 U.S.C.C.A.N. 3729, 3745 ("Section 201 of H.R. 6394 added a new section 1581(i) to Title 28, U.S.C. . . . to eliminate the confusion which currently exists as to the demarcation between the jurisdiction of the federal district courts and the Court of International Trade.").

merchandise had been sold at less than fair value. *See id.* at 64; *J. C. Penney Co. v. U.S. Dep't of Treasury* (*J. C. Penney I*), 319 F. Supp. 1023 (S.D.N.Y. 1970). The district court "dismiss[ed] the plaintiff's complaint for lack of subject matter jurisdiction" and concluded that the plaintiff "must seek its relief against the government in the [U.S.] Customs Court." *J. C. Penney II*, 439 F.2d at 64–65; *see J. C. Penney I*, 319 F. Supp. at 1028–31. On appeal, the plaintiff contended that the district court had jurisdiction over the action on the basis that "no adequate relief may be obtained in" the Customs Court. *J. C. Penney II*, 439 F.2d at 68. The plaintiff argued that the Customs Court lacked the equitable power to provide the plaintiff with its requested relief, including the "power to require the holding of a hearing" with respect to the plaintiff's challenge. *Id.* ; *cf. Flintkote Co., Glens Falls Div. v. United States*, 82 Cust. Ct. 305, 306, 467 F. Supp. 626, 628 (1979). The Second Circuit rejected the plaintiff's argument and concluded that "an adequate remedy [was] available . . . in the Customs Court" through "the obtaining of refunds of special dumping duties which may have been improperly assessed and paid." *J. C. Penney*, 439 F.2d at 68. The court stated further that "[t]hough it may be true that the ordering of a hearing would be a more desirable form of relief from [the plaintiff's] point of view than the obtaining of refunds, the mere fact that more desirable remedies are unavailable does not mean that existing remedies are inadequate." *Id.* ; *see Jerlian Watch*, 597 F.2d at 692. Similarly, in the instant action the mere existence of a potential remedy that plaintiff might prefer or find "more desirable" — *i.e.*, a court-issued injunction — does not render the alternative remedy manifestly inadequate.

Moreover, the alternative remedy is not "manifestly inadequate" notwithstanding plaintiff's argument that a Court decision with respect to plaintiff's challenge would have precedential effect while a panel decision would not. *See* Oral Arg. Tr. at 16:01–09, 2125; 19 U.S.C. § 1516a(b)(3). Plaintiff's argument proves too much. Applying plaintiff's reasoning, because a panel decision with respect to any legal issue lacks precedential effect, a panel decision as to any legal issue before it would be manifestly inadequate. *See* 19 U.S.C. § 1516a(b)(3). In a similar way, plaintiff's reasoning would lead to the conclusion that the Court's subject matter jurisdiction exists under 28 U.S.C. § 1581(i) with respect to *any* determination for which panel review is requested. This conclusion, in turn, would contravene the intent of Congress in amending 28 U.S.C. § 1581(i) to "assure that a litigant cannot invoke the CIT's 'residual jurisdiction' . . . for the purpose of circumventing the binational panel system." S. Rep. 100–509, at 35; *see* H.R. Rep. 103–361, at 86.

CONCLUSION

In *The Jungle Book*, the 1967 animated film based on the 1894 novel by Rudyard Kipling,[8] Mowgli, a young orphan, is found abandoned in the jungle and rescued by Bagheera, a black panther. Two wolves, Raksha and Rama, adopt Mowgli and raise him along with their own cubs. Over ten years, Mowgli — known affectionately as "man-cub" — learns the ways of his forest (which Kipling likely based on the forests in the vicinity of the city of Seoni in Madhya Pradesh, India), but Mowgli's animal guardians realize that he must return eventually to be with other humans.

One night, Akela, the leader of the wolf pack, announces that Shere Khan, a Bengal tiger who does not especially care for humans, has appeared in the jungle. The pack reaches the difficult decision that Mowgli must leave the forest and return to human society.

> Akela: "Shere Khan will surely kill the boy and all who try to protect him. Now, are we all in agreement as to what must be done?"
>
> [Wolves nod].
>
> Akela: "Now it is my unpleasant duty to tell the boy's father. Rama! Come over here, please."
>
> Rama: "Yes, Akela?"
>
> Akela: "The council has reached its decision. Man-cub can no longer stay with the pack. He must leave at once."
>
> Rama: "Leave?"
>
> Akela: "I am sorry, Rama. There is no other way."
>
> Rama "But-but the man-cub is-is like my own son. Surely he's entitled to the protection of the pack."
>
> Akela: "But, Rama, even the strength of the pack is no match for the tiger."
>
> Rama: "But the boy cannot survive alone in the jungle."

Bagheera then interjects to offer a potential solution to the quandary in which the pack finds itself.

> Bagheera: "Akela. Perhaps I can be of help."
>
> Akela: "You, Bagheera? How?"

[8] THE JUNGLE BOOK (Walt Disney Productions 1967); Rudyard Kipling, *The Jungle Book* (1894).

> Bagheera: "I know of a man-village where he'll be safe. Mowgli and I have taken many walks into the jungle together. I'm sure he'll go with me."
>
> Akela: "So be it. Now there's no time to lose. Good luck."

* * *

For the reasons discussed, the court concludes that it lacks subject matter jurisdiction under 28 U.S.C. § 1581(i) to hear the instant action. Accordingly, the court grants defendants' motion to dismiss pursuant to USCIT Rule 12(b)(1). Pursuant to the court's order of November 21, 2022, *see* Order, ECF No. 26, which stays consideration of "plaintiff's motion to consolidate Court Nos. 21–00641 and 22–00256 pending resolution of the jurisdictional issue raised in the instant action . . . after appeals, if any, are exhausted," the parties shall file a joint status report within 14 days of the date that the stay expires.

Judgment will enter accordingly.

Dated: January 25, 2023
New York, New York

/*s*/ *Timothy M. Reif*
JUDGE

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