

U.S. Customs and Border Protection



PROPOSED REVOCATION OF ONE RULING LETTER AND PROPOSED REVOCATION OF TREATMENT RELATING TO THE TARIFF CLASSIFICATION OF A CERTAIN INFINITY ROSE FLOWER BOX

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 certain Infinity Rose Flower Box.

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 certain Infinity Rose Flower Box 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 19, 2021.

ADDRESS: Written comments are to be addressed to U.S. Customs and Border Protection, Office of Trade, Regulations and Rulings, Attention: Erin Frey, 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. Erin Frey at (202) 325–1757.

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

SUPPLEMENTARY INFORMATION:

BACKGROUND

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

Pursuant to 19 U.S.C. § 1625(c)(1), this notice advises interested parties that CBP is proposing to revoke one ruling letter pertaining to the tariff classification of a certain Infinity Rose Flower Box. Although in this notice, CBP is specifically referring to New York Ruling Letter (“NY”) N307028, dated November 21, 2019 (Attachment A), this notice also covers any rulings on this merchandise, which may exist, but have not been specifically identified. CBP has undertaken reasonable efforts to search existing databases for rulings in addition to the one identified. No further rulings have been found. Any party who has received an interpretive ruling or decision (i.e., a ruling letter, internal advice memorandum or decision, or protest review decision) on the merchandise subject to this notice should advise CBP during the comment period.

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

In NY N307028, CBP classified the Infinity Rose Flower Box at issue in heading 0604, HTSUS, specifically in subheading 0604.90.6000, HTSUSA, which provides for “Foliage, branches and

other parts of plants, without flowers or flower buds, and grasses, mosses and lichens, being goods of a kind suitable for bouquets or for ornamental purposes, fresh, dried, dyed, bleached, impregnated or otherwise prepared: Other: Other: Other.” CBP has reviewed NY N307028 and has determined the ruling letter to be in error. It is now CBP’s position that the Infinity Rose Flower Box at issue is properly classified, in heading 0603, HTSUS, specifically in subheading 0603.90.0000, HTSUSA, which provides for “Cut flowers and flower buds of a kind suitable for bouquets or for ornamental purposes, fresh, dried, dyed, bleached, impregnated or otherwise prepared: Other.”

Pursuant to 19 U.S.C. § 1625(c)(1), CBP is proposing to revoke NY N307028 and to revoke or modify any other ruling not specifically identified to reflect the analysis contained in the proposed Headquarters Ruling Letter (“HQ”) H313526, 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.

Dated:

CRAIG T. CLARK,
Director
Commercial and Trade Facilitation Division

Attachments

HQ H313526
 OT:RR:CTF:FTM H313526 TSM
 CATEGORY: Classification
 TARIFF NO.: 0603.90.0000

MS. SUSANNE GELLERT
 GERMAN AMERICAN CHAMBER OF COMMERCE, INC.
 80 PINE STREET, 24TH FLOOR
 NEW YORK, NY 10005

Re: Revocation of NY N307028; Tariff classification of Infinity Rose Flower Box from Germany

DEAR MS. GELLERT:

This is in reference to New York Ruling Letter (“NY”) N307028, issued to Soeller, Radtke und Krieg GbR (Schonungen, Germany), on November 21, 2019. In that ruling, U.S. Customs and Border Protection (“CBP”) classified a product described as Infinity Rose Flower Box under subheading 0604.90.6000, Harmonized Tariff Schedule of the United States (Annotated) (“HTSUSA”), which provides for “Foliage, branches and other parts of plants, without flowers or flower buds, and grasses, mosses and lichens, being goods of a kind suitable for bouquets or for ornamental purposes, fresh, dried, dyed, bleached, impregnated or otherwise prepared: Other: Other: Other.” We have reviewed NY N307028 and found it to be incorrect. For the reasons set forth below, we are revoking NY N307028.

FACTS:

In NY N307028, the Infinity Rose Flower Box at issue was described as follows:

The subject merchandise is the Infinity Rose Flower Box. The product is a cardboard box that contains four roses affixed to sponge, a greeting card, an instruction card, an envelope, and a single ribbon. You have stated that the bouquet consists of fresh roses treated with a mixture glycerine and coloring agents that serve to extend the durability of the product.

ISSUE:

What is the tariff classification of the Infinity Rose Flower Box?

LAW AND ANALYSIS:

Classification under the HTSUS is determined in accordance with the General Rules of Interpretation (“GRIs”). 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 2020 HTSUS provisions under consideration are as follows:

0603 Cut flowers and flower buds of a kind suitable for bouquets or for ornamental purposes, fresh, dried, dyed, bleached, impregnated or otherwise prepared

* * *

0604 Foliage, branches and other parts of plants, without flowers or flower buds, and grasses, mosses and lichens, being goods of a kind suitable for bouquets or for ornamental purposes, fresh, dried, dyed, bleached, impregnated or otherwise prepared

* * *

Note 2 to Chapter 6 provides as follows:

Any reference in heading 0603 or 0604 to goods of any kind shall be construed as including a reference to bouquets, floral baskets, wreaths and similar articles made wholly or partly of goods of that kind, account not being taken of accessories of other materials. However, these headings do not apply to collages or similar decorative plaques of heading 9701.

* * *

In understanding the language of the HTSUS, the Explanatory Notes (“ENs”) of the Harmonized Commodity Description and Coding System may be utilized. The ENs, although neither dispositive nor legally binding, provide a commentary on the scope of each heading, and are generally indicative of the proper interpretation of the Harmonized System at the international level. *See* T.D. 89–80, 54 Fed. Reg. 35127 (August 23, 1989).

The EN to heading 06.03 states as follows:

The heading covers not only cut flowers and buds as such, but also bouquets, wreaths, floral baskets and similar articles (e.g., posies and buttonholes) incorporating flowers or flower buds. Provided that such bouquets, etc., have the essential character of florists’ wares, they remain in the heading even if they contain accessories of other materials (ribbons, paper trimmings, etc.).

Cut branches of trees, shrubs or bushes, if bearing flowers or flower buds (e.g., magnolia and certain types of roses), are treated as cut flowers or flower buds of this heading.

The heading **excludes** flowers, petals and buds of a kind used primarily in perfumery, in pharmacy, or for insecticidal, fungicidal or similar purposes, provided that, in the condition in which they are presented, they are not suitable for bouquets or for ornamental use (**heading 12.11**). The heading also **excludes** collages and similar decorative plaques of **heading 97.01**.

* * *

The EN to heading 06.04 states as follows:

This heading covers not only foliage, branches, etc., as such, but also bouquets, wreaths, floral baskets and similar articles incorporating foliage or parts of trees, shrubs, bushes or other plants, or incorporating grasses, mosses or lichens. Provided that such bouquets, etc., have the essential character of florists’ wares, they remain in the heading even if they contain accessories of other materials (ribbons, wire frames, etc.).

Goods of this heading may bear decorative fruits, but if they incorporate flowers or flower buds they are **excluded (heading 06.03)**.

The heading covers natural Christmas trees, provided that they are clearly unfit for replanting (e.g., root sawn off, root killed by immersion in boiling water).

The heading also **excludes** plants and parts of plants (including grasses, mosses and lichens) of a kind used primarily in perfumery, in pharmacy or for insecticidal, fungicidal or similar purposes (**heading 12.11**) or for plaiting (**heading 14.01**), provided that, in the condition in which they are presented, they are not suitable for bouquets or for ornamental purposes. The heading also **excludes** collages and similar decorative plaques of **heading 97.01**.

* * *

In NY N307028, CBP classified the Infinity Rose Flower Box at issue under heading 0604, HTSUS, which provides for “Foliage, branches and other parts of plants, without flowers or flower buds, and grasses, mosses and lichens, being goods of a kind suitable for bouquets or for ornamental purposes, fresh, dried, dyed, bleached, impregnated or otherwise prepared.” Upon review, we note that while heading 0604, HTSUS, provides in relevant part for “... other parts of plants, without flowers or flower buds...,” the Infinity Flower Box contains roses. Accordingly, we find that it is not classified under heading 0604, HTSUS.

Heading 0603, HTSUS, provides for “Cut flowers and flower buds of a kind suitable for bouquets or for ornamental purposes, fresh, dried, dyed, bleached, impregnated or otherwise prepared.” Upon review, we find that the roses in the Infinity Rose Flower Box at issue are classified in this heading. Specifically, because they are treated with a mixture of glycerin and coloring agents by means of a conservation process, and are no longer “fresh roses” for tariff classification purposes, the roses at issue are classified under subheading 0603.90.0000, HTSUSA, which provides for “Cut flowers and flower buds of a kind suitable for bouquets or for ornamental purposes, fresh, dried, dyed, bleached, impregnated or otherwise prepared: Other.”

The Infinity Rose Flower Box at issue is a composite good consisting of a cardboard box that contains four roses affixed to sponge, a greeting card, an instruction card, an envelope, and a single ribbon. The tariff classification of composite goods is governed by GRI 3, which provides, in pertinent part:

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 in sets for retail sale, which cannot be classified by reference to 3(a), shall be classified as if they consisted of the material or component which gives them their essential character, insofar as this criterion is applicable.

Pursuant to GRI 3(b), composite goods are classified by the component which gives them their essential character. *See Better Home Plastics Corp. v. United States*, 916 F. Supp. 1265 (CIT 1996), *aff'd*, 119 F.3d 969 (Fed. Cir. 1997). Of the several components that form the product at issue, only the roses are indispensable with relation to the product’s use as they are the sole reason one would purchase the product. Therefore, the component that imparts the essential character of the Infinity Rose Flower Box is the roses.

Based on the foregoing, we conclude that the Infinity Rose Flower Box at issue is classified in heading 0603, HTSUS, and subheading 0603.90.0000,

HTSUS, which provides for “Cut flowers and flower buds of a kind suitable for bouquets or for ornamental purposes, fresh, dried, dyed, bleached, impregnated or otherwise prepared: Other.”

HOLDING:

By application of GRIs 1 and 3(b), the Infinity Rose Flower Box at issue is classified under heading 0603, HTSUS, and specifically under subheading 0603.90.0000, HTSUSA, which provides for “Cut flowers and flower buds of a kind suitable for bouquets or for ornamental purposes, fresh, dried, dyed, bleached, impregnated or otherwise prepared: Other.” The 2020 column one, general rate of duty is 4% *ad valorem*.

EFFECT ON OTHER RULINGS:

NY N307028, dated November 21, 2019, is hereby REVOKED.

Sincerely,

CRAIG T. CLARK,

Director

Commercial and Trade Facilitation Division

N307028

November 21, 2019

CLA-2-06:OT:RR:NC:N2:231

CATEGORY: Classification

TARIFF NO.: 0604.90.6000

MS. SUSANNE GELLERT
GERMAN AMERICAN CHAMBER OF COMMERCE, INC.
80 PINE STREET
24TH FLOOR
NEW YORK, NY 10005

RE: The tariff classification of Infinity Rose Flower Box from Germany

DEAR MS. GELLERT:

In your letter dated October 25, 2019, you requested a tariff classification ruling on behalf of Soeller, Radtke und Krieg GbR (Schonungen, Germany). The sample submitted with your inquiry will be returned per your request.

The subject merchandise is the Infinity Rose Flower Box. The product is a cardboard box that contains four roses affixed to sponge, a greeting card, an instruction card, an envelope, and a single ribbon. You have stated that the bouquet consists of fresh roses treated with a mixture glycerine and coloring agents that serve to extend the durability of the product.

General Rule of Interpretation (GRI) 3(b) of the Harmonized Tariff Schedule states that goods put up in sets for retail sale are to be classified as if they consisted of the material or component which gives them their essential character. Of the several components, that forms the product at issue, only the roses are indispensable with relation to the set's use as it represents the sole reason one would purchase the product. The component that imparts the essential character of the intended import is the roses.

The applicable subheading the Infinity Rose Flower Box will be 0604.90.6000, Harmonized Tariff Schedule of the United States (HTSUS), which provides for "Foliage, branches and other parts of plants, without flowers or flower buds, and grasses, mosses and lichens, being goods of a kind suitable for bouquets or for ornamental purposes, fresh, dried, dyed, bleached, impregnated or otherwise prepared: Other: Other: Other." The rate of duty will be 7% ad valorem.

Pertaining to your inquiry on admissibility, the importation of these goods may be subject to regulations or restrictions administered by the U.S. Department of Agriculture, Animal and Plant Health Division (APHIS). You may contact this agency regarding possible applicable requirements at the following location:

U.S. Department of Agriculture
APHIS Plant Protection and Quarantine Permit Unit
4700 River Road, Unit 136
Riverdale, MD 20737-1236

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

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

A copy of the ruling or the control number indicated above should be provided with the entry documents filed at the time this merchandise is

imported. If you have any questions regarding the ruling, contact National Import Specialist Ekeng Manczuk at ekeng.b.manczuk@cbp.dhs.gov.

Sincerely,

STEVEN A. MACK

Director

National Commodity Specialist Division



19 CFR PART 177

MODIFICATION OF FOUR RULING LETTERS RELATING TO THE TARIFF CLASSIFICATION AND ORIGIN OF CERTAIN STEEL, IRON AND ALUMINUM PRODUCTS

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

ACTION: Notice of modification of four ruling letters relating to the tariff classification and origin of certain steel, iron, and aluminum products.

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 four ruling letters concerning the tariff classification under the Harmonized Tariff Schedule of the United States (HTSUS) and country of origin of certain steel, iron, and aluminum products. Notice of the proposed action was published in the *Customs Bulletin*, Vol. 54, No. 44, on November 11, 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 April 18, 2021.

FOR FURTHER INFORMATION CONTACT: Joy Marie Virga Valuation and Special Programs Branch, Regulations and Rulings, Office of Trade, at (202) 325–1511.

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. 44, on November 11, 2020, proposing to modify four ruling letters relating to the tariff classification and origin of certain steel, iron, and aluminum products. 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 Headquarter Ruling Letters (HQ) 561405, dated October 23, 2001; H276962, dated March 16, 2018; H303867, dated June 25, 2019; and H303868, dated June 27, 2019, CBP cited to HQ 561710, HQ 561744, or HQ 561745, which were rescinded on September 19, 2000 in a Customs Bulletin Notice. CBP has reviewed HQ 561405, HQ H276962, HQ H303867, and HQ H303868 and has found the citations to rescinded Ruling Letters to be in error.

Pursuant to 19 U.S.C. § 1625(c)(1), CBP is modifying HQ 561405, HQ H276962, HQ H303867, HQ H303868, and any other ruling not specifically identified to remove citations to any revoked Ruling Letter, set forth as Attachments A-D to this notice.

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

Dated:

CRAIG T. CLARK,
Director
Commercial and Trade Facilitation Division

Attachment

HQ H308206

February 2, 2021

OT:RR:CTF:VS: H308206 JMV

CATEGORY: Origin

MICHAEL K. TOMENGA
1400 16TH STREET, NW, SUITE 350
WASHINGTON, DC 20036

RE: Country of Origin; Steel/Aluminum Tubes; Caulking Guns

DEAR MR. TOMENGA,

This is in reference to Headquarters Ruling Letter (“HQ”) H303868, issued to you on behalf of your client Newborn Bros. Co. (“Newborn”), on June 27, 2019, concerning the country of origin marking for steel metal and aluminum tubes. In that ruling, U.S. Customs and Border Protection (“CBP”) found the steel and aluminum tubes were not substantially transformed by U.S. operations and therefore, must be marked with their country or origin, Taiwan, at the time of entry. CBP based this decision, in part, on HQ 561744, dated July 20, 2000, which was rescinded on September 19, 2000. *See* 34 Cust. Bull. & Dec., No. 39, 40–41, September 27, 2000. Therefore, we hereby modify HQ H303868 to remove reference to HQ 561744. The finding of HQ H303868 that the steel and aluminum tubes are not substantially transformed by U.S. operations is unaffected.

On November 11, 2020, CBP published its proposed modification of HQ H303868 in the *Customs Bulletin*, Volume 54, Number 44, 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, 2186 (1993). No comments were received in response to the proposed modification of HQ H303868.

FACTS:

Newborn is an importer and distributor at wholesale of caulking guns, parts and accessories in the United States. The imported products that are the subject of HQ H303868 are Carbon steel or aluminum metal tube with an inside diameter of two inches and an outside diameter of 2 1/8 inches, which may be sourced from suppliers in one or more foreign countries. The steel/aluminum tubes will be imported in lengths of approximately 7.5 feet. For the purposes of this ruling, you ask us to assume that the country of origin of these steel/aluminum tubes is Taiwan. The steel tube would meet Standard STKM 11A (JIS). The aluminum metal tube would meet Standard 6063 (JIS). As imported, the metal tube has plain ends.

After importation, the tube will be cut to lengths of 14 inches or 18 inches, and threaded at each end for use as barrels for caulking dispensing guns. Steel metal barrels will be polished and zinc-plated after threading for corrosion resistance. Aluminum barrels will be polished and anodized after threading for corrosion resistance.

ISSUE:

What is the country of origin marking of the steel metal and aluminum tubes?

LAW AND ANALYSIS:

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 imported into the United States shall be marked in a conspicuous place as legibly, indelibly, and permanently as the nature of the article (or container) will permit, in such a manner as to indicate to the ultimate purchaser in the United States the English name of the country of origin of the article. Congressional intent in enacting 19 U.S.C. § 1304 was “that the ultimate purchaser should be able to know by an inspection of the marking on the imported goods the country of which the goods is the product. The evident purpose is to mark the goods so that at the time of purchase the ultimate purchaser may, by knowing where the goods were produced, be able to buy or refuse to buy them, if such marking should influence his will.” *United States v. Friedlaender & Co. Inc.*, 27 CCPA 297, 302, C.A.D. 104 (1940).

Part 134, Customs Regulations (19 C.F.R. Part 134), implements the country of origin marking requirements and the exceptions of 19 U.S.C. § 1304. Section 134.1(b), Customs Regulations (19 C.F.R. § 134.1(b)), defines “country of origin” as the country of manufacture, production or growth of any article of foreign origin entering the United States. Further work or material added to an article in another country must effect a substantial transformation in order to render such other country the “country of origin” within the meaning of the marking laws and regulations.

In *National Hand Tool v. United States*, 16 CIT 308 (1992), aff'd, 989 F.2d 1201 (Fed. Cir. 1993), the court determined that certain hand tool components used to make flex sockets, speeder handles, and flex handles were not substantially transformed within the United States. The components were cold-formed or hot-forged into their final shape prior to importation, with the exception of speeder handle bars, which were reshaped by a power press after importation, and the grips of the flex handles which were knurled in the United States. The imported items were heat treated to strengthen the components, sand-blasted to clean the components, and electroplated to better enable the components to resist rust and corrosion. In making this determination, the court noted that the processing which occurred within the United States did not alter the name of the imported components, the character of the parts remained substantially unchanged upon the completion of such processing, and the intended use of the articles was predetermined at the time of importation. Although the court recognized that a predetermined use for imported articles does not preclude a finding of substantial transformation, the court noted that each component was intended to be incorporated in a particular finished mechanic's hand tool. Moreover, *National Hand Tool* dismissed as a basis for a substantial transformation the value of the processing, stating that the substantial transformation test utilizing name, character and use criteria should generally be conclusive in country of origin marking determinations, and that such a finding must be based on the totality of the evidence.

In determining whether a substantial transformation has occurred in the processing of metals, CBP has generally held that the mere cutting to length or width which does not render the article suitable for a particular use does not constitute a substantial transformation. For example, in New York Ruling Letter (“NY”) N284041, dated March 31, 2017, CBP found that black steel and galvanized steel pipes were not substantially transformed in China,

where the pipes were cut into shorter lengths, chamfered, threaded, cleaned and subject to anti-rusting treatments. CBP noted that the imported product manufactured in Korea was pipe and the product imported from China remained pipe. Therefore, CBP found that the pipes did not lose their identity and were not substantially transformed when cut and processed in China. *See also* HQ 734186, dated October 24, 1991 (finding that the threading and cutting of steel pipe did not result in a substantial transformation).

In HQ W968318, dated October 2, 2006, CBP similarly found that subjecting Bulgaria-origin brass strip to one cold-rolling pass in Germany which reduced its thickness by slightly less than three one-thousandths of an inch and smoothed the product's surface did not constitute a substantial transformation of the Bulgarian-origin strip. *See also* HQ 734716, dated November 27, 1992 (finding that polishing grade 304 stainless steel sheet to achieve a No. 8 mirror finish to promote corrosion resistance was a change in a characteristic of the steel but not its character and therefore not a substantial transformation).

Accordingly, we find that the processing of the steel metal and aluminum tubes described above in the United States, which includes cutting, threading, polishing and zinc-plating or anodizing for corrosion resistance, does not constitute a substantial transformation. Since Newborn, as the importer, will not be the ultimate purchaser, we find that the steel metal and aluminum tubes are subject to the requirements of 19 C.F.R. § 134.26(a). When Newborn files the entry summary, Newborn must also file a certificate for the country of origin marking of articles to be repacked pursuant to 19 C.F.R. § 134.26. The country of origin marking of the steel metal and aluminum tubes must be visible to the ultimate purchaser.

HOLDING:

Based on the information provided, the imported steel metal and aluminum tubes will not undergo a substantial transformation in the United States and the country of origin is Taiwan for marking purposes. The steel metal and aluminum tubes are subject to the requirements of 19 C.F.R. § 134.26(a). HQ H303868 is hereby MODIFIED in accordance with the above analysis.

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

Sincerely,

CRAIG T. CLARK,

Director

Commercial and Trade Facilitation Division

HQ H308207

February 2, 2021

OT:RR:CTF:VS: H308207 JMV

CATEGORY: Origin

MICHAEL K. TOMENGA
1400 16TH STREET, NW, SUITE 350
WASHINGTON, DC 20036

RE: Country of Origin; Steel Metal; Caulking Guns

DEAR MR. TOMENGA,

This is in reference to Headquarters Ruling Letter (“HQ”) H303867, issued to you on behalf of your client Newborn Bros. Co. (“Newborn”), on June 25, 2019, concerning the country of origin marking for steel metal rods. In that ruling, U.S. Customs and Border Protection (“CBP”) found the steel metal rods were not substantially transformed by U.S. operations and therefore, must be marked with their country of origin, Taiwan, at the time of entry. CBP based this decision, in part, on HQ 561744, dated July 20, 2000, which was rescinded on September 19, 2000. *See* 34 Cust. Bull. & Dec., No. 39, 40–41, September 27, 2000. Therefore, we hereby modify HQ H303867 to remove reference to HQ 561744. The finding of HQ H303867 that the steel metal rods are not substantially transformed by U.S. operations is unaffected.

On November 11, 2020, CBP published its proposed modification of HQ H303867 in the *Customs Bulletin*, Volume 54, Number 44, 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, 2186 (1993). No comments were received in response to the proposed modification of HQ H303867.

FACTS:

Newborn is an importer and distributor at wholesale of caulking guns, parts and accessories in the United States. Lengths of heat-treated carbon steel rods, Grade S45C, meeting Standard G4061 (JIS) in round, square, or hexagonal profiles may be sourced from suppliers in one or more foreign countries. For the purposes of this ruling, you ask us to assume the country of origin of these steel rods is Taiwan. After importation, the steel rods will be cut to lengths ranging between 18 and 24 inches, threaded at both ends, stamped to make a small concave indent, and treated with black oxide for corrosion resistance.

After post-importation processing, the rods will be used in dispensing guns to push the material to be dispensed. The concave stamp causes a small bulge in the rod to restrict its further travel through the release plate of a dispensing gun. The concave stamp is located at a place on the rod to stop the rod at the point where the other end of the rod has travelled to the front of the barrel of the dispensing gun.

ISSUE:

What is the country of origin marking of the steel metal rods?

LAW AND ANALYSIS:

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 imported into the United States shall be marked in a conspicuous place as legibly, indelibly, and permanently as the nature of the article (or container) will permit, in such a manner as to indicate to the ultimate purchaser in the United States the English name of the country of origin of the article. Congressional intent in enacting 19 U.S.C. § 1304 was “that the ultimate purchaser should be able to know by an inspection of the marking on the imported goods the country of which the goods is the product. The evident purpose is to mark the goods so that at the time of purchase the ultimate purchaser may, by knowing where the goods were produced, be able to buy or refuse to buy them, if such marking should influence his will.” *United States v. Friedlaender & Co. Inc.*, 27 CCPA 297, 302, C.A.D. 104 (1940).

Part 134, Customs Regulations (19 C.F.R. Part 134), implements the country of origin marking requirements and the exceptions of 19 U.S.C. § 1304. Section 134.1(b), Customs Regulations (19 C.F.R. § 134.1(b)), defines “country of origin” as the country of manufacture, production or growth of any article of foreign origin entering the United States. Further work or material added to an article in another country must effect a substantial transformation in order to render such other country the “country of origin” within the meaning of the marking laws and regulations.

In *National Hand Tool v. United States*, 16 CIT 308 (1992), aff'd, 989 F.2d 1201 (Fed. Cir. 1993), the court determined that certain hand tool components used to make flex sockets, speeder handles, and flex handles were not substantially transformed within the United States. The components were cold-formed or hot-forged into their final shape prior to importation, with the exception of speeder handle bars, which were reshaped by a power press after importation, and the grips of the flex handles which were knurled in the United States. The imported items were heat treated to strengthen the components, sand-blasted to clean the components, and electroplated to better enable the components to resist rust and corrosion. In making this determination, the court noted that the processing which occurred within the United States did not alter the name of the imported components, the character of the parts remained substantially unchanged upon the completion of such processing, and the intended use of the articles was predetermined at the time of importation. Although the court recognized that a predetermined use for imported articles does not preclude a finding of substantial transformation, the court noted that each component was intended to be incorporated in a particular finished mechanic's hand tool. Moreover, *National Hand Tool* dismissed as a basis for a substantial transformation the value of the processing, stating that the substantial transformation test utilizing name, character and use criteria should generally be conclusive in country of origin marking determinations, and that such a finding must be based on the totality of the evidence.

In determining whether a substantial transformation has occurred in the processing of metals, CBP has generally held that the mere cutting to length or width which does not render the article suitable for a particular use does not constitute a substantial transformation. For example, in New York Ruling Letter (“NY”) N284041, dated March 31, 2017, CBP found that black steel and galvanized steel pipes were not substantially transformed in China,

where the pipes were cut into shorter lengths, chamfered, threaded, cleaned and subject to anti-rusting treatments. CBP noted that the imported product manufactured in Korea was pipe and the product imported from China remained pipe. Therefore, CBP found that the pipes did not lose their identity and were not substantially transformed when cut and processed in China. *See also* HQ 734186, dated October 24, 1991 (finding that the threading and cutting of steel pipe did not result in a substantial transformation).

In HQ W968318, dated October 2, 2006, CBP similarly found that subjecting Bulgarian-origin brass strip to one cold-rolling pass in Germany which reduced its thickness by slightly less than three one-thousandths of an inch and smoothed the product's surface did not constitute a substantial transformation of the Bulgarian-origin strip. *See also* HQ 734716, dated November 27, 1992 (finding that polishing grade 304 stainless steel sheet to achieve a No. 8 mirror finish to promote corrosion resistance was a change in a characteristic of the steel but not its character and therefore not a substantial transformation).

Accordingly, we find that the processing of the rods described above in the United States, which includes cutting, threading, stamping and treating with black oxide for corrosion resistance, does not constitute a substantial transformation. Since Newborn, as the importer, will not be the ultimate purchaser, we find that the steel metal rods are subject to the requirements of 19 C.F.R. § 134.26(a). When Newborn files the entry summary, Newborn must also file a certificate for the country of origin marking of articles to be repacked pursuant to 19 C.F.R. § 134.26. The country of origin marking of the steel metal rods must be visible to the ultimate purchaser.

HOLDING:

Based on the information provided, the imported steel metal rods will not undergo a substantial transformation in the United States and the country of origin is Taiwan for marking purposes. The steel metal rods are subject to the requirements of 19 C.F.R. § 134.26(a). HQ H303867 is hereby MODIFIED in accordance with the above analysis.

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

Sincerely,

CRAIG T. CLARK,

Director

Commercial and Trade Facilitation Division

HQ H308208

February 2, 2021

OT:RR:CTF:VS JMV H308208

CATEGORY: Marking

JASON M. WAITE, ESQ.

GRUNFELD, DESIDERIO, LEBOWITZ, SILVERMAN & KLESTADT

303 PEACHTREE STREET, N.E.

SUITE 2980

ATLANTA, GEORGIA 30308

RE: Country of origin marking for imported castings incorporated into different types of regulators, transducers, and valve positioners; substantial transformation, assembly, 19 CFR 134.35(a)

DEAR MR. WAITE:

This is in reference to Headquarters Ruling Letter (“HQ”) 561405, issued to Marsh Bellofram Corp. (“MB”) on October 23, 2001, concerning the country of origin marking for imported castings incorporated into different types of regulators, transducers, and valve positioners. In that ruling, U.S. Customs and Border Protection (“CBP”) found the imported castings were substantially transformed when combined with the U.S. components in the United States to make the finished pressure controlling devices and therefore, the imported castings were excepted from having to be individually marked with their country of origin. CBP based this decision, in part, on HQ 561745, dated July 20, 2000, which was rescinded on September 19, 2000. *See* 34 Cust. Bull. & Dec., No. 39, 40–41, September 27, 2000. Therefore, we hereby modify HQ 561405 to remove reference to HQ 561745. The finding of HQ 561405 that the imported castings are substantially transformed in the United States and are excepted from marking requirements is unaffected.

On November 11, 2020, CBP published its proposed modification of HQ 561405 in the *Customs Bulletin*, Volume 54, Number 44, 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, 2186 (1993). No comments were received in response to the proposed modification of HQ 561405.

FACTS:

The imported products that are the subject of HQ 561405 are castings, which are incorporated in five types of finished products: spring-loaded regulators, dome-loaded regulators, pilot-operated regulators, transducers and valve positioners. MB makes several different models within each of these general categories of products. Each model may have different engineering features that allow for varying applications. However, HQ 561405 only discussed the finished products in terms of the five general categories.

REGULATORS

Certain of the castings MB imports are used in the manufacture of pressure-limiting devices called regulators. MB described their use as follows: a supply pressure on one side of a nozzle is reduced to a preset output pressure by compressing a control load, often exerted by a range spring, to produce a force equal to and opposite to the force the output pressure exerts

on the other side of a diaphragm assembly. Functionally, when there is an imbalance between the output pressure and the control load, there is a corresponding reaction in the diaphragm and nozzle assemblies. If the output pressure rises above the pressure set by the control load, the diaphragm seat is lifted from the plug, venting the excess pressure to the atmosphere until equilibrium is reached. If the output pressure drops below the pressure set by the control load, the control load mechanism acts through the diaphragm assembly unseating the nozzle plug and allowing the supply pressure to flow through the nozzle to the down stream port increasing the output pressure.

Typical applications for the type of pneumatic pressure regulators that MB produces include: medical ventilators, robotic balancing arms, vibration isolation systems, tank blanketing systems, inert gas purging, air motors, natural gas engines, and burner controls.

SPRING-LOADED REGULATORS

MB imports castings for use in 11 types of regulators that fall into three distinct categories. The majority of MB's regulators are spring loaded. In a spring-loaded regulator, the control load is set by a range spring. MB has provided a process sheet describing what must be done to produce a representative Type 41 spring-loaded regulator. The imported casting in the Type 41 is called the bonnet. In the United States, two are holes tapped in the bonnet, and it is combined with a U.S.-produced bushing. In making the Type 41 regulator, a second casting of U.S. origin called the body is used. This casting is sanded, reamed, has holes tapped in it, and is center drilled. Other components in the Type 41, such as the knob, must be assembled with a nut before being ready for use in producing the finished regulator. Another process sheet describes the individual packaging of a pipe plug, which is provided separately with each Type 41 regulator. The last process sheet applies to a particular part number, and it describes the steps necessary to produce the finished regulator.

The process to produce the finished regulator includes positioning the diaphragm assembly, spring and spring guide onto the body; then positioning the bonnet before removing temporary build pins and driving and applying torque to four build screws. The assembled regulator then undergoes performance checking in accordance with quality control specifications. This entails visual checks, leakage tests, setting supply pressure and then recording output pressure to ensure that the device is performing with the critical precision that is demanded of it. Following the testing, the device is prepped for painting. Lubricant is also applied to the threads of the knob before it is installed in the regulator. Labels are subsequently attached.

DOME-LOADED REGULATORS

The second type of regulator that MB makes is called a dome-loaded regulator. These regulators are controlled through the use of dome-pressure transmitted through a diaphragm to provide the desired output pressure. MB provided an assembly diagram which includes a parts instruction diagram from the booklet provided with a sample Type 75 dome-loaded regulator. The diagram indicates that there are two imported castings used in making the Type 75 regulator--the body assembly, and a spacer. It also shows that there are many other parts involved in the production of the instrument. We understand that all of these other parts are of U.S. origin.

In the United States, the imported body casting in the Type 75 regulator is fitted with a set assembly O-ring using special lubricant. Then a screen, a pintle-ring, and a rubber gasket are all set into the body. Finally, another O-ring and baffle guide as well as a baffle plate assembly are installed in the body. The other imported casting, a spacer, is machined, has a hole drilled in it and is sanded and washed to ready it for assembly.

The Type 75 regulator also includes a domestically sourced casting, the bonnet. This casting has a center hole tapped in it, while another component, a piston, must be machined, drilled cut and washed before being ready for use in making the finished regulator. A diaphragm is incorporated into the Type 75 regulator. Making the diaphragms is a complex process that entails forming fabric and elastomers according to specifications, then combining them, shaping them and incorporating them onto a diaphragm assembly that can be built into a Type 75 regulator. The process of producing the finished regulator includes: installing the lower diaphragm assembly after applying O-ring lube to the lip seal, installing the spacer, installing the upper-diaphragm assembly in perfect alignment, positioning the bonnet, and then installing six build screws. The assembled regulator then undergoes performance checking in accordance with quality control specifications. This entails visual checks, leakage tests, and setting supply pressure, then recording the output pressure to ensure that the device is performing with the critical precision that is demanded of it. Following the testing, the device is painted and labels are subsequently applied.

PILOT-OPERATED REGULATORS

MB also manufactures pilot-operated regulators that utilize an atmospheric reference capsule to create a pilot pressure on the topside of the diaphragm. The Type 10 and Type 20 regulators are pilot operated. One of the imported castings in the Type 10 regulator, called the body, is drilled and tapped in several places before it is painted. It is then placed in a fixture where a seat is pressed into the body. This processing is necessary as detailed in the particular part's process sheet, to prepare the body casting for use in the production of the finished Type 10 regulator.

Another imported casting used in making the Type 10 regulator, the spacer, is inspected and painted. A third imported casting, the housing, must be drilled and tapped, before being painted. Then a seat ring is pressed into the housing and a pintle is inserted through the seat ring into the spring slot where the spring is fastened to the housing. A bleed screw is also installed into the housing after it has been assembled with an O-ring, a silencer and an orifice disk. This processing is necessary to prepare the housing for the final assembly of the finished regulator.

A domestically-sourced casting, the bonnet, also undergoes painting, and it has a bushing pressed into it before the capsule is assembled into it. The capsule consists of a top shell and a bottom shell that are both heat-treated before they are used. The top shell has a shaft screw welded to it before the bottom shell is welded to it in three places. The capsule as prepared is tested for leakage. The diaphragm production method sheet describes the formula used to make the necessary fabric and elastomer combination and the dimensions it is formed into. Then the diaphragm is assembled with a piston upper, piston lower, seat, two washers and a staking operation. When the diaphragm assembly is completed, it is specially taped for packaging protection while awaiting final assembly.

The processing necessary to produce the finished Type 10 regulator includes positioning the diaphragm assembly in the body assembly. A coil spring is then placed in the housing assembly. The bonnet assembly is then attached to a gasket using an air driver and four build screws. The assembled regulator then undergoes performance checking in accordance with quality control specifications. This entails visual checks, leakage tests, and setting supply pressure, then recording output pressure to ensure that the device is performing with the critical precision that is demanded of it.

TRANSDUCERS

Another product that MB makes is called a transducer. Transducers are used as a means to convert an electrical signal to a proportional pneumatic pressure. The use of a transducer allows a computerized control system to react to changes in a process. Like regulators, transducers provide a desired output pressure by comparing the actual output pressure to the commanded output pressure and adjusting the actual output pressure as required. Typical applications for electro-pneumatic transducers are position control, chemical processing, louver/damper control, variable pitch fans, breaking systems, pulp bleaching, and porous media test systems.

While regulators use a range spring or pilot pressure to create the control load against which output pressure is balanced on the opposite side of a diaphragm assembly, transducers utilize electrical input signals to operate the nozzle and the diaphragm and maintain a set output pressure. MB imports castings for use in three transducers--the Type 1000, 1001, and 2000.

You indicate that the Type 1000 transducer is representative of all of the transducers, but it is generally one of the least complex and least expensive of the transducers. You have attached a detailed assembly diagram of the Type 1000. The drawing shows the castings that are used in the Type 1000, and also shows that many other parts are necessary for the production of these devices. One of the imported castings in the Type 1000, the housing, is repeatedly drilled and tapped to specifications before it is subject to an assembly operation described on the process sheet for part number 232-802-000-048. Another imported casting, the spacer has an eyelet pressed into it. A domestically-sourced casting, the body, is drilled and tapped to specification before being placed in a fixture where a seat is pressed into it. Then a pintle with a half-ball is placed into the body. Finally, a spring is assembled into the body. This necessary processing, as detailed in a process sheet, is to prepare the body casting for use in producing the finished Type 1000.

MB has also included the detailed process sheets describing the preparation of a magnet assembly, coil-pin assembly, heat-treated flexure spring, and coil/spring assembly. The Type 1000 also requires that a diaphragm be made using the method sheet formula. The diaphragm is assembled with a large piston, small piston, seat, two washers and a staking operation, and then coined to a specified depth using an air press. The worm, orifice, the relay, and tubing are subject to processing and/or subassembly before they are prepared for assembly into the Type 1000 transducer. You state that the final assembly process alone is highly complex and involves the precise combination of the several other subassemblies that are produced. Finally, the Type 1000 undergoes extensive testing.

VALVE POSITIONERS

Valve positioners are devices which receive a pneumatic command signal at the input port and thus provide an output pressure signal to an actuator until the positioner receives mechanical feedback that the actuator has reached a position proportional to the pneumatic command signal. MB imports castings for use in two valve positioners, the Type 80 and Type 86. The Type 80 gets mechanical feedback through an extension spring or a flat coiled rotary spring. The Type 86 gets mechanical feedback through a mechanical arm or a universal coupling.

An assembly diagram and a part list/diagram from the booklet that comes with the Type 80 valve positioner shows the castings that are used in building the Type 80. The drawings also show that many other parts are necessary for the construction of these devices. One of the imported castings in the Type 80, the bonnet, is machined and painted and then assembled to a signal spacer equipped with a diaphragm. The signal spacer itself is drilled, sanded, has specific dimension holes tapped and sunk in it, and is painted. Another imported casting, the housing, is drilled and reamed to specification. It is then painted, an orifice is put into it, and tube and eyelets pressed into it. A third imported casting in the Type 80, the body, has holes of a specific dimension tapped in it, and is painted before being fitted with a seat, a pintle to which a half ball is affixed, a spring and pipe plugs. The seat must be prepared for use by crimping a nozzle in it. The baffle must be painted. A manifold must be reamed and tapped to specification and then have a plug pressed into it before being painted.

An included method sheet describes the process of producing the diaphragm that must be incorporated into the finished Type 80. Making diaphragms entails forming fabric and elastomers according to specification and then combining them, shaping them and incorporating them onto a diaphragm assembly that can be built into a type 80. The diaphragm assembly involves the preparation of rubber according to precise formulas, and then assembling the rubber diaphragm into a fixture with a washer using a press.

After all of these component parts have themselves have been prepared for assembly into the finished Type 80, a subassembly of the valve positioner is built using the body assembly, spring, housing, bonnet assembly, build screws and the clevis assembly. The baffle and the manifold are attached to each other before being mounted to the valve positioner subassembly. The finished product then undergoes careful testing.

MB has also provided its opinion as to how the imported castings should be classified under the Harmonized Tariff Schedule of the United States (“HTSUS”). For purposes of this ruling, we are assuming that your proposed classification of the articles is correct. You indicate that the regulators, transducers and valve positioners are classifiable under subheading 9032.81.00, HTSUS and the imported castings specifically designed for use with particular regulators, transducers or valve positioners are classifiable in subheading 9032.90.60, HTSUS, which is currently 9032.90.61.

ISSUE:

Whether the imported castings are substantially transformed when they are used to produce regulators, transducers, and valve positioners in the United States as described above.

LAW AND ANALYSIS:

Section 304 of the Tariff Act of 1930, as amended (19 U.S.C. §1304), requires, subject to certain specified exceptions, that every article of foreign origin imported into the United States shall be marked to indicate the country of origin to the ultimate purchaser in the United States Part 134, Customs Regulations (19 CFR part 134), implements the country of origin marking requirements and exceptions of 19 U.S.C. §1304. An ultimate purchaser is defined in section 134.1, Customs Regulations (19 CFR 134.1), as “the last person in the United States who will receive the article in the form in which it was imported.” The regulation further provides that if an imported article will be used in manufacture, the manufacturer may be the ultimate purchaser if he subjects the imported article to a process that results in a substantial transformation. However, if the manufacturing process is merely a minor one which leaves the identity of the imported article intact, 19 CFR §134.1(d)(2) provides that the consumer or user of the article who obtains the article after the processing will be regarded as the ultimate purchaser.

According to *United States v. Gibson-Thomsen Company, Inc.*, 27 CCPA 267 (C.A.D.98), a U.S. manufacturer is considered to be an ultimate purchaser if a manufacturing process is performed on an imported item so that the item is substantially transformed in that it loses its identity and becomes an integral part of a new article with a new name, character or use. The court determined that in such circumstances, the imported article is excepted from individual marking. Only the outermost container is required to be marked. See Sections 134.32(d) and 134.35(a), Customs Regulations (19 CFR §134.32(d), 19 CFR 134.35(a)).

If the manufacturing or combining process is a minor one which leaves the identity of the imported article intact, a substantial transformation has not occurred and an appropriate marking must appear on the imported article so that the consumer can know the country of origin. See *Uniroyal Inc. v. United States*, 3 CIT 220, 542 F. Supp. 1026 (CIT 1982). Assembly operations that are minimal or simple, as opposed to complex or meaningful, will generally not result in a substantial transformation. See C.S.D. 80–111, C.S.D. 85–25, and C.S.D. 90–97.

The court noted in *Uniroyal* that the imported article, an upper, in its condition as imported, was a complete shoe (except for the absence of an outsole) that had “already attained its ultimate shape, form and size” and was “the very essence of the completed shoe.” The other factors considered by the court included the time involved in the combining process, the significantly less costly nature of the combining process and that five highly skilled operations were involved in making the upper while only one highly skilled operation was necessary to attach the upper and the outsole.

The finished products involved in this case fall into three basic categories: regulators, transducers and valve positioners. Within these basic categories there are various models, each of which may perform different functions and may be used in different applications. Although the processes involved in producing the various regulators, transducers, and valve positioners described in the ruling request differ to a certain extent, it appears that their production basically involves the use of one or more imported castings that usually are processed in the United States through different types of machin-

ing and various other operations before they are combined through an assembly process with U.S. made components to produce the finished products.

In HQ 732940 dated July 5, 1990, CBP considered water pump assemblies comprised of 6–8 components including a casting, bearing, impeller, hub, seal, mounting gasket, and in some cases, a spacer, and tubes or plugs which were assembled in the United States. Although the assembly process was not exceedingly complex, and in one instance a Taiwanese-origin casting was used to produce the water pump, which remained visible after assembly, a substantial transformation was found. The rationale given was that most of the important components of the water pump were of U.S. origin, and the foreign casting was permanently attached to the other components. *See also* HQ 732350 dated June 23, 1989, regarding imported transducers (i.e., microphones and receivers) which were wired to a faceplate in the United States along with a signal processing circuit, and were then cemented into a shell to create hearing aids. The transducers were considered substantially transformed and excepted from individual country of origin marking pursuant to 19 CFR 134.35 as they lost their separate identity and were merged into a new and different article (a hearing aid) when they were securely attached to the faceplate.

In *National Hand Tool v. United States*, 16 CIT 308, (1992) *aff'd* 989 F.2d 1201 (Fed. Cir. 1993), a country of origin marking case, certain hand tool components used to make flex sockets, speeder handles, and flex handles, were imported from Taiwan. The components were cold-formed or hot-forged into their final shape prior to importation, with the exception of speeder handle bars, which were reshaped by a power press after importation. The grip of the flex handles were also knurled in the United States, by turning the grip portion of the handle against a set of machine dies that formed a cross-hatched diamond pattern. The components were subjected to a heat treatment, which increased the strength of the components, sandblasting (a cleaning process), and electroplating (enabling the components to resist rust and corrosion). After these processes were completed, the components were assembled into the final products, which were used to loosen and tighten nuts and bolts.

The Court of International Trade decided the issue of substantial transformation based on three criteria, i.e., name, character, and use. Applying these rules, the court found that the name of the components did not change after the post-importation processing, and that the character of the articles similarly remained substantially unchanged after the heat treatment, electroplating and assembly, as this processing did not change the form of the components as imported. The court further pointed out that the use of the articles was predetermined at the time of importation, i.e., each component was intended to be incorporated in a particular finished mechanic's hand tool. The court dismissed as a basis for a substantial transformation the value of the processing, stating that the substantial transformation test utilizing name, character and use criteria should generally be conclusive in country of origin marking determinations, and that this finding must be based on the totality of the evidence. Based on this test, the court concluded that the processing in the United States did not effect a substantial transformation of the foreign hand tool components.

Based largely on the *National Hand Tool Corp. v. United States* case, CBP in several recent rulings has determined that simple machining of imported castings combined with a simple assembly did not result in a substantial

transformation of the imported castings. For example, in HQ 560399, dated May 14, 1998, a variety of iron and stainless steel pump castings from Finland were imported into the United States for further processing. In the United States, the processing of the imported pump castings included turning, boring and/or milling, drilling and/or tapping, balancing and testing. In making its decision, CBP noted that, upon importation into the United States, the castings were not rough, generic forms but had the same shape as the finished pump parts. CBP further noted that the casting already had the essential characteristics of finished pump parts at the time of importation. Therefore, CBP found that the imported castings did not lose their identity and become an integral part of a new article.

In HQ 561297, dated June 2, 1999, CBP considered whether a substantial transformation resulted when imported raw castings were processed in the United States into receivers, which were then assembled into rifles. The U.S. processing of the raw castings to produce receivers included machining, heat treatment, drilling four holes, sandblasting, dipping the castings into a hot caustic solution, stamping, and final inspection. The receivers were then ready to be assembled into rifles. CBP noted that the raw castings had the shape, character and predetermined use of the finished receivers and merely required intermediate finishing operations. Accordingly, CBP held that the processing of the raw castings into receivers in the United States did not result in a substantial transformation.

However, in HQ 561297, CBP also ruled that the processing of the raw castings into receivers and assembling them with other components to create finished rifles in the United States resulted in a substantial transformation creating a new article with a new name, character, and use. The factors considered were the complexity of the assembly operation, the number of parts involved, and the need for trained technicians to meet very exacting specifications.

In our opinion, the instant case is analogous to HQ 561297, in that initial processing of the imported castings (e.g., machining, drilling) by itself would not constitute a substantial transformation. However, the processing of the imported raw castings coupled with their assembly with other components manufactured in the United States to create the finished products in the United States results in a substantial transformation of the imported castings, creating a new article with a new name, character, and use.

Moreover, we believe that facts of this case are distinguishable from the *National Hand Tool* case and HQ 560399 because the imported castings do not impart the essential character to the finished products. In this case, most of the imported castings need extensive processing before they can be assembled with various U.S.-produced components to make the finished regulators, transducers, and valve positioners. In the *National Hand Tool* case, the imported castings comprised the only significant components used to make the finished articles. In contrast, in this case, other significant components of U.S. origin are used to make the final products. Although it is clear that the imported castings are significant components, we note that the finished products are complex and that a number of other components (including U.S. origin castings) besides the foreign castings are incorporated into the finished transducers, regulators and valve positioners. Consequently, we believe that the imported castings do not constitute the essence of the

finished products. We also find it significant that, except for the imported castings, all of the components in these devices are made in the United States.

Based on the diagrams and the process sheets submitted with the ruling request, the assembly operations appear to be fairly complex while in *National Hand Tool* and HQ 560399, the assembly was not particularly complex. In *National Hand Tool* the assembly consisted largely of putting together only a few pieces. The assembly of the finished products in this case is a multi-step process which appears to be far more intricate and involved than the assembly that was performed in *National Hand Tool*. The regulators also contain more components than the products in *National Hand Tool*. For example, according to a diagram submitted, one of the simpler devices, the Type 41 Regulator, consists of 13 individual components. Certain of the other devices contain more components. All of the individual components must be assembled together to produce the finished regulating devices.

In building the finished regulating devices, the imported castings are drilled, tapped, and machined to exact specifications so that the particular devices can effectively regulate flow. The process may also include pressing components into the castings, positioning springs and spring guides, applying torque to screws, and aligning various other components. In addition, much of the processing done in the United States consists of producing subassemblies such as diaphragm assemblies, pintle assemblies, coil and spring assembly baffles, manifolds, which are then incorporated into the finished products. To make the subassemblies, imported and domestic castings are used. These subassemblies must be carefully prepared before the final assembly to make the finished control devices can proceed. In turn, these subassemblies then must be combined carefully together to make the finished products.

Several of the components in these control devices appear to be quite tiny in addition to being delicate and intricate. This means that during the assembly process workers must use care to make a number of fine and precise adjustments and alignments to the components such as fitting springs and bushings to ensure that the finished products function properly. We are mindful of the fact that these are sophisticated devices, which are designed to precisely regulate flow. Therefore, they must be put together carefully in order to function properly. As a result, it appears that the technicians that perform the assembly operations must be highly trained and skilled.

Accordingly, we find that the imported castings are substantially transformed when combined with the U.S. components in the United States to make the finished pressure controlling devices. Therefore, under 19 CFR 134.35(a), the imported castings are excepted from having to be individually marked with their country of origin.

HOLDING:

Based upon the information provided, it is our opinion that the imported castings will undergo a substantial transformation in the United States, when they are processed and combined with other U.S. origin components to form the finished pressure-control devices. Therefore, the imported castings incorporated into the regulators, transducers, and valve positioners are excepted from the marking requirements of 19 U.S.C. 1304 and only the outermost containers in which MB receives the imported castings are required to be marked to indicate the country of origin of the castings. This ruling is

limited to the specific factual circumstances and models of regulators, transducers and valve positioners discussed herein. HQ 561405 is hereby MODIFIED in accordance with the above analysis.

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

Sincerely,

CRAIG T. CLARK,

Director

Commercial and Trade Facilitation Division

HQ H308209

February 2, 2021

OT:RR:CTF:VS: H308209 JMV

CATEGORY: Classification

TARIFF NO.: 7307.19.3085; 7307.19.9080

DEAN BARCLAY
WHITE & CASE PC
701 THIRTEENTH STREET, NW
WASHINGTON, DC 20005-3807

RE: Modification of HQ H276962; classification of ductile iron bolt rings and stainless steel bolt rings

DEAR MR. BARCLAY:

This is in reference to Headquarters Ruling Letter (“HQ”) H276962, issued to you on behalf of your client SIGMA Corp. (“SIGMA”), on March 16, 2018, concerning the reconsideration of New York Ruling Letter (“NY”) N077237, dated September 28, 2009, which considered the classification of ductile iron bolt rings and stainless steel bolt rings. In that ruling, U.S. Customs and Border Protection (“CBP”) found that the subject bolt rings are properly classified in heading 7307 of the Harmonized Tariff Schedule of the United States (“HTSUS”). Specifically, the ductile iron bolt rings are classified in subheading 7307.19.30, HTSUS and the stainless steel bolt rings are classified in subheading 7307.19.90, HTSUS. In making this decision, CBP cited to HQ 561710, dated July 20, 2000, which was rescinded on September 19, 2000. See 34 CUST. BULL. & DEC., No. 39, 40–41, September 27, 2000. Therefore, we hereby modify HQ H276962 to remove reference to HQ 561710. The finding of HQ H276962 that the ductile iron bolt rings are classified in subheading 7307.19.30, HTSUS and the stainless steel bolt rings are classified in subheading 7307.19.90, HTSUS is unaffected.

On November 11, 2020, CBP published its proposed modification of HQ H276962 in the *Customs Bulletin*, Volume 54, Number 44, 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, 2186 (1993). No comments were received in response to the proposed modification of HQ H276962.

HQ H276962 was in response to your letter of June 23, 2016, submitted on behalf of SIGMA, requesting reconsideration of NY N077237, dated September 28, 2009. NY N077237 involved classification of ductile iron bolt rings and stainless steel bolt rings (collectively, “bolt rings” or “subject merchandise”) under the HTSUS. In your June 23, 2016 letter (“reconsideration request”), you contend that the classification determination set forth in NY N077237 is erroneous. We regret the delay in responding to your reconsideration request.

Upon our review of NY N077237, we have determined the ruling to be correct. We are accordingly affirming the ruling. In reaching this decision, we have considered arguments presented in the reconsideration request, in a November 14, 2016 meeting, in a supplemental submission provided at the meeting, and in other communications with our office. Our decision is also based in part upon our inspection of product samples.

The bolt rings at issue are described and depicted as follows in NY N077237:

The products you plan to import are described as cast bolt rings made of two different materials, either ductile iron or stainless steel. The bolt rings are said to be used in the waterworks, sewer, fire protection, food and dairy industries. A sample of the stainless steel bolt ring has been submitted. The circular hollow sample measures 8.75 inches in outside diameter, approximately 4.5 inches in inside diameter, and approximately 1.12 inches in depth. It has a recessed inner circular groove. The circumference of the face of the ring contains six equally spaced holes for placement of bolts.



The bolt rings are described as being used specifically on HDPE (high density poly ethylene) pipes in conjunction with HDPE flange adaptors. The flange adaptors are fused by heat to the ends of the pipe. The flange adaptors provide a tighter seal but do not make a connection between the pipes. The bolt rings slip behind each of the fused flange adaptors. The rings are bolted together and serve as a clamping device to provide a tighter seal and connect the pipes together.

The reconsideration request provides the following additional information:

The bolt rings are placed on HDPE pipes in conjunction with HDPE flange adaptors. After HDPE flanges are fused to HDPE pipe ends, the Bolt Rings are then placed behind the HDPE flanges on the outside of the HDPE pipe (not within or in alignment with the pipe bore). The Bolt Rings do not fill the tube aperture or make an end-to-end connection with the bore...

* * *

Functionally, the Bolt Rings are used as adjoining compression or clamping devices to seal the two HDPE flanges to one another. The Bolt Rings apply high compressive force from outside of the pipe so that the two HDPE flanges press together to form a seal, clamping the flanges together. The Bolt Rings thus do not “chang[e] the direction of [nor even contact] fluid flow” or themselves connect the pipe bores. Customers use the Bolt Rings primarily the waterworks, sewer, fire protection, food, and dairy industries.

In NY N077237, U.S. Customs and Border Protection (“CBP”) classified the subject bolt rings in heading 7307, HTSUS. Specifically, the ductile iron bolt rings were classified in subheading 7307.19.30, HTSUS, which provides for: “Tube or pipe fittings of iron or steel: Cast fittings: Other: Ductile fittings.” The stainless steel bolt rings were classified in subheading 7307.19.90, HTSUS, which provides for: “Tube or pipe fittings of iron or steel: Cast fittings: Other: Other.” In your reconsideration request, you contend that

these classifications are incorrect, and that the bolt rings are properly classified in heading 7325, HTSUS, which provides for “other cast articles of iron or steel.”

As a preliminary matter, the subject bolt rings can only be classified in heading 7325, 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.”). Heading 7307, HTSUS, applies to pipe fittings of iron or steel. The tariff term “pipe fitting” is not defined in the HTSUS. As such, it must be construed in accordance with its common meaning, which may be ascertained by reference to “standard lexicographic and scientific authorities” and to the pertinent ENs. *GRK Can., Ltd. v. United States*, 761 F.3d 1354, 1357 (Fed. Cir. 2014). EN 73.07 states, in pertinent part, as follows:

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.

The heading **excludes**:

- (a) Clamps and other devices specially designed for assembling parts of structures (**heading 73.08**).
- (b) Bolts, nuts, screws, etc., suitable for use in assembly of tube or pipe fittings (**heading 73.18**).

According to the above EN, as well as various technical references, pipe fittings generally include articles used (*inter alia*) to connect separate pipes to each other. *See, e.g.*, Headquarters Ruling Letter (“HQ”) H282297, dated July 6, 2017 (referencing technical definitions cited in various court cases). Additionally, EN 73.07 specifies that “flanges” and “lap joint stub-ends” are among the qualifying connectors of the heading. *See also* subheading 7307.21, HTSUS, and subheading 7307.91, HTSUS (providing for “Flanges” within the subheading structure of heading 7307). With regard to the former, we note that the dimensional criteria of “pipe flanges and flanged fittings” are detailed in industry standard B16.5, promulgated jointly by the American Society of Mechanical Engineers (AMSE) and American National Standards

Institute (ANSI). See Am. Soc’y Mech. Eng’r, Pipe Flanges and Flanged Fittings: NPS 1/2 through NPS 24 Metric/Inch Standard (2017). AMSE/ANSI B16.5 is particularly illuminative as to the types of articles falling under the banner of “flanges” and, by extension, pipe fittings of heading 7307. Per the standard, there are six recognized types of pipe flanges in industry, all of which are disc-shaped with a center aperture and smaller apertures encircling the main aperture at even intervals. See *id.*; see also CCTF Corp., Forged Steel Flanges 4 (2015) [hereinafter Forged Steel Flanges], available at http://www.cctf.com/catalogues/flanges_catalog_dec_2015.pdf (summarizing types of flanges covered by AMSE/ANSI B16.5).

Two of these flange types, “lap joint” flanges and “slip-on” flanges, are situated around the outer circumference of the pipe segments to be conjoined. See Forged Steel Flanges, *supra*, at 3. To that extent, both seal the connection between the two pipe lengths without coming into contact with the fluid transmitted through the aperture. In particular, lap joint flanges are placed around short, lipped bores, which are in turn butt-welded to pipe ends. *Id.* These bores are referred to as “stub ends,” which, again, are specifically identified in EN 73.07 as pipe fittings of heading 7307, HTSUS. *Id.* When two counter-facing flange/stub end combinations are conjoined, and the stub ends are aligned to form the inner aperture through which fluid flows, the flanges are then bolted together to seal the connection between the pipe lengths. See *id.*; see also W.M. Huitt, Eng’g Practice: Piping Design, Part 2 – Flanges 57 (2007), available at http://www.wmhuittco.com/images/Article_2_Piping_Design_Part_2_Flanges.pdf. Given the myriad indicia in EN 73.07, the sub-heading breakouts under heading 7307, and AMSE/ANSI B16.5, it is our position that products used in this manner, and which meet the above-stated physical description of flanges, are pipe fittings of heading 7307. See HQ 559871, dated February 18, 1997 (accepting claimed classification of slip-on and lap joint flanges in heading 7307, HTSUS, for purposes of determining the flanges’ country of origin).

Here, the bolt rings at issue are disc-shaped articles with a center aperture and smaller encircling apertures set at uniform intervals along the article’s rim. As such, they take the form of industry-recognized flanges as detailed in AMSE/ANSI B16.5. Product descriptions in both NY N077237 and your reconsideration request indicate that the bolt rings are designed to slip onto the outer circumference of lipped apertures of HDPE referred to as “flange adapters,” and that once so placed, they are bolted to counter-facing flanges on adjacent pipe segments. In other words, they are identical in form and function to the lap joint flanges described above. In fact, according to product literature included with your reconsideration request, as well as an inscription found in the inner recesses of the samples, the bolt rings even adhere to the dimensional standards set forth in the above-referenced AMSE/ANSI B16.5. Moreover, our research indicates that in HDPE pipe end assemblies of the specific type in which the instant bolt rings are used, these rings are actually referred to as lap joint flanges and the HDPE flange adapters as stub ends. See Plastic Pipe Inst., Bolt Torque for Polyethylene Flanged Joints 5 (2011), available at https://plasticpipe.org/pdf/tn-38_bolt_torque_flanged_joints.pdf. In all but product name, therefore, the instant bolt rings are flanges of heading 7307, HTSUS.

In your reconsideration request, you present several arguments opposing this classification. You contend that it is the heat-sealing of the HDPE adapters, rather than the bolting of the rings, which forms the sole “end-to-

end connection with the bore”; that the bolt rings instead function merely as “clamps” or “restraining devices” excluded from heading 7307; that the bolt rings do not form an “integral part of the bore,” as is purportedly required by EN 73.07, or comply with the connection methods listed in the EN; that the bolt rings could not be considered “complete” fittings because they cannot perform their intended function absent the HDPE adapters, which are not included at entry; that the classification of the bolt rings in heading 7307 conflicts with prior CBP rulings pertaining to similar merchandise; and that this classification also conflicts with a ruling, issued September 20, 2016 by Department of Commerce, that the subject bolt rings fall outside the scope of an antidumping duty order on certain pipe fittings (“Commerce scope ruling”).

We disagree with these arguments. As stated above, the bolt rings are physically and functionally identical to lap joint flanges, which are pipe fittings of heading 7307. It is immaterial that the particular stub ends with which the bolt rings are used happen to be heat-sealed prior to the bolting of the rings. It is also of no consequence whether the bolt rings can additionally be characterized as “clamps” (which, per EN 73.07, are included in the heading regardless). The fact remains that the bolt rings are, in form and function alike, flanges classifiable in heading 7307. If the pipe-to-pipe connections formed by the bolting of flanges generally, and lap joint flanges in particular, are sufficient for purposes of the heading, then this is also the case for bolt rings used in exactly the same manner. To this extent, the characterization of bolt rings in NY N077237 as articles which “provide a tighter seal but do not make a connection between the pipes” is incorrect.*

Moreover, there is nothing to suggest that the bolt rings must form part of the bore to warrant treatment as a pipe fitting of heading 7307, HTSUS. Contrary to your contention, EN 73.07 does not establish integration into the bore as a universal criterion for pipe fittings; rather, it merely states that certain articles which both are used to install pipes and tubes *and* are not an integral part of the bore are excluded from the heading. As stated above, at least two of the flange types recognized in industry as “pipe flanges” are placed along the outer circumference of the aperture, to the effect that they do not form part of the bore or come into contact with the fluid flowing through the bore. *See also* HQ 965939, dated July 16, 2003 (classifying pipe fitting nuts in heading 7307 where they had previously been described, in HQ 965584, dated September 24, 2002, as “never touch[ing] the substance that passes through the pipes”).

For similar reasons, we are not convinced that the bolt rings fall outside the scope of heading 7307, HTSUS, simply because they are used in combination with HDPE adapters to form a connection between separate pipes. Again, as articles specifically identified as products of heading 7307, HTSUS, the bolt rings are in and of themselves constitutive of “complete” pipe fittings. Hence, the statement in NY N270588, dated November 24, 2015, that “classification as tube or pipe fittings requires that the complete fitting be imported,” is inapplicable here. Moreover, upon review of NY N270588, find that the ruling is incorrect and accordingly intend to revoke it.

* By extension, we disagree that the role of the bolt rings can be reduced to the kind of “assistive” seal-forming function performed by the ferrules at issue in HQ 967490, dated November 14, 2005.

Lastly, our determination is not precluded by the Commerce scope ruling or any of the prior CBP rulings cited in your reconsideration request. As to the former, it is well-established that scope rulings issued by the Department of Commerce are not binding on CBP for purposes of classification under the HTSUS. *See* HQ 966728, dated June 29, 2004 (citing court precedent in stating that “CBP has been designated to administer the HTSUS” and that “the classification of imported merchandise is a matter properly determined by this agency”). As to the latter, the CBP rulings cited in your request all involve distinguishable merchandise or are otherwise inapplicable. The sleeves and “end rings” at issue in NY K86336, dated June 14, 2004, and NY N097562, dated April 1, 2010, are designed for use internally within larger coupling assemblies which in turn function as joints for pipe ends. Unlike the bolt rings, neither is used to directly bolt separate pipe ends together. Moreover, HQ 967490, *supra*, involved small ferrules that do not remotely resemble the bolt rings in form or function. Lastly, irrespective of whether the glands in NY N118077, dated August 18, 2010, are comparable to the bolt rings, the glands’ classification was not at issue in that case; nor was it material to the determination of the glands’ country of origin, which *was* at issue there. As such, CBP’s passing mention that the glands are products of heading 7325 is not actually dispositive as to their classification.

Accordingly, we remain of the position that the bolt rings are classified as “pipe fittings” in heading 7307, HTSUS, and for all the aforementioned reasons, we hereby affirm NY N077237. As determined in that ruling, the ductile iron bolt rings are specifically classified in subheading 7307.19.3085, HTSUSA (Annotated), which provides for: “Tube or pipe fittings of iron or steel: Cast fittings: Other: Ductile fittings: Other.” The stainless steel bolt rings are specifically classified in subheading 7307.19.9080, HTSUSA, which provides for: “Tube or pipe fittings of iron or steel: Cast fittings: Other: Other: Other: Other: Other.” HQ H303868 is hereby MODIFIED in accordance with the above analysis.

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

Sincerely,

CRAIG T. CLARK,

Director

Commercial and Trade Facilitation Division



RECEIPT OF APPLICATION FOR “LEVER-RULE” PROTECTION

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

ACTION: Notice of receipt of application for “Lever-Rule” protection.

SUMMARY: Pursuant to 19 CFR 133.2(f), this notice advises interested parties that CBP has received an application from JUUL Labs, Inc., (“JUUL”) seeking “Lever-Rule” protection for six federally registered and recorded JUUL trademarks.

FOR FURTHER INFORMATION CONTACT: W. Richmond Beevers, Intellectual Property Rights Branch, Regulations & Rulings, (202) 325-0084.

SUPPLEMENTARY INFORMATION:

BACKGROUND

Pursuant to 19 CFR 133.2(f), this notice advises interested parties that CBP has received an application from JUUL seeking “Lever-Rule” protection. Protection is sought against importations of electronic cigarettes; electronic smoking vaporizers; tobacco substitutes in liquid solution form; liquid nicotine used to refill electronic cigarettes; chemical flavorings in liquid form used to refill electronic cigarettes; and, cartridges sold filled with chemical flavorings in liquid form for electronic cigarettes, manufactured in the United States and China and intended for sale outside the United States, that bear the “JUUL” word mark (U.S. Trademark Registration No. 4,818,664/ CBP Recordation No. TMK 16-00860); the “JUUL (STYLIZED)” trademark (U.S. Trademark Registration No. 4,898,257/ CBP Recordation No. TMK 16-00874); the “JUUL LABS” word mark (U.S. Trademark Registration No. 5,776,153/ CBP Recordation No. TMK 19-01018); the “JUULPOD DESIGN” trademark (U.S. Trademark Registration No. 5,304,697/ CBP Recordation No. TMK 18-00062); the “DESIGN ONLY (JUUL DEVICE DESIGN)” trademark (U.S. Trademark Registration No. 5,299,392/ CBP Recordation No. TMK 18-00063); and/or, the “JUULPODS” word mark (U.S. Trademark Registration No. 5,918,490/ CBP Recordation No. TMK 21-00061).

In the event that CBP determines that the electronic cigarettes; electronic smoking vaporizers; tobacco substitutes in liquid solution form; liquid nicotine used to refill electronic cigarettes; chemical flavorings in liquid form used to refill electronic cigarettes; and, cartridges sold filled with chemical flavorings in liquid form for electronic cigarettes, under consideration are physically and materially different from the electronic cigarettes; electronic smoking vaporizers; tobacco substitutes in liquid solution form; liquid nicotine used to refill electronic cigarettes; chemical flavorings in liquid form used to refill electronic cigarettes; and, cartridges sold filled with chemical flavorings in liquid form for electronic cigarettes, authorized for sale in the United States, CBP will publish a notice in the Customs Bulletin, pursuant 19 CFR 133.2 (f), indicating that the above-referenced trademarks are entitled to “Lever-Rule” protection with respect to those physically and materially different electronic cigarettes; electronic smoking vaporizers; tobacco substitutes in liquid solution form; liquid nicotine used to refill electronic cigarettes;

chemical flavorings in liquid form used to refill electronic cigarettes; and, cartridges sold filled with chemical flavorings in liquid form for electronic cigarettes.

Dated: January 28, 2021

ALAINA VAN HORN
Chief,
Intellectual Property Rights Branch
Regulations and Rulings,
Office of International Trade

U.S. Court of International Trade

Slip Op. 21–09

VENUS WIRE INDUSTRIES PVT. LTD., et al., Plaintiffs, v. UNITED STATES, Defendant, and CARPENTER TECHNOLOGY CORPORATION, et al., Defendant-Intervenors.

Before: Mark A. Barnett, Judge
Court No. 18–00113

[The U.S. Department of Commerce’s second remand results concerning the changed circumstances review of the antidumping duty order on stainless steel bar from India are sustained.]

Dated: January 28, 2021

Eric C. Emerson and *St. Lutheran M. Tillman*, Steptoe & Johnson LLP, of Washington, DC, for Plaintiffs.

Kara M. Westercamp, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC, for Defendant. With her on the brief were *Jeffrey B. Clark*, Acting Assistant Attorney General, *Jeanne E. Davidson*, Director, and *Tara K. Hogan*, Assistant Director. Of counsel on the brief was *Hendricks Valenzuela*, Attorney, Office of the Chief Counsel for Trade Enforcement and Compliance, U.S. Department of Commerce, of Washington, DC.

Grace W. Kim and *Laurence J. Lasoff*, Kelley Drye & Warren LLP, of Washington, DC, for Defendant-Intervenors.

OPINION AND ORDER

Barnett, Judge:

This matter is before the court following the U.S. Department of Commerce’s (“Commerce” or “the agency”) second redetermination upon court-ordered remand. *See Confidential Results of Redetermination Pursuant to Court Remand (“2nd Remand Results”)*, ECF No. 75–1. Plaintiffs, Venus Wire Industries Pvt. Ltd. (“Venus Wire”) and its affiliates Precision Metals (“Precision”), Sieves Manufacturers (India) Pvt. Ltd. (“Sieves”), and Hindustan Inox Ltd. (“Hindustan”) (collectively, “Venus”), commenced this action challenging Commerce’s final results in the changed circumstances review of the antidumping duty order on stainless steel bar from India. *See Summons*, ECF No. 1; *Compl.*, ECF No. 9; *Stainless Steel Bar From India*, 83 Fed. Reg. 17,529 (Dep’t Commerce Apr. 20, 2018) (final results of changed circumstances review and reinstatement of certain companies in the antidumping duty order) (“*Final Results*”), ECF No. 20–5, and accompanying Issues and Decision Mem., A-533–810 (Apr. 16, 2018), ECF

No. 20–6.¹ Venus, an exporter and producer of the subject merchandise, contested Commerce’s determinations (1) that Venus is not the producer of subject merchandise made from inputs purchased from unaffiliated suppliers that are covered by the scope of the underlying antidumping duty order; and (2) to use total facts otherwise available with an adverse inference (referred to as “total adverse facts available” or “total AFA”) to determine Venus’s rate. *See* Confidential [Venus’s] Mem. of P&A in Supp. of Its Mot. For J. on the Agency R., ECF No. 33; Compl. ¶ 3. The court has issued two opinions addressing issues in this case; familiarity with those opinions is presumed. *See Venus Wire Indus. Pvt. Ltd. v. United States* (“*Venus I*”), 43 CIT ___, 424 F. Supp. 3d 1369 (2019); *Venus Wire Indus. Pvt. Ltd. v. United States* (“*Venus II*”), 44 CIT ___, 471 F. Supp. 3d 1289 (2020).

Briefly, on December 20, 2019, the court remanded Commerce’s *Final Results* with respect to the agency’s determination that Venus is not the producer of subject merchandise manufactured from in-scope inputs and deferred Venus’s challenge to Commerce’s use of total AFA. *See generally Venus I*, 424 F. Supp. 3d 1369. In the agency’s first remand redetermination, Commerce provided additional explanation in support of its conclusion that Venus is not the producer of certain subject merchandise and made no changes to the *Final Results*. Results of Redetermination Pursuant to Court Remand at 3–11, 14–20, ECF No. 61–1. On August 14, 2020, the court sustained Commerce’s redetermination as to the identity of the producer and remanded Commerce’s use of total AFA for reconsideration. *See generally Venus II*, 471 F. Supp. 3d 1289.

Commerce filed its 2nd Remand Results on November 12, 2020. In the redetermination, Commerce provided additional support for its finding that Venus failed to act to the best of its ability to obtain cost information from its unaffiliated suppliers. *See* 2nd Remand Results at 4–9. Despite the inclusion of this additional reasoning, Commerce, “under respectful protest,”² determined not to use total

¹ The administrative record associated with the 2nd Remand Results is divided into a Public Record (“PR”), ECF No. 77–2, and a Confidential Record (“CR”), ECF No. 77–3. The Parties submitted a public joint appendix containing record documents cited in their comments. *See* Public J.A., ECF No. 87. Submission of the confidential joint appendix has been deferred pending resolution of issues with the court’s electronic court filing system. While the court is able to resolve the challenges to the 2nd Remand Results without reference to the confidential joint appendix, Plaintiffs must nevertheless file such appendix within five business days of a court order resolving the method of such non-public filings in order to provide for a complete record in case of any further appeal.

² By making the determination under protest, Commerce preserves its right to appeal. *See Viraj Grp., Ltd. v. United States*, 343 F.3d 1371, 1376 (Fed. Cir. 2003).

AFA to determine Venus's dumping margin.³ *Id.* at 10. Instead, Commerce calculated an antidumping duty margin in the amount of 0.64 percent for Venus using:

- (1) Venus'[s] actual costs for the subject merchandise Venus produced from stainless steel wire rod;
- (2) the actual costs reported by Rajputana Stainless Ltd. (Rajputana), the sole unaffiliated supplier which provided its actual costs, for the subject merchandise Venus purchased from Rajputana; and
- (3) the acquisition cost Venus paid to the other unaffiliated suppliers as the non-adverse facts available on the record in place of those suppliers' actual costs for the subject merchandise Venus purchased from them.

Id.

Commerce rejected Venus's arguments that Commerce improperly collapsed Venus Wire, Precision, Sieves, and Hindustan "into a single entity and [improperly] calculated Venus'[s] margin by including the producer as part of the model-matching criteria for purposes of conducting the cost-of-production test." *Id.* at 11; *see also id.* at 11–13. Commerce also disagreed with Petitioners'⁴ argument that the agency should continue to use total or partial AFA. *Id.* at 13–15.

Venus seeks to challenge, in part, Commerce's 2nd Remand Results. Confidential Pls.' Cmts. on the Second Remand Redetermination ("Venus's Opp'n Cmts."), ECF No. 81. While Venus agrees with Commerce's decision not to apply total AFA, *id.* at 2–3, Venus challenges Commerce's method of calculating its dumping margin, *id.* at 3–5.

Defendant-Intervenors object to Commerce's determination not to use total AFA. Confidential Def.-Ints.' Cmts. in Opp'n to Remand Redetermination ("Def.-Ints.' Opp'n Cmts."), ECF No. 79. Defendant-Intervenors support Commerce's margin calculation methodology. Def.-Ints.' Resp. to Cmts. on the Second Remand Redetermination ("Def.-Ints.' Supp. Cmts."), ECF No. 84.

Defendant United States ("the Government") urges the court to sustain the 2nd Remand Results. Def.'s Resp. to Cmts. on the Second Remand Redetermination ("Def.'s Supp. Cmts."), ECF No. 83.⁵

³ Commerce did not revisit its previous finding that Venus's "obfuscation of the fact that it purchased subject merchandise from its unaffiliated suppliers" presented an additional basis for using AFA. 2nd Remand Results at 10.

⁴ Petitioners—Defendant-Intervenors in this case—consist of Carpenter Technology Corporation; Crucible Industries LLC; Electralloy, a Division of G.O. Carlson, Inc.; North American Stainless; Universal Stainless & Alloy Products, Inc.; and Valbruna Slater Stainless, Inc. *Id.* at 4 n.19.

⁵ The court references the public version of the Government's comments. The redacted information is immaterial to the court's disposition of the Parties' challenges to the 2nd

JURISDICTION AND STANDARD OF REVIEW

The court has jurisdiction pursuant to section 516A(a)(2)(B)(iii) of the Tariff Act of 1930, as amended, 19 U.S.C. § 1516a(a)(2)(B)(iii) (2018),⁶ and 28 U.S.C. § 1581(c).

The court will uphold an agency determination that is supported by substantial evidence and otherwise in accordance with law. 19 U.S.C. § 1516a(b)(1)(B)(i). “The results of a redetermination pursuant to court remand are also reviewed for compliance with the court’s remand order.” *SolarWorld Ams., Inc. v. United States*, 41 CIT ___, ___, 273 F. Supp. 3d 1314, 1317 (2017) (citation omitted).

DISCUSSION

Venus argues that Commerce’s inclusion of the identity of the manufacturer as part of the agency’s model-match criteria for purposes of conducting the cost-of-production test was arbitrary given its inconsistency with Commerce’s approach in the subsequent 2017–2018 administrative review of the underlying order. Venus’s Opp’n Cmts. at 3–5. Venus’s argument lacks merit.

As Commerce explained, the term “foreign like product” is statutorily defined in reference to the producer. *See* 2nd Remand Results at 12 (citing 19 U.S.C. § 1677(16)). Specifically, foreign like product is defined, *inter alia*, as merchandise that is “produced in the same country and *by the same person*” as the subject merchandise. 19 U.S.C. § 1677(16) (emphasis added). Commerce therefore matches sales by manufacturer when “compar[ing] prices of U.S. sales of subject merchandise to the prices of sales of the foreign like product.” 2nd Remand Results at 12. Accordingly, irrespective of Commerce’s methodology in the subsequent review, Commerce’s decision in this proceeding to account for the identity of the manufacturer when conducting the cost-of-production test complies with the statute.

Commerce also explained that the agency has a “long-standing practice” of using manufacturer codes as part of its model-match criteria. *Id.* at 12 & n.52 (collecting agency determinations). Indeed, Commerce’s methodology in the 2nd Remand Results comports with the methodology Commerce used for the final results of the 2018–2019 administrative review of the underlying order. *See* Issues and Decision Mem. for the Final Results of the Admin. Review of the Antidumping Duty Stainless Steel Bar from India, A-533–810 (Nov.

Remand Results. Nevertheless, as discussed *supra*, note 1, the Government must file the confidential version of its comments within five business days of a court order resolving the method of such non-public filings.

⁶ All further citations to the Tariff Act of 1930, as amended, are to Title 19 of the U.S. Code, and all references to the U.S. Code are to the 2018 edition.

18, 2020) at 49–50, *available at* <https://enforcement.trade.gov/frn/summary/india/2020-25942-1.pdf> (last visited Jan. 28, 2021). Venus does not dispute the existence of this practice but instead focuses on Commerce’s methodology for the final results of the 2017–2018 administrative review. *See* Venus’s Opp’n Cmts. at 4–5. However, as the Government and Defendant-Intervenors point out, the court granted Commerce’s request for a remand to reconsider certain aspects of that determination. Def.’s Supp. Cmts. at 12; Def.-Ints.’ Supp. Cmts. at 2. In its redetermination, Commerce aligned its margin calculation methodology with its long-standing practice. *See Carpenter Tech. Corp., et al. v. United States, et al.*, Court No. 19-cv-00200 (CIT Jan. 28, 2021), ECF No. 34–1 (Results of Redetermination Pursuant to Court Remand) at 10–11. Because Commerce’s methodology in the 2nd Remand Results is in accordance with law, the court sees no reason to disturb Commerce’s redetermination.

Defendant-Intervenors argue that Commerce erred in reversing its decision to use total AFA. *See* Def.-Ints.’ Opp’n Cmts. at 2–15. However, during a telephone conference with the Parties, Defendant-Intervenors conceded that this issue is moot in the event the court sustains Commerce’s calculation methodology. *See* Docket Entry (Jan. 15, 2021), ECF No. 86. As discussed above, the court will sustain Commerce with respect to its model-match methodology and, as a result, Commerce has calculated an above-*de minimis* margin of 0.64 percent. *See* 2nd Remand Results at 10. Because Commerce’s calculation is above *de minimis*, Venus will remain reinstated in the underlying order. *See id.* at 15. The rate calculated in these remand results will not be the basis of any assessment of antidumping duties; instead, the assessment of antidumping duties will occur on the basis of the results of the subsequent administrative reviews. *See id.* Consequently, Defendant-Intervenors’ argument for the use of total AFA is moot and will not be further addressed.

CONCLUSION AND ORDER

In accordance with the foregoing, Commerce’s 2nd Remand Results will be sustained. Notwithstanding the court’s entry of Judgment, as discussed *supra*, notes 1 and 5, Plaintiffs are **ORDERED** to file the confidential joint appendix, and the Government is **ORDERED** to file the confidential version of its comments, within five business days of a court order resolving the method of making such non-public filings with the court. Judgment will enter accordingly.

Dated: January 28, 2021

New York, New York

/s/ Mark A. Barnett
MARK A. BARNETT, JUDGE

Slip Op. 21–10

SHANDONG YONGTAI GROUP CO., LTD., Plaintiff, and QINGDAO SENTURY TIRE CO., LTD., SENTURY TIRE USA INC., SENTURY (HONG KONG) TRADING CO., LIMITED, PIRELLI TYRE CO., LTD., PIRELLI TYRE S.P.A., and PIRELLI TIRE LLC, Consolidated Plaintiffs, v. UNITED STATES, Defendant.

Before: Jennifer Choe-Groves, Judge
Consol. Court No. 18–00077
Member cases: Court No. 18–00079
Court No. 18–00080

[The court grants Plaintiff Shandong Yongtai Group Co., Ltd.’s motion to sever, reconsolidate, and enter judgment.]

Dated: January 29, 2021

Jordan C. Kahn and *Ned H. Marshak*, Grunfeld Desiderio Lebowitz Silverman & Klestadt, LLP, of New York, N.Y. and Washington, D.C., for Plaintiff Shandong Yongtai Group Co., Ltd.

Ned H. Marshak, *Dharmendra N. Choudhary*, and *Jordan C. Kahn*, Grunfeld Desiderio Lebowitz Silverman & Klestadt, LLP, of New York, N.Y. and Washington, D.C., for Consolidated Plaintiffs Qingdao Sentury Tire Co., Ltd., Sentury Tire USA Inc., and Sentury (Hong Kong) Trading Co., Limited.

Daniel L. Porter, *James P. Durling*, and *Tung A. Nguyen*, Curtis, Mallet-Prevost, Colt & Mosle LLP, of Washington, D.C., for Consolidated Plaintiffs Pirelli Tyre Co., Ltd., Pirelli Tyre S.p.A., and Pirelli Tire LLC.

Ashley Akers, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, D.C., for Defendant United States. With her on the brief were *Joseph H. Hunt*, Assistant Attorney General, *Jeanne E. Davidson*, Director, and *Patricia M. McCarthy*, Assistant Director. Of counsel on the brief was *Ayat Mujais*, Office of the Chief Counsel for Trade Enforcement and Compliance, U.S. Department of Commerce.

OPINION**Choe-Groves, Judge:**

Before the court is Plaintiff Shandong Yongtai’s Consent Motion to Sever, Reconsolidate, and Enter Judgment (“Shandong Yongtai’s Motion” or “Pl.’s Mot.”), ECF No. 93, filed by Plaintiff Shandong Yongtai Group Co., Ltd. (formerly known as Shandong Yongtai Chemical Co., Ltd) (“Shandong Yongtai”). Shandong Yongtai requests that the court: (1) sever the action *Shandong Yongtai Group Co., Ltd. v. United States*, Court No. 18–00077 from the consolidated action with *Qingdao Sentury Co., Ltd. v. United States* (“Sentury action”), Court No. 18–00079 and *Pirelli Tyre Co., Ltd. v. United States* (“Pirelli action”), Court No. 18–00080; (2) reconsolidate the Sentury action and Pirelli action into *Qingdao Sentury Co., Ltd. v. United States*, Consol. Court No. 18–00079; and (3) enter judgment in Shandong

Yongtai's action, *Shandong Yongtai Group Co., Ltd. v. United States*, Court No. 18-00077. Pl.'s Mot. at 1-2. All other parties consent to this motion. *Id.* at 3.

Shandong Yongtai requests this relief in light of the court's recent decision in *Shandong Yongtai Grp. Co. v. United States* ("*Shandong Yongtai II*"), 44 CIT __, Slip Op 20-182 (Dec. 21, 2020), ECF 92. Pl.'s Mot. at 2. In *Shandong Yongtai II*, the court sustained in part and remanded in part the Final Results of Redetermination Pursuant to Remand, ECF Nos. 71, 72 ("*Remand Results*") by the Department of Commerce ("Commerce"). *Shandong Yongtai II*, 44 CIT at __, Slip Op 20-182 at 3, 12, 16, 18, 19-20. The court sustained Commerce's determination that Shandong Yongtai Group Co., Ltd. was the successor-in-interest to Shandong Yongtai Chemical Co., Ltd. and affirmed the 2.96% separate rate for Shandong Yongtai. *Id.* at __, Slip Op. 20-182 at 19. The court sustained Commerce's assignment of the China-wide entity rate to Consolidated Plaintiffs Pirelli Tyre Co., Pirelli Tire LLC, and Pirelli Tyre S.p.A. (collectively, "Pirelli") and Commerce's determination to make an export subsidy adjustment for the Export Buyer's Credit Program. *Id.* at __, Slip Op. 20-182 at 12-18. The court remanded Commerce's export price determination for Consolidated Plaintiffs Qingdao Sentury Co., Sentury Tire U.S.A. Inc., and Sentury (Hong Kong) Trading Co., (collectively, "Sentury"). *Id.* at __, Slip Op. 20-182 at 4-12, 20. The court ordered a second remand for Commerce to recalculate Sentury's export price and eliminate the adjustments made for Sentury's irrecoverable value-added tax ("VAT"). *Id.* at __, Slip Op. 20-182 at 20.

Shandong Yongtai seeks to sever, reconsolidate, and have judgment entered in accordance with the Court's "express intent to provide for 'the just, speedy, and inexpensive determination' of all actions." Pl.'s Mot. at 2; USCIT Rule 1. Shandong Yongtai states that it is satisfied with the court's final decision to sustain Commerce's determination that Shandong Yongtai was the successor-in-interest to Shandong Yongtai Chemical Co., Ltd., which would result in Shandong Yongtai's entries being liquidated at a rate of 2.96%. Pl.'s Mot. at 2. Shandong Yongtai argues that there is "no reason to delay the liquidation of [Shandong Yongtai's] entries at the 2.96% separate rate pending applicable appeal deadlines" because Shandong Yongtai's outcome will not be affected by the second remand ordered in *Shandong Yongtai II*. *Id.*

The court has discretion to add or drop a party under USCIT Rule 21 and may consolidate actions involving a common question of law or fact under USCIT Rule 42. The court seeks to apply USCIT rules in order "to secure the just, speedy, and inexpensive determination of

every action and proceeding.” USCIT Rule 1. Considering that all of Shandong Yongtai’s claims have been finally adjudicated and the second remand proceedings are scheduled to conclude in late 2021, the court agrees that Shandong Yongtai would be unnecessarily delayed in obtaining final relief if Shandong Yongtai were required to wait until the second remand is completed as a consolidated action. The court concludes that severance is therefore appropriate to promote the “just, speedy, and inexpensive determination” of Shandong Yongtai’s action.

Because *Shandong Yongtai Group Co., Ltd. v. United States*, Court No. 18–00077 is the lead case of the consolidated action in *Shandong Yongtai Group Co., Ltd. v. United States*, Consol. Court No. 18–00077, the court concludes that it is appropriate to reconsolidate the Sentury action and Pirelli action into a new consolidated case.

Upon consideration of Shandong Yongtai’s Motion, all other papers and proceedings herein, and pursuant to USCIT Rules 1, 21, and 42 it is hereby

ORDERED that Shandong Yongtai’s Motion is GRANTED; and it is further

ORDERED that *Shandong Yongtai Group Co., Ltd. v. United States*, Court No. 1800077 is severed from the consolidated action with *Qingdao Sentury Co., Ltd. v. United States*, Court No. 18–00079 and *Pirelli Tyre Co., Ltd. v. United States*, Court No. 18–00080; and it is further

ORDERED that *Qingdao Sentury Co., Ltd. v. United States*, Court No. 18–00079, and *Pirelli Tyre Co., Ltd. v. United States*, Court No. 18–00080 are reconsolidated into *Qingdao Sentury Co., Ltd. v. United States*, Consol. Court No. 18–00079; and it is further

ORDERED that the proceedings in new consolidated action *Qingdao Sentury Co., Ltd. v. United States*, Consol. Court No. 18–00079 should comply with the opinion and order issued by the court in *Shandong Yongtai II* with respect to the second remand; and it is further

ORDERED that Commerce shall afford the parties in *Qingdao Sentury Co., Ltd. v. United States*, Consol. Court No. 18–00079 at least twelve (12) business days to comment on the draft second remand results; and it is further

ORDERED that *Qingdao Sentury Co., Ltd. v. United States*, Consol. Court No. 1800079 shall proceed according to the same schedule ordered in *Shandong Yongtai II*, reiterated below:

1. Commerce shall file the second remand results on or before February 19, 2021;
2. Commerce shall file the administrative record on or before March 5, 2021;

3. Comments in opposition to the second remand results shall be filed on or before April 9, 2021;
4. Comments in support of the second remand results shall be filed on or before May 7, 2021; and
5. The joint appendix shall be filed on or before May 21, 2021; and it is further

ORDERED that *Shandong Yongtai Group Co., Ltd. v. United States*, Court No. 1800077, having been severed from the consolidated action and duly submitted for decision, and the court, after due deliberation, having rendered a decision in *Shandong Yongtai II*, 44 CIT ___, Slip Op. 20–182; now therefore, in conformity with *Shandong Yongtai II* it is hereby

ORDERED that the U.S. Department of Commerce’s *Certain Passenger Vehicle and Light Truck Tires from the People’s Republic of China*, 83 Fed. Reg. 11,690 (Dep’t Commerce Mar. 16, 2018) (final results of antidumping duty administrative review and final determination of no shipments; 2015–2016), as amended by the *Remand Results*, which confirmed the 2.96% separate rate for Shandong Yongtai, is sustained; and it is further

ORDERED that final judgment will be entered in *Shandong Yongtai Group Co., Ltd. v. United States*, Court No. 18–00077 in favor of Defendant and in accordance with *Shandong Yongtai II*, 44 CIT ___, Slip Op. 20–182; and it is further

ORDERED that the subject entries enjoined in *Shandong Yongtai Group Co., Ltd. v. United States*, Court No. 18–00077 shall be liquidated in accordance with the final court decision, including all appeals, as provided for in Section 516A(e) of the Tariff Act of 1930, as amended, 19 U.S.C. § 1516A(e).

Dated: January 29, 2021

New York, New York

/s/ Jennifer Choe-Groves
JENNIFER CHOE-GROVES, JUDGE

Slip Op. 21–11

CALCUTTA SEAFOODS PVT. LTD., BAY SEAFOOD PVT. LTD., and ELQUE & Co., Plaintiffs, v. UNITED STATES, Defendant, and AD HOC SHRIMP TRADE ACTION COMMITTEE, Defendant-Intervenor.

Before: Gary S. Katzmann, Judge
Court No. 19–00201

[Plaintiffs’ motion for judgment on the agency record is granted and Commerce’s *Final Results* are remanded consistent with this opinion.]

Dated: February 3, 2021

Neil R. Ellis, Law Office of Neil Ellis PLLC, of Washington, DC, argued for plaintiffs. With him on the brief were *Rajib Pal* and *Alexandra S. Mauever* of Sidley Austin LLP, of Washington, DC.

Kara M. Westercamp, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC, argued for defendant. With her on the brief were *Joseph H. Hunt*, Assistant Attorney General, *Jeanne E. Davidson*, Director, and *Patricia M. McCarthy*, Assistant Director. Of Counsel *Brandon J. Custard*, Senior Attorney, Office of Chief Counsel for Trade Enforcement & Compliance, U.S. Department of Commerce. With them on the post argument submission was *Jeffrey Bossert Clark*, Acting Assistant Attorney General.

Zachary J. Walker, Picard Kentz & Rowe LLP, of Washington, DC, argued for defendant-intervenor. With him on the brief was *Nathaniel Maandig Rickard*.

OPINION

Katzmann, Judge:

This case deals with the interpretation and application of a statute, the extent to which thereunder small companies are entitled to additional assistance in antidumping (“AD”) reviews or investigations, the process by which assistance can be triggered, and how the U.S. Department of Commerce (“Commerce”) should account for the difficulties those small companies may encounter. At issue is Commerce’s AD review of duties on certain frozen warmwater shrimp from India. *Certain Frozen Warmwater Shrimp From India: Final Results of Antidumping Duty Administrative Review; 2017–2018*, 84 Fed. Reg. 57,847 (Dep’t Commerce Oct. 29, 2019) (“*Final Results*”). Plaintiffs *Calcutta Seafoods Pvt. Ltd.*, *Bay Seafood Pvt. Ltd.*, and *Elque & Co.* (collectively, “the Elque Group”), exporters of frozen warmwater shrimp from India, initiated this suit against Defendant the United States (“Government”) to challenge the final results issued by Commerce in the thirteenth administrative review of the AD duty order covering certain frozen warmwater shrimp from India. Pls.’ Mot. For J. on the Agency R. at 2, Feb. 26, 2020, ECF No. 20 (“Pls.’ Br.”). Commerce imposed an AD duty rate of 110.90% for Plaintiffs based on the application of facts available with adverse inferences (“AFA”). Mem. From J. Maeder to J. Kessler re: Issues and Decision Mem. for the Final Results of the 2017–2018 Antidumping Duty Administrative Review of Certain Frozen Warmwater Shrimp from India at 19 (Dep’t Commerce Oct. 21, 2019), P.R. 188 (“IDM”).

Plaintiffs challenge Commerce’s imposition of this rate on the basis that: (1) Commerce did not provide adequate assistance to Plaintiffs as a small company subject to 19 U.S.C. § 1677m(c)(2); (2) Commerce improperly applied AFA neither supported by substantial evidence nor in accordance with law as required by 19 U.S.C. § 1677e(b); and (3) even if Commerce properly applied AFA, the selected rate was unsupported by substantial evidence and was not otherwise in accordance with the law under 19 U.S.C. § 1677e(d). Pls.’ Br. at 2–4. The

Government and Defendant-Intervenor Ad Hoc Shrimp Trade Action Committee (“AHSTAC”) ask the court to sustain Commerce’s determination. Def.’s Resp. to Pls.’ Mot. For J. on the Agency R., May 1, 2020, ECF No. 24 (“Def.’s Br.”); Def.-Inter. AHSTAC’s Resp. to Pls.’ Mot. For J. on Agency R., May 1, 2020, ECF No. 23 (“Def.-Inter.’s Br.”). The court holds that Commerce unlawfully applied AFA to the Elque Group without providing it adequate assistance or considering its difficulties as a small company and remands to Commerce.

BACKGROUND

I. Legal Background

Congress’s AD statute empowers Commerce to impose remedial duties on imported goods when those goods are sold in the United States for less than their fair market value, and when the International Trade Commission determines that the domestic industry is thereby “materially injured, or . . . is threatened with material injury.” See 19 U.S.C. § 1673(2)(A)(i)–(ii); *Diamond Sawblades Mfrs. Coal. v. United States*, 866 F.3d 1304, 1306 (Fed. Cir. 2017). Dumping constitutes unfair competition because it permits foreign producers to undercut domestic companies by selling products below their fair market value. *Sioux Honey Ass’n v. Hartford Fire Ins. Co.*, 672 F.3d 1041, 1046 (Fed. Cir. 2012). To address the harmful impact of such unfair competition, Congress enacted the Tariff Act of 1930, which empowers Commerce to investigate potential dumping and, if necessary, to issue orders instituting duties on subject merchandise. *Id.* at 1047. In these instances, “the amount of the [AD] duty is ‘the amount by which the normal value exceeds the export price (or the constructed export price) for the merchandise.’” *Shandong Rongxin Imp. & Exp. Co. v. United States*, 42 CIT __, __, 331 F. Supp. 3d 1390, 1394 (2018), *aff’d*, 779 F. App’x 744 (Fed. Cir. 2019) (quoting 19 U.S.C. § 1673). Upon request, Commerce may conduct an administrative review of its AD duty determination and recalculate the applicable rate. 19 U.S.C. § 1675(a)(1)–(2); see *Shandong Rongxin*, 331 F. Supp. 3d at 1394.

In determining whether a good is being sold in the United States at less than fair value, Commerce may issue questionnaires to selected mandatory respondents¹ in order to gather information for its review.

¹ In AD investigations or administrative reviews, Commerce may select mandatory respondents pursuant to 19 U.S.C. § 1677f-1(c)(2), which provides:

If it is not practicable to make individual weighted average dumping margin determinations under paragraph (1) because of the large number of exporters or producers involved in the investigation or review, the administering authority may determine the weighted average dumping margins for a reasonable number of exporters or producers by limiting its examination to—

See 19 U.S.C. § 1677f-1(c)(2)(A)–(B). If Commerce deems a response to its request deficient, then Commerce “shall promptly inform the person submitting the response of the nature of the deficiency and shall, to the extent practicable, provide that person with an opportunity to remedy or explain the deficiency in light of the time limits established for the completion of investigations or reviews under this subtitle.” *Id.* § 1677m(d). Commerce may provide this notice and the opportunity to remedy deficiencies through issuance of a supplemental questionnaire.

Additionally, 19 U.S.C. § 1677m(c) addresses the possibility that respondents may have difficulty fulfilling Commerce’s requests for information during an investigation or review. Under section 1677m(c)(1), upon prompt notification by a party, Commerce must consider the interested party’s ability to provide the requested information and modify requirements to avoid imposing an unreasonable burden. *Id.* § 1677m(c)(1). Under section 1677m(c)(2), Commerce must consider difficulties experienced by parties, “particularly small companies,” and “provide to such interested parties any assistance that is practicable in supplying such information.” *Id.* § 1677m(c)(2).

Pursuant to 19 U.S.C. § 1677e, if a party fails to satisfactorily respond to Commerce’s requests for “necessary information” to calculate a dumping margin by (1) withholding requested information, (2) failing to provide information by the submission deadlines or in the form or manner requested, (3) significantly impeding a proceeding, or (4) providing information that cannot be verified, Commerce shall use facts otherwise available to calculate the margin. *Id.* § 1677e(a)(1)–(2). Furthermore, Commerce may make a separate determination that the respondent failed to cooperate and apply AFA. *Id.* § 1677e(b)(1)(A). A respondent does not cooperate to the “best of its ability” when it fails to “put forth its maximum effort to provide Commerce with full and complete answers to all inquiries.” *Nippon Steel Corp. v. United States*, 337 F.3d 1373, 1382 (2003). The Federal Circuit in *Nippon Steel* explained that Commerce must make an objective and subjective determination regarding respondent’s efforts in assessing whether it acted to the best of its ability. *Id.* at 1382–83. The Federal Circuit clarified that this test applies “regardless of motivation or intent” on the part of the respondent, but that it “does not condone inattentiveness, carelessness, or inadequate record keeping.” *Id.*

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- (A) a sample of exporters, producers, or types of products that is statistically valid based on the information available to the administering authority at the time of selection, or
 - (B) exporters and producers accounting for the largest volume of the subject merchandise from the exporting country that can be reasonably examined.

After making a finding that AFA is appropriate, Commerce may then select an AD rate using the adverse inferences against respondent. *See* 19 U.S.C. § 1677e(d)(2). The statute explicitly provides Commerce with the discretion to select among any dumping margins “under the applicable [AD] order,” including “the highest such rate or margin.” *Id.* § 1677e(d)(1)(B)–(2). However, in selecting an AFA rate, Commerce must “consider the totality of the circumstances in selecting an AFA rate, including, if relevant, the seriousness of the conduct of the uncooperative party.” *BMW of N. Am. LLC v. United States*, 926 F.3d 1291, 1301–02 (Fed. Cir. 2019).

II. Factual Background

A. Administrative Review of the Elque Group

On April 16, 2018, Commerce published a notice of initiation regarding its administrative review of the AD duty order covering warmwater shrimp from India. *Initiation of Antidumping and Countervailing Duty Administrative Reviews*, 83 Fed. Reg. 16,298, 16,300–04 (Dep’t Commerce Apr. 16, 2018). After first selecting two of the largest exporters who subsequently withdrew their review requests, and after receiving additional withdrawals from 234 other companies, Commerce selected Calcutta Seafoods and Magnum Sea Foods as mandatory respondents. *See* Mem. from B. Bauer to M. Skinner, re: Selection of New Respondents for Individual Review (Aug. 7, 2018), P.R. 57.

Commerce issued an initial AD duty questionnaire to Calcutta Seafoods and Magnum Sea Foods. Letter from Commerce to Calcutta Seafoods, re: Request for Information (Aug. 9, 2018), P.R. 59 (“Section D Questionnaire”). Based on Calcutta Seafoods’ initial responses, Commerce collapsed Calcutta Seafoods, Bay Seafood, and Elque & Co. as one entity, the Elque Group, for the purpose of the administrative review. Mem. from B. Bauer to M. Skinner, re: Whether to Collapse Bay Seafood Pvt. Ltd., Calcutta Seafoods Pvt. Ltd., and Elque & Co. in the 2017–2018 Antidumping Duty Administrative Review of Certain Frozen Warmwater Shrimp from India (Oct. 19, 2018), P.R. 108. Relevant here, the Elque Group responded to Commerce’s Section D Questionnaire and then replied to two supplemental questionnaires regarding Section D from Commerce. Section D Questionnaire; Letter from Elque Group to Commerce, re: Elque Group Resp. to Section D Questionnaire (Nov. 13, 2018), P.R. 117 (“SDQ Resp.”); Letter from Commerce to Elque Group, re: Administrative Review of the Antidumping Duty Order on Certain Frozen Warmwater Shrimp from India (Suppl. Section D Questionnaire) (Dec. 17, 2018), P.R. 122 (“Suppl. SDQ1”); Resp. from Elque Group to

Commerce, re: Submission of Suppl. Questionnaire Resp. Against Your Letter Dated Dec. 17, 2018 for Elque Group for Administrative Review of the Antidumping Duty on Frozen Warmwater Shrimp from India (Dec. 24, 2018), P.R. 138 (“Suppl. SDQ1 Resp.”); Letter from Commerce to Elque Group, re: Administrative Review of the Antidumping Duty Order on Certain Frozen Warmwater Shrimp from India (Second Suppl. Section D Questionnaire) (Mar. 5, 2019), P.R. 142 (“Suppl. SDQ2”); Resp. from Elque Group to Commerce, re: Submission of Suppl. Questionnaire Resp. Against Your Letter Dated Mar.5, 2019 for Elque Group for Administrative Review of the Antidumping Duty on Frozen Warmwater Shrimp from India (Mar. 20, 2019), P.R. 150 (“Suppl. SDQ2 Resp.”). Commerce also granted the Elque Group various extensions throughout the review. *See, e.g.*, Letter from Commerce to the Elque Group, re: 2017–2018 Administrative Review of Certain Frozen Warmwater Shrimp from India: Grants Partial Extension for Section D Resp. (Nov. 6, 2018), P.R. 114; Letter from Commerce to the Elque Group, re: 2017–2018 Administrative Review of Certain Frozen Warmwater Shrimp from India: Grants Partial Extension for Second Section D Response (Mar.11, 2019), P.R. 144.

B. Results of Commerce’s Review

On April 23, 2019, Commerce published preliminary results finding that the Elque Group had been a non-cooperative respondent. *Certain Frozen Warmwater Shrimp From India: Preliminary Results of Antidumping Duty Administrative Review; 2017–2018*, 84 Fed. Reg. 16,843 (Dep’t Commerce Apr. 23, 2019) (“*Preliminary Results*”). Commerce determined that the Elque Group failed, despite having multiple opportunities, to provide product-specific conversion costs and complete cost reconciliations that Commerce could rely on to calculate AD duty margins. Mem. from J. Maeder to G. Taverman, re: Decision Mem. for the Preliminary Results of the 2017–2018 Administrative Review of the Antidumping Duty Order on Certain Frozen Warmwater Shrimp from India at 7–15 (Apr. 9, 2019), P.R. 59 (“PDM”). Commerce determined that the application of an adverse inference was justified because the Elque Group did not cooperate to the best of its ability and provided only vague answers to several questions. *Id.* at 7–13. As a result, Commerce assigned the Elque Group a 110.90% AD margin. *Preliminary Results* at 16,844. In May 2019, the Elque Group submitted case and rebuttal briefs regarding the *Preliminary Results* and specifically noted, in response to Commerce’s preliminary application of AFA, their status as a small busi-

ness, their efforts to cooperate and comply with Commerce's requests, and their timeliness in filing. Case Br. of Elque Group at 1 (May 22, 2019), P.R. 170 ("Case Br.").

In its *Final Results*, Commerce maintained the application of AFA, stated that it considered the Elque Group's difficulties as a small business by providing extensions and supplemental questionnaires, and stated that the 110.90% AD margin was appropriate and in accordance with the law. IDM at 11–19. Commerce explained that the Elque Group's responses to the initial and supplemental questionnaires for Section D were insufficient because their answers were vague and did not provide product-specific costs. *Id.* at 12. Commerce outlined the most relevant physical characteristics that differentiate products, which make up a product's control number ("CONNUM"), and noted that shrimp has fourteen product characteristics.² *Id.* Commerce asked the Elque Group how its accounting system used recorded measures of date of purchase, species, form of purchase, basis of purchase, count sizes, quantities and rate for mix count size among other CONNUM-characteristics. *Id.* In response, the Elque Group submitted raw cost data indicating that it tracked some physical characteristics and that some products required more processing than others. *Id.* at 13–14. However, Commerce stated that the Elque Group questionnaire responses did not explain how these CONNUM-specific metrics affected costs or price, nor did the Elque Group provide a CONNUM conversion to account for varied processing costs for the same physical products. *Id.* at 14. The Elque Group instead replied that "all physical characteristics were incorporated in its reporting methodology." *Id.* at 12. Without this CONNUM-specific information or conversion rates, Commerce concluded that it was not able to ensure that product-specific costs reflect the physical characteristics of a product and the variable costs associated with physical differences. *Id.* at 16. Commerce found that reported shrimp costs did not clearly or logically reflect differences in other CONNUM characteristics. *Id.* at 13. Commerce additionally found the replies deficient because of "numerous discrepancies" where the reported costs did not seem to correspond to the reconciliation of reported costs in each company's books and records. *Id.* at 14. As a result, Commerce determined that it could not have confidence in the integrity of the Elque Group's responses, and thus applied AFA and assigned a 110.90% AD duty rate. *Id.* at 15–16.

² The fourteen characteristics are: "cooked form, head status, count size, organic certification, shell status, vein status, tail status, other shrimp preparation, frozen form, flavoring, container weight, presentation, species, and preservative." IDM at 12–13.

C. Procedural History

The Elque Group initiated the present litigation on November 20, 2019, challenging Commerce's *Final Results* as pertaining to the Elque Group. Summons, ECF No. 1; Compl., ECF No. 4. AHSTAC joined the litigation as Defendant-Intervenor on November 22, 2019. Order Granting Mot. to Intervene as Def.-Inter., ECF No. 13. On February 26, 2020, Plaintiff filed a revised Rule 56.2 motion for judgment on the agency record, arguing that Commerce did not provide the Elque Group with the requisite assistance they were entitled to as a small company and that Commerce's application of AFA was unsupported by substantial evidence and otherwise not in accordance with law. Pls.' Br. at 2–4. The Government and AHSTAC filed its response to Plaintiff's motion on May 1, 2020. Def.'s Br.; Def.-Inter.'s Br. Plaintiff filed a reply to the Government's opposition on May 22, 2020. Reply of Pls. in Supp. of Mot. for J. on the Agency R., ECF No. 26 ("Pls.' Reply"). Oral argument was held on November 16, 2020. Oral Arg., Nov. 16, 2020, ECF No. 42. Prior to oral argument, the court issued and the parties responded to questions regarding the case. Letter re: Questions for Oral Arg., Nov. 5, 2020, ECF No. 38; Resp. of Pls. to Questions for Oral Arg., Nov. 12, 2020, ECF No. 41 ("Pls.' Suppl. Br."); Def.'s Resp. to Ct.'s Questions, Nov. 12, 2020, ECF No. 39 ("Def.'s Suppl. Br."); Def.-Inter. AHSTAC's Resp. to the Ct.'s Questions for Oral Arg., Nov. 12, 2020, ECF No. 40 ("Def.-Inter.'s Suppl. Br.").

JURISDICTION AND STANDARD OF REVIEW

The court has jurisdiction over this action pursuant to 28 U.S.C. § 1581(c) and 19 U.S.C. § 1516a(a)(2). The standard of review in this action is set forth in 19 U.S.C. § 1516a(b)(1)(B)(i): "[t]he 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)(B)(i).

DISCUSSION

Plaintiffs challenge Commerce's determination on two bases: (1) whether Commerce adequately considered the difficulties faced by the Elque Group as a small company and provided it sufficient accommodations as required by 1677m(c); and (2) whether, given the totality of the circumstances, Commerce properly applied AFA and justified its selection of a 110.90% AD margin. Pls.' Br. at 2–4.

First, as a threshold matter, the court must address whether the notice requirement of section 1677m(c)(1) triggers the application of section 1677m(c)(2) or whether those provisions can be applied inde-

pendently. The court concludes that section 1677m(c) contains two interrelated provisions, in that clause (c)(1) requires that a party notify Commerce of any difficulties in order to trigger the applicability of clause (c)(2). Next, the court concludes that the Elque Group did notify Commerce pursuant to section 1677m(c)(1), and that Commerce did not meet its further obligations under section 1677m(c)(2). Thus, the court cannot sustain Commerce's application of AFA.

I. Framework and Interaction of Section 1677m(c)

The parties first dispute whether section 1677m(c)(2) is an extension of section 1677m(c)(1), or whether the subsections address separate, independent scenarios. In Commerce's explanation of its *Final Results*, Commerce acknowledged that the Elque Group is a small company and that Commerce provided accommodations, such as questionnaire extensions and supplemental questionnaires, due to the Elque Group's status and difficulties. IDM at 17. Both Plaintiffs and the Government agree that the Elque Group participated in the administrative review as a small company respondent.³ Pls.' Br. at 12; Def.'s Br. at 17. Nevertheless, the Elque Group alleges that Commerce failed to provide it additional assistance and consider its difficulties as a small company as required by section 1677m(c)(2) regardless of any requirement for the Elque Group to provide notice to Commerce. Pls.' Br. at 12–15. The Government responds that Commerce both provided assistance to the Elque Group by granting it extensions of time to respond to original and supplemental questionnaires and considered its status as a small company. Def.'s Br. at 26–28. However, the Government contends that Commerce appropriately applied AFA because the Elque Group nevertheless failed to provide requested information and did not specifically alert Commerce to its difficulty in providing responses regarding its Section D Questionnaire. Def.'s Br. at 21–24, 32–34.⁴ AHSTAC agrees that Com-

³ AHSTAC contests the Elque Group's claimed status as a small company for purposes of section 1677m(c)(2). Def.-Inter.'s Br. at 21–22. AHSTAC argues that the Elque Group's extensive commentary in its administrative case briefs and in the present proceedings indicate that, despite their failures in the questionnaires, they were in fact competent to navigate agency reviews and could afford counsel to help them do so. *Id.* at 22. The court does not address these claims because Commerce conceded the Elque Group's status as a small company for purposes of 1677m(c).

⁴ Both the Government and AHSTAC claim that the Elque Group did not exhaust administrative remedies for its specific arguments regarding Commerce's obligation to provide additional assistance to small respondents by not raising those arguments in its case brief and by not requesting additional assistance during the review. Def.'s Br. at 17, 30–31; Def.-Inter.'s Suppl. Br. at 13–14. While parties are required to exhaust administrative remedies before bringing claims to the court, 28 U.S.C. § 2637(d); 19 C.F.R. § 351.309(c)(2), the Federal Circuit has stated that a party discharges the obligation of exhaustion if the record contains "a 'suggestion' of the argument" and Commerce has the opportunity to address it. *Apex Frozen Foods Priv. Ltd. v. United States*, 862 F.3d 1322, 1332 (Fed Cir.

merce was justified in applying AFA because the Elque Group did not notify Commerce of any difficulty in providing responses to the Section D Questionnaire. Def.-Inter.'s Br. at 24–25.

Section 1677m(c) sets out:

- (1) *Notification by Interested Party.* If an interested party . . . notifies the administering authority or the Commission (as the case may be) that such party is unable to submit the information requested in the requested form and manner, together with a full explanation and suggested alternative forms in which such party is able to submit the information, the administering authority or the Commission (as the case may be) shall consider the ability of the interested party to submit the information in the requested form and manner and may modify such requirements to the extent necessary to avoid imposing an unreasonable burden on that party.
- (2) *Assistance to Interested Party.* The administering authority and the Assistance to Commission shall take into account any difficulties experienced by interested parties, *particularly small companies*, in supplying information requested by the administering authority or the Commission in connection with investigations and reviews under this subtitle, and shall provide to such interested parties any assistance that is practicable in supplying such information.

19 U.S.C. § 1677m(c)(1)–(2) (emphasis added).

The Elque Group argues that the plain reading of the statute makes clear that Commerce should provide additional assistance to small companies beyond those accommodations that it ordinarily provides larger, veteran respondents. Pls.' Br. at 13. The Elque Group contends that this obligation exists even when a small company respondent (2017) (quoting *Ningbo Dafa Chem. Fiber Co. v. United States*, 580 F.3d 1247, 1259 (Fed. Cir. 2009)). Furthermore, parties may introduce “an extension of previously made arguments” before the court. *Solvay Solexis S.p.A. v. United States*, 33 CIT 1179, 1183 n.2, 637 F. Supp. 2d 1306, 1309 n.2 (2009). The Elque Group made more than a mere suggestion of the argument in their case brief, and thus exhausted their remedies before Commerce. Case Br. at 7–8 (explaining the Elque Group's status as a small company and difficulties it encountered during the review). The issues that the Elque Group raises in the present proceedings are closely related arguments to the issues raised in the administrative proceedings, and the Elque Group did engage with Commerce on these and related issues during the administrative stages of the review process. See IDM at 17. Thus, the Elque Group exhausted administrative remedies and Commerce had an opportunity to address these issues below, and in fact did so. The Government and AHSTAC make a similar exhaustion argument regarding the Elque Group's arguments about Commerce's selection and application of the AFA dumping margin. Def.'s Br. at 36; Def.-Inter.'s Br. at 34–35. For the same reasons, the court finds that the Elque Group satisfactorily exhausted these arguments as well. See Case Br. at 22–24 (arguing against application of the highest AFA rate).

has not alerted Commerce to any specific issues it encounters in submitting information as contemplated by clause (c)(1). Pls.' Reply at 8–9. The Government and AHSTAC, however, argue that every respondent, including small companies, has an affirmative duty to seek specific assistance under section 1677m(c)(1) first, which then triggers Commerce's obligation to provide additional assistance under section 1677m(c)(2). Def.'s Br. at 26–27; Def.-Inter.'s Br. at 20–21. AHSTAC further adds that the Statement of Administrative Action (“SAA”) of the Uruguay Round Trade Agreements supports this reading by including reference to similar language indicating that clause (c)(1) is a precondition to the application of clause (c)(2). Def.-Inter.'s Suppl. Br. at 7 (citing Uruguay Round Agreements Act, *Statement of Administrative Action*, H.R. Doc. No. 103–316, Vol. 1, 656, 864–65 (1994), reprinted in 1994 U.S.C.C.A.N. 4040, 4163).

The court agrees with the Government's and AHSTAC's contention that these subsections are most clearly read as a notification process and subsequent remedy, such that there is (1) a process for *any* interested party to seek help pursuant to clause (c)(1); and (2) a requirement that Commerce assist those interested parties (particularly small companies) with unique difficulties pursuant to clause (c)(2). As noted, under section 1677m(c)(1) respondents are required to alert Commerce to their difficulties, provide an alternate option, and seek assistance. However, section 1677m(c)(2) can reasonably be interpreted to presuppose that small company respondents need assistance when they encounter difficulties in an investigation or review and that Commerce should “provide any assistance practicable” to those types of respondents. The court also agrees that the interrelatedness of the provisions can be further inferred from the SAA's discussion of small companies and of clause (c)(1). *See* SAA at 865 (noting that where “an interested party promptly notifies the requesting agency that it does not maintain its records in such a medium or language . . . Commerce . . . will not insist on the submission of the data in the requested medium or language” and that this requirement is “intended to alleviate some of the difficulties encountered by small firms”). The court's decision in *World Finer Foods, Inc. v. United States*, a non-binding, but ultimately persuasive authority, also supports this reading. 24 CIT 541, 543–44 (2000) (analyzing the application of clause (c)(2) after holding that the requirements of clause (c)(1) had been met).

Thus, the court concludes that section 1677m(c) requires that a party notify Commerce of its difficulties providing requested information before Commerce is obligated to provide additional assistance

and consideration of a small company's status and difficulties. The court next turns to whether those requirements were met in this review.

II. Commerce Unlawfully Applied AFA Despite Having Sufficient Notice of the Elque Group's Need for Assistance as a Small Company.

Having concluded that the Elque Group was required by statute to notify Commerce of its need for assistance, the court must resolve whether the Elque Group's initial request for assistance and subsequent responses provided sufficient notice to Commerce of its difficulties and need for assistance to trigger Commerce's obligations under section 1677m(c)(2). The court concludes that the Elque Group did provide that notice, and that Commerce did not fulfill its subsequent obligation of providing additional assistance and consideration to the Elque Group. Therefore, the court concludes that Commerce's application of AFA was unlawful.

A. The Elque Group Adequately Notified Commerce of its Need for Additional Assistance.

The Elque Group contends that it provided sufficient notice to Commerce of its difficulties as a small company respondent and, specifically, its difficulties in responding to the Section D Questionnaire under the deadlines imposed. Pls.' Br. at 15; Pls.' Suppl. Br. at 7–8. The Elque Group explains that it informed Commerce of “the limitations in its data maintained in the normal course of business” and then “did what it could to convert the information it had access to into a form that matched Commerce's request.” Pls.' Suppl. Br. at 8 (citing Suppl. SDQ2 Resp. at Exhs. D-17–D-20; SDQ Resp. at 16). The Government and AHSTAC argue that the Elque Group did not provide adequate notice to Commerce of its need for assistance related to its Section D Questionnaire responses. Def.'s Br. at 26–27, 32; Def.-Inter.'s Br. at 20–21. The Government asserts that the Elque Group requested only general guidance about the review process initially and not about the Section D Questionnaires. Def.'s Br. at 30, 32; Def.'s Suppl. Br. at 7–8. Rather, the Government and AHSTAC argue that the Elque Group merely invited Commerce to follow-up with questions because the Elque Group prepared their reply on a “limited time frame,” and did not seek assistance as required under section 1677m(c)(1); therefore, Defendants argue that Commerce was not on notice that the Elque Group needed help as a small business. Def.'s Br. at 32; Def.-Inter.'s Br. at 20.

The record shows that the Elque Group made multiple attempts to notify Commerce of its difficulties throughout the review. First, once

the Elque Group was notified that it had been selected as a respondent in Commerce's administrative review, it "contacted Commerce . . . to obtain guidance about the review process and administrative requirements." IDM at 17. Once the review was underway, Commerce asked the Elque Group for several types of data and information, namely: (1) explanations and documentation showing how information is maintained in its accounting system; (2) explanations of how the reported costs in its questionnaire responses and cost databases were derived; (3) demonstrations of the extent to which its reported costs reasonably reflect cost differences attributable to the physical characteristics contained in its reported CONNUMs; and (4) a complete cost reconciliation and other information necessary for the agency to analyze the Elque Group's reported costs. *Id.* at 12, 15. Commerce submitted two supplemental Section D questionnaires requesting that the Elque Group's "reported costs [should] reflect [raw material] cost differences for different sizes of input shrimp" with details such as "date of purchase, species, form of purchase, basis of purchase, count sizes, quantities and rate for mix count size." PDM at 9. Commerce also requested that the Elque Group "report cost differences for conversion costs attributable to CONNUMs with different physical characteristics," and that if the Elque Group was unable to provide this that it should use "any reasonable method, such as production time or product yield, to calculate such cost differences." *Id.* Further, Commerce requested the Elque Group provide "the complete reconciliation of the reported costs to each producing company's normal books and records." *Id.*

In responding to each of Commerce's requests, the Elque Group informed Commerce that it received raw materials from suppliers and did not track count-sizes of those materials, nor was it able to meaningfully calculate count-size raw material data from post-production data. Suppl. SDQ1 Resp. at 1–2; Suppl. SDQ2 Resp. at 1. Rather, the Elque Group explained that its data included only average costs of raw materials because it purchased raw shrimp at an average price and only recorded shrimp count-size after the shrimp was processed. SDQ Resp. at 15; Suppl. SDQ1 Resp. at 1; Suppl. SDQ2 Resp. at 1. The Elque Group provided invoices and explanations to demonstrate their use of data; for example, showing that while it maintained the average count of each lot of raw shrimp, it did not possess size-specific raw material cost data. SDQ Resp. at Exhibit D-45; *see also* Pls.' Br. at 18. Further, the Elque Group attempted to provide raw material costs by CONNUM by tying the costs to the 'as sold' CONNUMs. SDQ Resp. at 29; *see also* Pls.' Br. at 19. The Elque Group explained that on the issue of allocating conversion costs

among its CONNUMs, it did not perform the large majority of these activities, such as de-heading, peeling, de-veining, and de-tailing; instead, these activities were performed by its raw material suppliers and factored into the raw input cost. Suppl. SDQ1 Resp. at 2; Suppl. SDQ2 Resp. at 3. Additionally, the Elque Group reported that for remaining conversion costs it did not have data for each product with identified physical differences, and that such conversion costs accounted for only seven to two percent of the total cost of production regardless. SDQ Resp. at 15; Pls.' Suppl. Br. at 4 (citing Suppl. SDQ2 Resp. at Exh. D-20). However, the Elque Group notes that nevertheless it provided Commerce with "the requested computer file, including a printout of the file in Exhibit D-20," which the Elque Group claimed consisted of "all unit details for all products produced." Pls.' Post-Arg. Submission, Nov. 19, 2020, ECF No. 43 (quoting SDQ Resp. at 34). Finally, its supplemental responses included a cover letter stating: "[i]f the Department has any further questions regarding this submission, please contact the undersigned," because of tight deadlines for responding. Suppl. SDQ1 Resp.; Suppl. SDQ2 Resp.

The court concludes that the Elque Group satisfied its burden to notify Commerce of its difficulties as a small company respondent under section 1677m(c)(1) and thus Commerce had an obligation to "take into account any difficulties" and "provide . . . any assistance that is practicable in supplying such information" under section 1677m(c)(2). 19 U.S.C. § 1677m(c)(2). The Government and AHSTAC do not provide adequate justification for why the threshold notification for assistance is as stringent or formulaic as they suggest. The court agrees that a standardized byline in a cover letter offering to answer questions does not serve as a direct request for assistance. However, when examined together with the Elque Group's fulsome, but ultimately inadequate, responses to Commerce's questionnaires and explanation of its difficulties it is clear that Commerce had sufficient notice that the Elque Group was having trouble providing the requested information and that they needed additional help. The Elque Group stayed in constant contact with Commerce, attempted to provide the requested information, explained the information that it had, and offered to cooperate with Commerce further, including by providing all data and consenting to on-site verification of its replies. *See* IDM at 15–16. This willingness and attempt to cooperate in the review, along with the Elque Group's initial notice to Commerce that it was a small company respondent without previous experience participating in an investigation or review, was sufficient notice to Commerce of the information it could provide in fulfillment of its section 1677m(c)(1) obligations.

Caselaw cited by the Government and AHSTAC is inapposite because those cases do not speak to situations in which small company respondents attempted to cooperate with Commerce's investigations. See *Kawaskai Steel Corp. v. United States*, 24 CIT 684, 691–92, 110 F. Supp. 2d 1029, 1036–37 (2000) (rejecting a respondent's attempt to be exempted from answering questionnaires because of its status as a small company); *Kompass Food Trading Int'l v. United States*, 24 CIT 678, 682 (2000) (“Commerce attempted to assist [respondent] With no response from Vita forthcoming, further assistance from Commerce was not warranted.”); *Maverick Tube Corp. v. United States*, 857 F.3d 1353, 1361 (Fed. Cir. 2017) (“Borusan admits it did not provide the information, and the explanation of its difficulties does not constitute a statement that it was unable to provide the information.”). The Elque Group points to more persuasive caselaw. First, in *World Finer Foods*, the respondent offered to provide “limited information that Commerce felt might be worthwhile or helpful.” 24 CIT at 543–44. The court held that, although the respondent did not offer an alternative form under section 1677m(c)(1), respondent “offered to submit what it could,” thus effectively satisfying section 1677m(c)(1)'s requirement to propose a solution and shifted the burden to Commerce to assist as possible. *Id.* at 544. In a different context, as described in *Habas Sinai ve Tibbi Gazlar Istihsal Endustrisi, A.S. v. United States*, in its response to Commerce's questionnaires, a party informed Commerce that it did not have requested information. 43 CIT __, __, 361 F. Supp. 3d 1314, 1334–36 (2019). However, Commerce concluded that the respondent provided incomplete information and applied partial AFA. *Id.* The court then rejected Commerce's application of AFA and found that the respondent had complied with the requirements of section 1677m(c)(1) to promptly notify Commerce of its difficulties when it explained its data limitation shortcomings in its response to questionnaires. *Id.* Similarly, the Elque Group's questionnaire responses, along with its initial notice to Commerce of its status as small company, first-time respondent, serves as adequate notice of its difficulties in this review. Thus, while each case turns on its own facts, *Yama Ribbons & Bows Co. v. United States*, 36 CIT 1250, 1253, 865 F. Supp. 2d 1294, 1298 (2012) (“Commerce must base its decisions on the record before it in each investigation”), these facts satisfy clause (c)(1) and the Elque Group's burden to provide a suggested alternative form of submitting information. In the end, the court is not presented with some sort of ethereal epistemological inquiry, but with the realities grounded in the facts of each case. The court recognizes the substantial responsibilities placed on Commerce in every investigation and the importance of cooperation

by investigated parties. While a different case may come out differently, here, Commerce's obligations under clause (c)(2) were triggered such that it was obligated to provide the Elque Group additional assistance.

B. Commerce's Failure to Assist the Elque Group as a Small Company Renders its AFA Determination Unlawful.

Given that Commerce had notice of the Elque Group's difficulty during the review, the court concludes that Commerce did not adequately assist the Elque Group given its status as a small company. Thus, Commerce's application of AFA in calculating a dumping margin for the Elque Group cannot be sustained.

In the IDM, Commerce noted that "in accordance with section 782(c)(2) of the Act, Commerce takes into account difficulties experienced by parties, particularly small companies." IDM at 17. The IDM then outlines how Commerce provided the Elque Group with accommodations, including "multiple opportunities to provide such information, including in the initial questionnaire and in two supplemental questionnaires, in an attempt to give the Elque Group adequate opportunity to provide such information and to convey the importance of providing this information." *Id.* Commerce found that the Elque Group failed to provide explanations and supporting calculations, submitted responses with accounting discrepancies, and did not supply adequate cost reconciliations. *Id.* 12–16. As a result, Commerce determined that it was appropriate to apply AFA because of its determination that the Elque Group did not act to the best of its ability and had a "repeated pattern of not providing information in the form and manner requested" and "offer[ed] little information concerning its cost reporting methodology." *Id.* at 15. Commerce determined that the Elque Group was not cooperative, despite the Elque Group's argument that it provided all of the information in its possession. *Id.* Further, Commerce noted that because the Elque Group did not "employ a reasonable method to use available lot-specific count size information to report product-specific costs," it did not act to the best of its ability. *Id.* at 16. Commerce thus applied AFA and calculated a dumping margin for Elque of 110.90%. *Id.* at 19.

The Elque Group argues that Commerce was required to "take into account any difficulties experienced by interested parties, particularly small companies, in supplying information requested,' and to 'provide to such interested parties any assistance that is practicable in supplying such information.'" *Pls.' Br.* at 13 (quoting 19 U.S.C. § 1677m(c)(2)). The Elque Group asserts that Commerce did not provide satisfactory assistance and that the extensions Commerce

granted and issuance of a supplemental questionnaire do not constitute adequate assistance as contemplated by section 1677m(c)(2) because it does not accommodate the Elque Group's status as a small, first-time respondent. *Id.* at 13–14. Rather, the Elque Group argues that Commerce afforded it even fewer accommodations than other veteran respondents. *Id.* at 14–15 (citing *Mukand, Ltd. v. United States*, 767 F. 3d 1300, 1306 (Fed. Cir. 2014) (referencing four supplemental questionnaires issued); *Qingdao Taifa Grp. Co. v. United States*, 33 CIT 1090, 1095 & n.3, 637 F. Supp. 2d 1231, 1238 & n.3 (2009) (discussing the fifth supplemental questionnaire sent to respondent)).

Thus, the Elque Group challenges Commerce's application of facts available with an adverse inference and asserts that the facts, circumstances, and record evidence do not warrant Commerce's application of AFA. Pls.' Br. at 3. It argues that its repeated efforts to supply the data available, detailed above, indicated their willingness to cooperate to "the best of its ability," which the Federal Circuit has interpreted to mean "one's maximum effort." Pls.' Br. at 16 (quoting *Nippon Steel Corp.*, 337 F.3d at 1382). The Elque Group contends that Commerce misunderstood its statement that "we maintain in our system the average shrimp count size and the form for each purchased lot in the production report" to mean that it had information about raw input shrimp count size. Pls.' Reply at 15 (citing IDM at 15). Rather, the Elque Group explains that "by overlooking the phrase 'in the production report' in the just-quoted statement," Commerce erred by concluding that the Elque Group provided inconsistent responses and withheld information. *Id.* at 15–16. The Elque Group maintains that it could not have "concocted a methodology that would utilize the data that actually were available to estimate size-specific shrimp costs with any reasonable degree of accuracy. In fact, no such reasonable methodology was available -- whether utilizing [Commerce]'s suggestions of using 'production time or product yield' or 'production and purchase records' . . ." *Id.* at 16 (citations omitted). As a result, the Elque Group argues that it would be improper to conclude that it "failed to cooperate by withholding information if the respondent did not have the information in its possession and it would have been infeasible for the respondent to supply the information." Pls.' Br. at 16 (citing *Tung Fong Indus. Co. v. United States*, 28 CIT 459, 476–77, 318 F. Supp. 2d 1321, 1335–36 (2004)). The Elque Group contends that "[i]n these circumstances, it was unreasonable for [Commerce] to expect the Elque Group -- a small, first-time, pro se respondent -- to develop from scratch a cost reporting methodology that would differentiate insignificant costs in the form and manner

requested by [Commerce] without meaningful assistance.” Pls.’ Suppl. Br. at 4. Further, the Elque Group asserts that it is unlawful for Commerce to apply facts available or AFA for failure to provide data that does not exist. *Id.* (citing *NTN Bearing Corp. of Am. v. United States*, 26 CIT 53, 69–70, 186 F. Supp. 2d 1257, 1274 (2002)).

The Government agrees that Commerce needed to account for difficulties that the Elque Group may have experienced as a small company but claims that by providing extensions and requesting supplemental questionnaire responses, it satisfied this statutory requirement. Def.’s Br. at 15. The Government points to the IDM in which Commerce stated that it granted the Elque Group extensions of time in responding to questionnaires and issued two supplemental questionnaires providing the Elque Group additional opportunities to provide information. *Id.* at 28–29. Additionally, the Government claims that Commerce still provided the Elque Group with recommendations on how to more easily submit information, including the option to “use any reasonable method” to report the cost differences for conversion costs. *Id.* at 28. Thus, the Government contends that Commerce lawfully applied AFA. *Id.* at 15. It repeats Commerce’s view that the Elque Group could have been more responsive to Commerce’s questionnaires and “was still required to provide a reasonable methodology to account for size-specific shrimp cost differences.” *Id.* at 23 (citations omitted). AHSTAC takes a similar position and adds that because the Elque Group “does not argue that the information submitted by the company could have been used to calculate an accurate dumping rate[,] . . . it is undisputed that a gap existed in the record as a result of necessary information not being available.” Def.-Inter.’s Br. at 16. Thus, AHSTAC claims that “Commerce properly concluded that this gap was the result of the Elque Group’s failure to cooperate by not acting to the best of its abilities.” *Id.*

First, the court agrees with the Elque Group that Commerce did not provide adequate assistance to it as a small company respondent pursuant to section 1677m(c)(2). Section 1677m(c)(2) requires that Commerce provide “any [practicable] assistance.” 19 U.S.C. § 1677m(c)(2). The court is unpersuaded by the Government’s and Commerce’s claims that merely treating the Elque Group as it would any other respondent by granting extension requests and providing supplemental questionnaires constitutes any consideration of or provision of additional assistance in light of the Elque Group’s status as a small company. Commerce offered two supplemental questionnaires for the Elque Group and only gave an extension for one of these two questionnaires, which contrasts with cases where parties had several supplemental replies. IDM at 17; *see, e.g., Mukand*, 767 F. 3d at 1306;

Qingdao Taifa Grp. Co., 33 CIT at 1095. While Commerce has discretion on how it provides extensions and accommodations to any respondent in its investigations, this discretion does not absolve Commerce of its obligation to provide additional assistance and consideration to small companies in its investigations.

More significantly, Commerce did not elaborate on whether its questionnaires were sufficiently clear in a way that facilitated the Elque Group's responses or "[took] into account any difficulties experienced" by the Elque Group. 19 U.S.C. § 1677m(c)(2). Commerce repeated questions in the questionnaires to indicate that the prior responses were insufficient and simply requested that the Elque Group use a reasonable method if unable to otherwise answer without providing any additional guidance or recommendations on how to comply with Commerce's requests given the Elque Group's data limitations. IDM at 14–15. The court fails to see how repeating the same question or directing respondent to use any reasonable method serves as assistance to a small respondent. The court agrees with the Elque Group that "[a] respondent is not accommodated under Section 1677m(c)(2) merely by being asked the same or similar questions repeatedly under tight deadlines; rather, it is accommodated by being provided tailored assistance or modifications of existing questions in light of data limitations, or by [Commerce] factoring into its decision-making the difficulties faced by the respondent in providing the requested information." Pls.' Reply at 10.

Second, the Elque Group rightly asserts that Commerce's failure to provide the statutorily required additional assistance in light of its status as a small company bears on Commerce's AFA decision. Pls.' Br. at 16. Commerce's application of AFA relied on unsupported assumptions about the Elque Group's available data. While Defendants characterize the Elque Group as creating a gap in the record with deficient responses, the court rejects this characterization. The Elque Group provided proof, in the form of invoices, that it could not comply with requests for cost-size raw data information, which undermines Commerce's conclusion that the Elque Group could have complied with requests. *See China Steel Corp. v. United States*, 27 CIT 715, 735, 264 F. Supp. 2d 1339, 1360 (2003) ("Commerce's explanation [of AFA application] must include, '[a]t a minimum,' a determination 'that a respondent could comply, or would have had the capability of complying if it knowingly did not place itself in a condition where it could not comply.'" (quoting *Nippon Steel Corp.*, 24 CIT at 1171, 118 F. Supp. 2d at 1378–79)). The Elque Group attempted to communicate with Commerce about its difficulties in providing the information

requested, Commerce had an obligation to provide additional assistance as it was on notice that the Elque Group was a small respondent, but Commerce did not.

In short, the Elque Group was not required to provide information that it did not have, and Commerce cannot penalize the Elque Group for providing information it did not possess.⁵ See *Tung Fong Indus. Co.*, 28 CIT at 459, 318 F. Supp. 2d at 1335–36 (holding that Commerce is not permitted to require a party to manufacture or rely on a calculation scheme that would result in inaccurate data). The court also rejects AHSTAC’s contention that, despite any intent to cooperate, the Elque Group’s “incomplete responses are reflective of the type of ‘inattentiveness, carelessness, or inadequate record keeping’ that permit the application of adverse inferences by Commerce in choosing between facts otherwise available.” Def.-Inter.’s Br. at 31 (quoting *Nippon Steel Corp.*, 337 F.3d at 1383). As the Federal Circuit stated in *Nippon Steel*, “[t]he focus of [the AFA provision] is respondent’s failure to cooperate to the best of its ability, not its failure to provide requested information.” 337 F.3d at 1381 (emphasis omitted). This conclusion is again supported by the court’s earlier opinion, *World Finer Foods*. There, the court relied on section 1677m(c)(2) to demonstrate and emphasize Commerce’s obligation to help small companies, especially after a respondent offered to provide any data it had available. *World Finer Foods, Inc.*, 24 CIT at 544. Commerce there failed to provide any avenue to avoid an adverse inference, and the court reasoned that, had the parties known about alternate avenues, respondents presumably would have complied. *Id.* at 544–45. Thus, the court rejected Commerce’s application of AFA. *Id.* at 545.

In sum, the court concludes that Commerce did not provide adequate assistance to the Elque Group as a small, first-time mandatory respondent. Thus, Commerce’s decision to treat the Elque Group as an uncooperative respondent and apply AFA cannot be upheld. The court remands its determination to Commerce so that it may reconsider its decision.⁶ On remand, Commerce may reopen the record in order to provide further assistance to Calcutta in procuring the re-

⁵ The court rejects the Government’s attempt to distinguish *Tong Fung*. See Def.’s Suppl. Br. at 13. Furthermore, the court declines to require a respondent to utter magic words informing Commerce of an inability to provide specific information, as the Government seems to request, when review of the Elque Group’s responses clearly indicates that they did not have the ability to provide the information as requested. See Def.’s Br. at 34 (“Again, not only did the Elque Group not provide the information, but ‘the explanation of its difficulties does not constitute a statement that it was unable to provide the information.’” (first quoting Suppl. SDQ Resp. at 2 then quoting *Maverick Tube Corp.*, 857 F.3d at 1361)).

⁶ Because the court remands Commerce’s application of AFA, it need not further address Plaintiffs’ challenge to Commerce’s selection of the AFA rate.

quested information. *Shandong Rongxin Imp. & Exp. Co.*, 203 F. Supp. 3d at 1337 (“The [c]ourt may remand with instructions for Commerce to decide whether to reopen and supplement the record, in order to obtain necessary information or resolve ambiguities, per its discretion.” (citing *Essar Steel Ltd. v. United States*, 678 F.3d 1268, 1278 (Fed. Cir. 2012))); see also *Fresh Garlic Producers Ass’n v. United States*, 40 CIT __, __, 190 F. Supp. 3d 1302, 1306 (2016) (“Commerce generally may reopen the administrative record on remand.”). The court leaves to Commerce the determination of whether, for example, an application of neutral facts available would remedy Elque Group’s further need for assistance in this review.

CONCLUSION

The court finds that Commerce was sufficiently on notice of the difficulties that the Elque Group had as a small company because (1) the Elque Group explained and offered to provide all available data and (2) the Elque Group was unable to provide reasonably effective or accurate calculations for conversion cost. Commerce was thus statutorily obligated to provide further assistance under section 1677m(c)(2) and applicable caselaw, yet it did not and instead applied AFA. For the foregoing reasons, Commerce’s *Final Results* are remanded for a decision in accordance with this opinion. Commerce shall file with this court and provide to the parties its remand results within ninety (90) days of the date of this order; thereafter, the parties shall have thirty (30) days to submit briefs addressing the revised final determination to the court, and the parties shall have fifteen (15) days thereafter to file reply briefs with the court.

SO ORDERED.

Dated: February 3, 2021
New York, New York

/s/ Gary S. Katzmann
GARY S. KATZMANN, JUDGE

Slip Op. 21–12

UNIVERSAL STEEL PRODUCTS, INC., et al., Plaintiffs, v. THE UNITED STATES, et al., Defendants.

Before: Gary S. Katzmann, M. Miller Baker, and Leo M. Gordon, Judges
Court No. 19–00209

[Defendants’ motion for judgment on the pleadings is granted; Plaintiffs’ motion for partial summary judgment is denied. Judge Katzmann, with whom Judge Gordon joins, files a separate concurrence. Judge Baker files a separate opinion concurring in part and dissenting in part.]

Dated: February 4, 2021

Lewis E. Leibowitz, the Law Office of Lewis E. Leibowitz, of Washington, DC, argued for plaintiffs.

Meen Geu Oh, Trial Attorney and *Ann C. Motto*, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC, argued for defendant. With them on the brief were *Joseph H. Hunt*, Assistant Attorney General, *Jeanne E. Davidson*, Director, *Tara K. Hogan*, Assistant Director, and *Stephen C. Tosini*, Senior Trial Attorney.

OPINION and ORDER

Per Curiam:¹ The primary question before us is whether *Proclamation 9705* and a series of subsequent modifications to it issued by the President, imposing heightened tariffs on steel imports on the grounds that they threaten to impair the national security of the United States, violate Section 232 of the Trade Expansion Act of 1962, codified as amended at 19 U.S.C. § 1862 (“Section 232”). We conclude that *Proclamation 9705* and its subsequent modifications do not violate that statute.

Plaintiffs Universal Steel Products, Inc., PSK Steel Corporation, The Jordan International Company, Dayton Parts, LLC, and Borusan Mannesman Pipe U.S. Inc. (collectively, “Plaintiffs”) are U.S. corporations that import steel from foreign nations and claim injury based on tariffs imposed by the President under Section 232. Am. Compl. at 1, Dec. 11, 2019, ECF No. 11. Plaintiffs brought this action against naming as defendants the United States, and various officers of the United States in their official capacities (the President of the United States, the Secretary of Commerce, and the Acting Commissioner of Customs and Border Protection) (collectively, “the Government”), seeking equitable and legal relief for tariffs on certain steel products. Am. Compl. at 1. To defeat Plaintiffs’ challenge to these Proclamations, the Government moved for judgment on the pleadings. Def.’s Mot. for J. on the Pleadings at 7, Apr. 9, 2020, ECF No. 32 (“Def.’s Br.”). Plaintiffs oppose this motion. Pls.’ Br. in Opp’n to Def.’s Mot. for J. on the Pleadings, Apr. 28, 2020, ECF No. 35 (“Pls.’ Br.”). Plaintiffs have also filed a cross-motion for partial summary judgment. Pls.’ Cross-Mot. for Summ. J., Oct. 12, 2020, ECF No. 56.

BACKGROUND

I. Legal and Regulatory Framework for Action Under Section 232 Generally

With its genesis in the Cold War, Section 232 was enacted by Congress in 1962, authorizing the President to adjust imports that

¹ Judge Baker joins all but footnotes 6 and 14 and Section III of this opinion.

pose a threat to the national security of the United States. Section 232 directs that, upon receipt of a request from the head of a department or agency, upon application of an interested party, or *sua sponte*, the Secretary of Commerce is to conduct an “appropriate investigation to determine the effects on the national security of imports of the article which is the subject of such request.” 19 U.S.C. § 1862(b)(1)(A). The Secretary shall, “if it is appropriate and after reasonable notice, hold public hearings or otherwise afford interested parties an opportunity to present information and advice relevant to such investigation.” 19 U.S.C. § 1862(b)(2)(A)(iii). The Secretary of Commerce must “provide notice to the Secretary of Defense” of the investigation’s commencement and, in the course of the investigation, “consult with the Secretary of Defense regarding the methodological and policy questions raised[.]” 19 U.S.C. § 1862(b)(1)(B); 19 U.S.C. § 1862(b)(2)(A)(i). The Secretary of Commerce must also “(ii) seek information and advice from, and consult with, appropriate officers of the United States, and (iii) if it is appropriate and after reasonable notice, hold public hearings or otherwise afford interested parties an opportunity to present information and advice relevant to such investigation.” 19 U.S.C. § 1862(b)(2)(A)(ii)–(iii).

The statute provides that, within 270 days of commencing the investigation, the Secretary shall submit a report to the President summarizing the investigation’s findings and offering recommendations for action or inaction; in addition, if the Secretary concludes the subject article’s imports are in quantities or under circumstances that “threaten to impair the national security,” the report shall indicate that finding. 19 U.S.C. § 1862(b)(3)(A). If the Secretary finds a threat to national security, the President then has ninety days from his receipt of the report to determine whether he concurs with the Secretary’s finding. 19 U.S.C. § 1862(c)(1)(A)(i). If the President concurs, he must “determine the nature and duration of the action that, in the judgment of the President, must be taken to adjust the imports of the article and its derivatives so that such imports will not threaten to impair the national security.” 19 U.S.C. § 1862(c)(1)(A)(ii). If the President elects to take such action, the statute provides he shall “implement” that action within fifteen days after the day on which he decides to act. 19 U.S.C. § 1862(c)(1)(B). If the action chosen by the President is to negotiate an agreement with a foreign nation, and no such agreement is entered into before the date that is 180 days after the date on which the President made the determination to negotiate, or if the agreement is not being carried out or is ineffective, the President shall “take such other actions as the President deems necessary to adjust the imports of such article so that such imports

will not threaten to impair the national security.” 19 U.S.C. §§ 1862(c)(3)(A)(i)–(ii). Finally, section (d) lists the following factors that the Secretary and the President are to consider when acting pursuant to the statute:

(d) Domestic production for national defense; impact of foreign competition on economic welfare of domestic industries

For the purposes of this section, the Secretary and the President shall, in the light of the requirements of national security and without excluding other relevant factors, give consideration to domestic production needed for projected national defense requirements, the capacity of domestic industries to meet such requirements, existing and anticipated availabilities of the human resources, products, raw materials, and other supplies and services essential to the national defense, the requirements of growth of such industries and such supplies and services including the investment, exploration, and development necessary to assure such growth, and the importation of goods in terms of their quantities, availabilities, character, and use as those affect such industries and the capacity of the United States to meet national security requirements. In the administration of this section, the Secretary and the President shall further recognize the close relation of the economic welfare of the Nation to our national security, and shall take into consideration the impact of foreign competition on the economic welfare of individual domestic industries; and any substantial unemployment, decrease in revenues of government, loss of skills or investment, or other serious effects resulting from the displacement of any domestic products by excessive imports shall be considered, without excluding other factors, in determining whether such weakening of our internal economy may impair the national security.

19 U.S.C. § 1862(d).

II. Facts and Procedural History

On April 19, 2017, the Secretary of Commerce, Wilbur L. Ross, initiated a Section 232 investigation to determine the effects of steel imports on national security. *See Publication of a Report on the Effect of Imports of Steel on the National Security*, 85 Fed. Reg. 40,202, 40,208 (Dep’t Commerce July 6, 2020) (“Steel Report”).² The Secre-

² Although the Secretary initially issued the Steel Report in 2018, *see The Effect of Imports of Steel on the National Security* (Dep’t Commerce Jan. 11, 2018), publication in the Federal Register was delayed until 2020.

tary issued his report and recommendation to the President on January 11, 2018, within 270 days of initiation of the investigation, as required by 19 U.S.C. § 1862(b)(3)(A). *See id.* The Secretary found that the availability of steel manufactured by a healthy domestic industry is important to national defense, that steel “[i]mports in such quantities as are presently found adversely impact the economic welfare of the U.S. steel industry, that the displacement of domestic steel by excessive quantities of imports has the serious effect of weakening our internal economy, and that global excess steel capacity is weakening the domestic economy.” *Id.* at 40,210. In light of these findings, the Secretary recommended that the President act to adjust the level of imports through quotas or tariffs on steel imported into the United States. *Id.* at 40,225.

The President, Donald J. Trump, concurred with the Secretary’s findings and issued a series of Proclamations from March 8, 2018 to May 19, 2019. The first, *Proclamation 9705*, announced measures aimed at “adjusting imports of steel into the United States,” and established a twenty-five percent tariff on imports of steel articles from all countries except Canada and Mexico, effective March 23, 2018. *Proclamation 9705 of March 8, 2018, Adjusting Imports of Steel Into The United States*, 83 Fed. Reg. 11,625, cl. 9 (Mar. 15, 2018) (“*Proclamation 9705*”). Additionally, the President declared in *Proclamation 9705* that “any country with which [the United States has] a security relationship could discuss alternative ways to address the threatened impairment of our national security caused by imports from that country.” *Id.*

Thereafter, the President modified *Proclamation 9705* on several occasions. On March 22, 2018, the President issued *Proclamation 9711* that temporarily exempted imports from Argentina, Australia, Brazil, the countries of the European Union (“EU”), and the Republic of Korea, in addition to Canada and Mexico, from the twenty-five percent tariff imposed by *Proclamation 9705*, pending negotiations with those countries. *Proclamation 9711 of March 22, 2018, Adjusting Imports of Steel Into the United States*, 83 Fed. Reg. 13,361, ¶¶ 6–9 (Mar. 28, 2018) (“*Proclamation 9711*”). On April 30, 2018, the President issued *Proclamation 9740* that continued exempting imports from Canada, Mexico, and the EU and replaced the tariff on steel imports from the Republic of Korea with quotas. *Proclamation 9740 of April 30, 2018, Adjusting Imports of Steel Into the United States*, 83 Fed. Reg. 20,683, ¶ 5 (May 7, 2018) (“*Proclamation 9740*”). The President issued *Proclamation 9759* on May 31, 2018 that imposed quotas on Brazil and Argentina based on agreements with those countries but did not mention any satisfactory alternative agreement with

Canada, Mexico, or the EU. *Proclamation 9759 of May 31, 2018, Adjusting Imports of Steel Into the United States*, 83 Fed. Reg. 25,857 (June 5, 2018) (“*Proclamation 9759*”). The temporary exemption on the imposition of tariffs on Mexico, Canada, and the EU was allowed to expire on June 1, 2018, and the twenty-five percent tariffs on steel imports from those countries, as set forth in *Proclamation 9705*, took effect. See *Proclamation 9711*, ¶ 11; *Proclamation 9740*, ¶ 7; *Proclamation 9705*, cl. 2. On August 10, 2018, the President further amended *Proclamation 9705*, based on a recommendation from the Secretary, and determined that certain countries should be subject to a higher tariff because of the need to further reduce steel imports from major foreign exporters, Turkey in particular. Accordingly, the President increased the tariffs for steel imports from Turkey from twenty-five to fifty percent. See *Proclamation 9772 of August 10, 2018, Adjusting Steel Imports Into the United States*, 83 Fed. Reg. 40,429, ¶ 6 (Aug. 15, 2018). Shortly thereafter, the President issued *Proclamation 9777* that authorized the Secretary to permit specific exclusions to countries subject to quotas under previous Proclamations and authorized other modifications to the product exclusion process. *Proclamation 9777 of August 29, 2018, Adjusting Imports of Steel Into the United States*, 83 Fed. Reg. 45,025 (Sept. 4, 2018) (“*Proclamation 9777*”). Finally, on May 19, 2019, the President permanently excluded Mexico and Canada from these tariffs because of the conclusion of the United States-Mexico-Canada Agreement. *Proclamation 9894 of May 19, 2019, Adjusting Imports of Steel Into the United States*, 84 Fed. Reg. 23, 987 (May 23, 2019).³

Plaintiffs filed a four-count amended complaint on December 11, 2019, alleging that the Secretary’s report and the President’s Proclamations violated various procedural requirements of Section 232 and the Administrative Procedure Act (“APA”). See Am. Compl., Dec. 11, 2019, ECF No. 11.⁴ The Government filed a motion for judgment on the pleadings pursuant to USCIT Rule 12(c) on April 9, 2020. Def.’s Br. at 2. Plaintiffs responded in opposition to the Government’s motion on April 29, 2020. Pls.’ Br. at 9–10. The Government filed a

³ We note that subsequent modifications of *Proclamation 9705* followed. See, e.g., *Proclamation 10060 of August 6, 2020, Adjusting Imports of Aluminum Into the United States*, 85 Fed. Reg. 49,921 (Aug. 14, 2020). However, we limit our discussion and decision to the Proclamations referenced in the amended complaint. See Am. Compl. ¶¶ 45–55, Dec. 11, 2019, ECF No. 11.

⁴ At the request of the parties, we stayed Count Four’s challenge to *Proclamation 9772* pending final resolution of an identical challenge in a separate case. Am. Compl. ¶ 71; Joint Status Report (and Proposed Briefing Schedule, Mar. 5, 2020, ECF No. 25; Scheduling Order, Mar. 10, 2020, ECF No. 26 (“Ordered that consideration of Plaintiffs’ challenge to Presidential Proclamation 9772, as pleaded in Count Four of the Amended Complaint, Am. Compl. ¶ 71, is stayed pending the final disposition of *Transpacific Steel, LLC v. United States*, Ct. Int’l Trade No. 19–0009”).

corrected reply brief on May 20, 2020. Def.'s Corr. Reply, May 20, 2020, ECF No. 39 ("Def.'s Corr. Reply"). Prior to oral argument, we issued questions to the parties, to which they filed written responses. *See* Pls.' Resp. to Questions from the Ct., July 17, 2020, ECF No. 45; Def.'s Resp. to Ct.'s Order, July 17, 2020, ECF No. 44 ("Def.'s Resp."). We held oral argument on July 21, 2020. ECF No. 46. Subsequently, in response to an order from the court, ECF No. 55, Plaintiffs filed a cross-motion for partial summary judgment. Pls.' Cross-Mot. for Summ. J., Oct. 12, 2020, ECF No. 56;⁵ *see also* Ct. Letter, Sept. 25, 2020, ECF No. 49; Pls.' Resp., Oct. 4, 2020, ECF No. 51; Def.'s Resp., Oct. 5, 2020, ECF No. 54.

JURISDICTION and STANDARD OF REVIEW

We have jurisdiction under 28 U.S.C. §§ 1581(i)(2) and (4), which provide that this court "shall have exclusive jurisdiction of any civil action commenced against the United States, its agencies, or its officers, that arises out of any law of the United States providing for . . . tariffs, duties, fees, or other taxes on the importation of merchandise for reasons other than the raising of revenue" and "administration and enforcement with respect to the matters referred to in paragraphs (1)–(3) of this subsection."

We may review a President's action pursuant to Section 232 for a "clear misconstruction of the governing statute, a significant procedural violation, or action outside delegated authority." *See Maple Leaf Fish Co. v. United States*, 762 F.2d 86, 89 (Fed. Cir. 1985). Such non-statutory review of Presidential action for violation of a statute is "only rarely available." *Silfab Solar, Inc. v. United States*, 892 F.3d 1340, 1346 (Fed. Cir. 2018).

"Judgment on the pleadings is appropriate where there are no material facts in dispute and the party is entitled to judgment as a matter of law." *Forest Labs., Inc. v. United States*, 476 F.3d 877, 881 (Fed. Cir. 2007) (citation omitted). Summary judgment is appropriate "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." USCIT R. 56(a).

⁵ We directed that Plaintiffs' Cross-Motion for Partial Summary Judgment incorporate by reference Plaintiffs' response and revised response to Defendants' Motion for Judgment on the Pleadings, ECF Nos. 33, 35, as its memorandum in support of the cross-motion, and also directed, upon the filing of the cross-motion, that the Office of the Clerk deem Defendants' memorandum in support of their Motion for Judgment on the Pleadings, plus the attachment thereto, ECF Nos. 32, 32-1, and Defendants' Reply, ECF No. 36, as Defendants' response to Plaintiffs' cross-motion.

DISCUSSION

Plaintiffs allege the following: (1) the Steel Report is a reviewable, final agency action, is procedurally deficient, and invalidates subsequent Presidential action; (2) both the Secretary and the President fundamentally misinterpreted the statute by failing to base their determinations on an “impending threat;” (3) the President violated Section 232 by failing to set the duration of the action he chose; and (4) tariffs imposed on Canada, Mexico, and EU member nations violated Section 232’s timing provisions. Am. Compl. ¶¶ 56–70; Pls.’ Br. at 5–46. The Government responds that (1) the Steel Report is not final agency action and is therefore not reviewable, but even if it were, the Secretary followed all procedural requirements; (2) the statute does not require the Secretary or President to identify an “impending threat;” (3) the President is not required by the “duration” language of Section 232 to establish an end to the action at its outset; and (4) no timing provisions of Section 232 were contravened, but even if they were, the President has the discretion to do so. Def.’s Br. at 2–4. We hold that Plaintiffs’ claims fail on the pleadings.⁶

I. The Steel Report is Not Final Agency Action and Thus Is Not Subject to Judicial Review Under the APA.⁷

In Count One, Plaintiffs allege that the Secretary’s Steel Report is a reviewable, final agency action, is procedurally deficient, and invalidates subsequent Presidential action. Count Two, paragraph 64, echoes the allegations of Count One except that it fails to allege that the Secretary’s report is reviewable.⁸ We find that the Steel Report is

⁶ In his separate opinion, Judge Baker argues *sua sponte* that the President in his official capacity should be dismissed from this litigation entirely, even for actions not arising under the APA. Judges Katzmann and Gordon do not share that view. Their position can be stated as follows:

The Government has not raised this issue, nor has it asserted under any theory that dismissal of the President in his official capacity is warranted. We do not construe the amended complaint to be asserting claims against the President. Rather, the claims are directed against the Proclamations themselves, not the President, against whom no remedy is sought. Plaintiffs do not ask that we enjoin the President, but rather seek to enjoin the Secretary and the Acting Commissioner, U.S. Customs and Border Protection. Moreover, there is no dispute as to whether the court has jurisdiction to entertain the requested relief — to declare that the Proclamations are contrary to law and invalid, to enjoin the enforcement of any quota, and to order refunds of any duties. See Am. Compl. ¶ 72. We simply note that it does. Accordingly, we do not think it necessary for the court *sua sponte* to dismiss the President in his official capacity from this litigation.

⁷ This section corresponds to Count One and Count Two, paragraph 64, of Plaintiffs’ amended complaint. Am. Compl. ¶¶ 56–62, 64.

⁸ Although Count Two, paragraph 64, arguably alleges a nonstatutory review claim — which by definition is *outside* of the APA — based on the Secretary’s Steel Report, Plaintiffs’ briefing does not argue that their challenge to the report is reviewable outside of the APA. Moreover, Plaintiffs have expressly clarified that their challenge to the Steel Report is limited to “whether the [Steel Report] is subject to judicial review[,] and . . . if so, whether

not reviewable as final agency action under the APA; thus, the Government is entitled to judgment as a matter of law as to these claims.

The APA provides that “agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review.” 5 U.S.C. § 704. Two conditions must be satisfied for an agency action to be final. First, the action must mark the “consummation” of the agency’s decision-making process — it must not be of a merely tentative or interlocutory nature. *Bennett v. Spear*, 520 U.S. 154, 177–78 (1997); *see also Franklin v. Massachusetts*, 505 U.S. 788 (1992). Second, the action must be one by which “rights or obligations have been determined” or from which “legal consequences will flow.” *Bennett*, 520 U.S. at 177–78.

In *Franklin*, the Supreme Court articulated the meaning of final agency action through a challenge to the method by which Congress apportioned seats in the U.S. House of Representatives based on a recommendation of the Secretary of Commerce, which was reviewed and approved by the President before taking effect. 505 U.S. 788. The Court found that the Secretary of Commerce’s recommendation was not reviewable “final agency action” under the APA. *Id.* At 799. In reaching its conclusion, the Court evaluated the “core question” of whether “the agency ha[d] completed its decision-making process, and whether the result of that process [was] one that will directly affect the parties.” *Id.* at 797. Because the President had to submit the Secretary of Commerce’s recommendation to Congress and had the opportunity to alter it before doing so, the Court held that the agency action “serve[d] more like a tentative recommendation than a final and binding determination.” *Id.* at 798. The test was again articulated and used in *Bennett*, where the Court found that agency action pursuant to the Endangered Species Act was final and reviewable because the report in question “altere[d] the legal regime to which the action agency is subject” and therefore had “direct and appreciable legal consequences.” 520 U.S. at 178.

Plaintiffs, relying primarily on *Corus Group PLC v. International Trade Commission*, 352 F.3d 1351, 1358 (Fed. Cir. 2003), argue that judicial review of the Secretary’s Steel Report is proper because the Steel Report affected rights and obligations of the President and legal consequences resulted. *See* Pls.’ Br. at 18. The Government responds, contending that an agency action is not final if it is purely advisory the [Steel Report] violated the Administrative Procedure Act.” Resp. to the Ct.’s Letter of Sept. 25, 2020 on Behalf of Pls. at 2, Oct. 4, 2020, ECF No. 51. Accordingly, we do not consider whether Plaintiffs’ allegations against the Steel Report are reviewable outside of the APA, and we treat Count Two, paragraph 64, as duplicative of Count One’s APA claim.

and does not affect the legal rights of the parties, and that the Steel Report falls “squarely within the bounds of an advisory action.” Def.’s Br. at 19 (quoting *Franklin*, 505 U.S. at 798). We agree with the Government that the issue is not controlled by *Corus Group*, as Plaintiffs contend, but by *Franklin* and *Bennett*. Moreover, this case is similar to other cases that held that agency recommendations to the President were not final action subject to judicial review. See generally *Dalton v. Specter*, 511 U.S. 462 (1994) (holding that an agency’s recommendation of military bases for closure was not a final decision and was not reviewable under the APA); *Michael Simon Design, Inc. v. United States*, 609 F.3d 1335 (Fed. Cir. 2010) (holding that the International Trade Commission’s act of recommending that the President modify HTSUS was not final agency action); *Motion Systems Corp. v. Bush*, 437 F.3d 1356 (Fed. Cir. 2006) (holding that the Trade Representative’s recommendations for presidential action pursuant to the Trade Act of 1974 were not final actions). These cases, viewed together, suggest that the determinative factor is whether the recommendation itself carries direct consequences, or if a form of approval from the President is necessary before any consequences attach. See, e.g., *Michael Simon Design*, 609 F.3d at 1339; *Motion Systems Corp.*, 437 F.3d at 1362.

In *Corus Group*, the U.S. Court of Appeals for the Federal Circuit (“Federal Circuit”) held that a recommendation made by the U.S. International Trade Commission (“the Commission”) to the President pursuant to the Trade Act of 1974 was reviewable because “the President does not have complete discretion under the statute, and the Commission’s report had ‘direct and appreciable legal consequences.’” 352 F.3d at 1359. While the relevant statutory provision of the Trade Act of 1974 and Section 232 are strikingly similar, there is a key distinction: the Trade Act of 1974 does not give the President the option to accept or reject the finding of the Commission. 19 U.S.C. § 2253(a)(1)(A). Rather, if an affirmative finding is issued by the Commission, the President is required to take action, although he may use his discretion in choosing the nature of the action. *Id.* The statute provides:

After receiving a report under section 2252(f) of this title containing an affirmative finding regarding serious injury, or the threat thereof, to a domestic industry, the President shall take all appropriate and feasible action within his power which the President determines will facilitate efforts by the domestic industry to make a positive adjustment to import competition and provide greater economic and social benefits than costs.

19 U.S.C. § 2253(a)(1)(A). In contrast, under Section 232, when the Secretary makes an affirmative finding of a threat, the President is to first determine “whether [he] concurs with the finding of the Secretary” before acting, as the relevant portion of the statute states:

Within 90 days after receiving a report submitted under subsection (b)(3)(A) in which the Secretary finds that an article is being imported into the United States in such quantities or under such circumstances as to threaten to impair the national security, the President shall—(i) determine whether the President concurs with the finding of the Secretary, and (ii) if the President concurs, determine the nature and duration of the action that, in the judgment of the President, must be taken to adjust the imports of the article and its derivatives so that such imports will not threaten to impair the national security.

19 U.S.C. §§ 1862(c)(1)(A)(i)–(ii). The statute at issue in *Corus Group* requires the President to take action if an affirmative finding is issued. 352 F.3d at 359. Therefore, the court’s holding in *Corus Group* that the Commission’s recommendation was reviewable is not determinative here.

Section 232 gives the President the discretion to disagree with the Secretary’s recommendation and not take any action. This case is thus more akin to *Dalton v. Specter*, 511 U.S. 462 (1994). In *Dalton*, the Supreme Court held that recommendations for military base closures, made by the Secretary of Defense pursuant to the Defense Base Closure and Realignment Act of 1990, did not constitute final agency action because the President had to review and submit a certificate of approval of those recommendations to Congress before they took effect. 511 U.S. at 463. The Court highlighted that “without the President’s approval, no bases are closed under the act” and that “what is crucial is the fact that the President, not the [agency], takes the final action that affects the military installations.” *Id.* at 470. Even though that statute limited the President’s discretion significantly in that he could only accept or reject the recommendations in its entirety, the determinative fact, the Court found, was that the President’s approval was the final, necessary step before any action occurred. *Id.* (“That the president cannot pick and choose among bases, and must accept or reject the entire package offered by the Commission, is immaterial. What is crucial is the fact that ‘[t]he President, not the [agency], takes the final action that affects’ the military installations.”).

Similarly, in *Michael Simon Design*, the Federal Circuit heard a challenge to modifications that were made to the Harmonized Tariff Schedule based on the Commission’s recommendations and held that

the recommendations were not final, but it was the President's proclamation adopting the proposed modifications that constituted the final action. 609 F.3d at 1341. Examination of the relevant statutory language reveals that, similar to the language of Section 232, the President had the option of choosing not to accept the recommendations at all: "the President may proclaim modifications, based on the recommendations by the Commission under section 3005 of this title, to the Harmonized Tariff Schedule if the President determines that the modifications -- (1) are in conformity with United States obligations under the Convention; and (2) do not run counter to the national economic interest of the United States." 19 U.S.C. § 3006(a). Elaborating upon why the recommendations were not final, the Federal Circuit stated that the recommendations "[did] not contain terms or conditions that circumscribe the President's authority to act; [they did] not limit the President's potential responses, and . . . [did] not directly modify the HTSUS."⁹ *Michael Simon Design*, 609 F.3d at 1339.

Finally, in *Motion Systems Corp.*, the Federal Circuit held that the Commission and the U.S. Trade Representative's recommendations to the President were not final. 437 F.3d at 1359. The relevant statute in that case provides that if the Commission and the Trade Representative find a threat to the United States economy, they must submit a report to the President. 19 U.S.C. § 2451. The statute provides that, within fifteen days of receiving the report, the President must "provide import relief . . . unless the President determines that provision of such relief is not in the national economic interest of the United States." 19 U.S.C. § 2451(k)(1). This statutory provision cabins the President's authority to reject the recommendations more than Section 232 does because Section 232 does not articulate any criteria upon which the President must base his decision. Notably, and pertinent to the case now before us, the court still held that the agency's actions were only recommendations for Presidential action, and thus not reviewable. *Motion Systems*, 437 F.3d at 1362. Like the recommendations to the President in *Dalton*, *Michael Simon Design*, and *Motion Systems*, the Secretary's findings and recommendations at issue here did not require the President to take any action; rather, Section 232 left to the President's discretion whether to concur with the findings and recommendations. The imposition of tariffs, which is the action that gave rise to the legal consequences that Plaintiffs

⁹ As noted, *Dalton* makes clear that even if the President's potential responses were limited by the recommendations, that would not mean that the agency action is final in itself. See *Dalton v. Specter*, 511 U.S. at 470. Because the President's discretion to act is not limited under Section 232 in the way it was by the statute at issue in *Dalton*, this suggests a *fortiori* that the agency's action was not final.

challenge, was an action taken by the President, and not by the Secretary. In conclusion, the Steel Report is not reviewable under the APA, and the Government is entitled to judgment on the pleadings as to Count One and Count Two, Paragraph 64, of the amended complaint.¹⁰

II. “*Impending Threat*” and the Validity of the President’s Actions¹¹

Plaintiffs allege that the President “fundamentally misinterpreted Section 232 by failing to base his determination upon a finding of an impending threat to impair the national security of the United States.” Am. Compl. ¶ 68; Pls.’ Br. at 32–34. Plaintiffs challenge the President’s action after he concurred with the Secretary’s recommendations, contending that the President’s failure to find an “impending” threat violated the statute. *Id.*¹²

As Plaintiffs correctly indicate, Section 232 requires the President to concur with a finding by the Secretary that “an article is being imported into the United States in such quantities or under such circumstances as to threaten to impair the national security” before the President may take action. Pls.’ Br. At 32; 19 U.S.C. §§ 1862(b)(3)(A); (c)(1)(A)(ii).¹³ Plaintiffs contend that the ordinary

¹⁰ Even if Plaintiffs’ challenge to the Steel Report were reviewable (under the APA or otherwise) and even if the court were to find that the Steel Report was procedurally flawed, precedent reveals that such a finding would not allow the court to invalidate the subsequent Presidential action. See *Silfab Solar, Inc. v. United States*, 892 F.3d 1340, 1345 (Fed. Cir. 2018). In *Silfab Solar*, the Federal Circuit plainly rejected the contention that failure of the Commission to comply with procedural statutory obligations when reporting to the President invalidates subsequent Presidential action. *Id.* When nothing in the relevant statute requires the President to determine whether procedural violations were committed by the agency making a recommendation to the President, or prohibits the President from approving recommendations that are procedurally flawed, courts have repeatedly held that the court cannot overturn the resulting Presidential action on the basis of such a procedural violation. See *Michael Simon Design*, 609 F.3d at 1342–43; see also *Dalton*, 511 U.S. at 476. Section 232 does not contain any requirements to that effect, and thus, even a concrete finding of a procedural violation by the Secretary would not enable the court to overturn the President’s actions. See generally 19 U.S.C. § 1862.

¹¹ This section corresponds to Count Three of Plaintiffs’ amended complaint. Am. Compl. ¶¶ 67–68.

¹² Plaintiffs similarly allege the Secretary similarly violated the statute in failing to find an impending threat, but that claim — as one aspect of Plaintiffs’ broader APA claim — is not reviewable for the reasons provided above.

¹³ Section 1862(b)(3)(A) refers to the Secretary’s duties and provides that: “[i]f the Secretary finds that such article is being imported into the United States in such quantities or under such circumstances as to threaten to impair the national security, the Secretary shall so advise the President in such report.” Section 1862(c)(1)(A)(ii) refers to the President’s duties, and provides: “if the President concurs, determine the nature and duration of the action that, in the judgment of the President, must be taken to adjust the imports of the article and its derivatives so that such imports will not threaten to impair the national security.”

meaning of the word “threat” is “something impending,” and further, that this is the only definition that can apply to “imports.” Pls.’ Br. at 33–34 (citing *Threat*, *Merriam-Webster Online Dictionary*, <https://www.merriam-webster.com/dictionary/threat> (last visited Jan. 27, 2021)). Plaintiffs further argue that “in the context of Section 232, the ‘threat’ of impairment of national security cannot be distant in time or conjectural—it must be both genuine and ‘impending.’” *Id.*

Section 232, however, grants the President latitude in evaluating whether imports threaten the national security. The statutory language makes clear that the list of factors to be considered in determining whether a threat exists is nonexclusive. 19 U.S.C. § 1862(d) (“the President shall, in the light of the requirements of national security and without excluding other relevant factors . . .”).

An examination of *Proclamation 9705* and its subsequent modifications reveals that the President made findings after considering recommendations from the Secretary that addressed data relevant to the factors provided by the statute, such as the domestic production needed for projected national defense requirements, the capacity of domestic industries to meet such requirements, and the serious effects resulting from the displacement of any domestic products by excessive imports. See Def.’s Br., Exh. 1 at 25–53 (*The Effect of Imports of Steel on the National Security*. U.S. Dep’t of Commerce (Jan. 11, 2018)). Generally, the President’s exercise of discretion is not open to scrutiny. See *United States v. George S. Bush & Co.*, 310 U.S. 371 (1940) (challenging a Presidential Proclamation issued pursuant to Section 336(c) of the Tariff Act of 1930). In exercising his discretion to impose import restrictions, the President concurred with the Secretary’s findings that current import levels could impair the country’s national security. Where Congress, as in this case, has authorized the President to take “legislative action that is necessary or appropriate . . . the judgment of the [President] as to existence of facts calling for that action is not subject to review.” *Id.* at 380 (citations omitted); see also *Am. Inst. for Int’l Steel, Inc. v. United States*, 43 CIT __, __, 376 F. Supp. 3d. 1335, 1341–43 (2019), *aff’d*, 806 Fed. App’x 982 (Fed Cir. 2020), *cert. denied*, 141 S. Ct. 133 (2020) (reviewing cases involving unreviewability of discretionary Presidential actions). Because Plaintiffs’ claim that the President failed to identify an “impending threat” is not reviewable, the Government is entitled to judgment on the pleadings as to Count Three of the Complaint.¹⁴

¹⁴ Even if reviewable, Plaintiffs’ textual argument also fails. First, Plaintiffs focus mostly on the word “impending,” which is not found anywhere in the statute, but rather comes from the Plaintiffs-provided definition of “threat.” Moreover, the word “threat” does not appear in this provision of the statute, either. The word used in the statute is the transitive verb “threaten,” which, as the Government notes, has a different set of definitions than “threat.”

III. *The Duration As Set Forth in Proclamation 9705 Does Not Violate Section 232.*¹⁵

Under Section 232, if the President concurs with a finding of the Secretary in his report that imports “threaten to impair national security,” 19 U.S.C. § 1862(c)(1)(A)(i), the President “shall” “determine *the nature and duration of the action that, in the judgment of the President, must be taken to adjust the imports . . . so that such imports will not threaten to impair the national security.*” 19 U.S.C. § 1862(c)(1)(A)(ii) (emphasis added). Plaintiffs contend that the President violated the statute by not “setting a termination date *or by [not] specifying circumstances that would end the threat to impair national security.*” Pls.’ Br. at 38 (emphasis added).

In *Proclamation 9705*, the President “concur[s] in the Secretary’s finding that steel articles are being imported into the United States in such quantities and circumstances as to threaten to impair the national security of the United States.” *Proclamation 9705*, ¶ 5. He states that in his “judgment” a twenty-five percent tariff on steel articles imported from all countries except Canada and Mexico is “[u]nder current circumstances . . . necessary and appropriate to address the threat that imports of steel articles pose to the national

Def.’s Corr. Reply at 17. These definitions include: “to utter threats against,” “to give signs or warning of,” “to hang over dangerously,” “to announce as intended or possible,” and “to cause to feel insecure or anxious.” *Threaten*, Merriam-Webster Online Dictionary, <https://www.merriamwebster.com/dictionary/threaten> (last visited Jan. 27, 2021). Plaintiffs chose not to consider any of these definitions and instead rely solely upon Merriam-Webster’s third-provided definition of “threat,” which is “an indication of something impending.” The court disagrees that the plain text of the statute supports Plaintiffs’ preferred reading.

As noted, Plaintiffs make much of the word “impending,” suggesting that the circumstances hypothesized about the inability of the United States to defend itself due to levels of steel imports if it were to enter a war is nothing more than a “fanciful scenario,” and not concrete enough to justify action pursuant to Section 232. Pls.’ Br. at 35. However, the Government is correct in contending that the statute does not require identification of an “impending” threat, and that “threaten to impair” and “impending threat” are not identical. Def.’s Br. at 30. Furthermore, in this case, the President concurred with the Secretary’s finding that a threat to impair already existed, not that it was “on the distant horizon.” See Def.’s Br. at 31; see also *Proclamation 9705*, ¶ 2 (The President noting that “steel articles are being imported into the United States in such quantities . . . as to threaten to impair the national security of the United States,” not that they may be in the distant future.). Section 232 is written in the present tense (“ . . . an article *is* being imported into the United States in such quantities,” 19 U.S.C. § 1862(b)(3)(A) (emphasis added)); in determining the meaning of any act of Congress, words used in the present tense include the future as well as the present. See *Carr v. United States*, 560 U.S. 438, 448 (2010). Furthermore, Plaintiffs conceded at oral argument that the statute allows the President to act to address present threats as well as future ones. Oral Arg. at 11:43. Thus, even if the statute did require an impending threat, that condition was met by the President’s finding here.

¹⁵ This section corresponds to Count Two, Paragraph 66, of Plaintiffs’ amended complaint. Am. Compl. ¶ 66.

security.” *Id.* ¶ 8.¹⁶ *Proclamation 9705* states that the twenty-five percent tariff rate on most steel imports would be effective from “March 23, 2018, and shall continue in effect, unless such actions are expressly reduced, modified, or terminated.” *Id.* at cl. 5(a). The Government contends that the President satisfied this requirement in *Proclamation 9705* by stating that the twenty-five percent tariff rate on most steel imports would remain in effect from March 23, 2018 “until and unless such actions are expressly reduced, modified, or terminated.” Def.’s Br. at 26 (quoting *Proclamation 9705*, 83 Fed. Reg. 11,628, cl. 5(a)). The Government believes that stating that the tariffs will remain in effect until the President says otherwise is a sufficient way for the President to “determine the . . . duration” of the action.

In ascertaining the meaning of “duration” in Section 232, we are informed by fundamental principles of statutory construction: we look to the plain meaning of the statute, legislative history as may be necessary to provide context, and caselaw. *See Cook v. Wilkie*, 908 F.3d 813, 817 (Fed. Cir. 2018) (“Accordingly, we will ascertain the best meaning of § 7107(b) ‘by employing the traditional tools of statutory construction; we examine the statute’s text, structure, and legislative history, and apply the relevant canons of interpretation.’”) (quoting *Delverde, SrL v. United States*, 202 F.3d 1360, 1363 (Fed. Cir. 2000)); *see generally* Robert Katzmman, *Judging Statutes* (2014). We conclude that more finite terms than the Proclamation provides in this case are not necessary.

The plain meaning of the word “duration” is straightforward. Duration is defined as “(1) [t]he length of time something lasts, [and] (2) [a] length of time or continuance in time.” *Duration, Black’s Law Dictionary* (11th ed. 2019); *see also Duration, Ballentine’s Law Dictionary* (3d ed. 2010) (“The period of existence, . . . continuance in time; the portion of time during which anything exists.”). The word “determine” is equally clear, meaning “[t]o terminate; to cease; to end[, t]o put an end to controversy by deciding the issue or issues.” *Determine, Ballentine’s Law Dictionary* (3d ed. 2010); *see also Determine, Oxford English Dictionary*, <https://www.oed.com/view/Entry/51244?redirectedFrom=determine#eid> (last visited Feb. 2, 2021)

¹⁶ The President states that the tariff is necessary and appropriate in light of the many factors I have considered, including the Secretary’s report, updated import and production numbers for 2017, the failure of countries to agree on measures to reduce global excess capacity, the continued high level of imports since the beginning of the year, and special circumstances that exist with respect to Canada and Mexico. This relief will help our domestic steel industry to revive idled facilities, open closed mills, preserve necessary skills by hiring new steel works, and maintain or increase production, which will reduce our Nation’s need to rely on foreign producers for steel and ensure that domestic producers can continue to supply all the steel necessary for critical industries and national defense.

Proclamation 9705, ¶ 8.

("[t]o put an end or limit to; to come to an end."). In light of these definitions, when the President is required to "determine the . . . duration" of the action, he must state and decide at that time the action's continuance in time, or the time for which the action will last. There are multiple ways that the President could feasibly do so, especially because the statute explicitly states that he shall make the determination "in his judgment." 19 U.S.C. § 1862(c)(1)(A)(ii). For example, he could identify a date by which he believes the action will no longer be necessary, or he could identify criteria or conditions which, if met, would end the action's continuance. Either of these options is consistent with the plain meaning of the word "duration" and allows the President a great deal of flexibility, as he may determine the duration based solely on his judgment.

Here, the President did specify the "duration" of his selected measures. *Proclamation 9705* specifies when the duties would first be collected — the President ordered that the twenty-five percent tariff rate on most steel article imports would begin on March 23, 2018. The Proclamation then states it would remain in effect until and "unless such actions are expressly reduced, modified or terminated," 83 Fed. Reg. at 11628, cl. 5(a), with further instruction to the Secretary to "inform the President of any circumstance that in the Secretary's opinion might indicate that the increase in duty rate provided for in this proclamation is no longer necessary." *Id.* at cl. 5(b). In our view, the President thus explained that the measures he was placing on steel article imports would continue until the problems he had identified were alleviated. That is the "duration" the President believed, in [his] "judgment," addressed the national security concerns that he had specified. Accordingly, the President's pronouncement falls within the plain reading of the statute.

Plaintiffs contend that the President must "state a finite duration" of his action at the outset because the word "duration" "communicates Congress' intention that if subsequent events require a reassessment of the measures needed to end the threat to impair the national security, further investigation and fact-finding would be necessary." Pls.' Br. at 38–40. The Government counters that interpreting the word "duration" in the way Plaintiffs suggest "would not only constrict the President's authority to make ongoing national assessments, but it would allow foreign governments and producers to evade the President's predetermined limits by simply waiting out the measures, undermining the central purpose of Section 232 assessments." Def.'s Corr. Reply at 18–19. We need not wade into the differing policy perspectives evidenced by these two dueling views: what cannot be disputed is that if Congress wanted to require that

the President proclaim a fixed temporal limit to the measures selected, it could have done so. It did not; and it is not the role of the court to direct otherwise. As to Plaintiffs' concern that the measures imposed could persist indefinitely, the court notes that there is a distinction between the indefinite and the undefined. Here, as noted, even if the duration may be unlimited, it is not undefined, but bounded by whether, in the President's judgment, the threat to impair national security exists.

Noting that in 1988 Congress revised Section 232, Plaintiffs urge that those amendments support their interpretation of the word "duration." Prior to the 1988 amendments, Section 232 provided in relevant part:

If the Secretary finds that such article is being imported into the United States in such quantities or under such circumstances as to threaten to impair the national security he shall so advise the President and *the President shall take such action, and for such time, as he deems necessary* to adjust the imports of such article and its derivatives so that such imports will not threaten to impair the national security

19 U.S.C. 1862(b) (1980) (emphasis added).

The 1988 amendments changed "the President *shall take such action and for such time, as he deems necessary*" to the President shall "*determine the nature and duration of the action* that, in the judgment of the President, must be taken" 19 U.S.C. § 1862(c)(1)(A)(ii) (emphasis added); *see also* H. Rep. No. 100-578 at 161 (1988). Plaintiffs contend that Congress added the word "duration" for "a reason," namely to remove the "option to declare import restrictions for an indefinite period." Pls.' Br. at 37. We are not persuaded. If the 1988 amendments removed such Presidential authority, we would expect that Congress would have made such a change explicitly. "Here, the applicable principle is that Congress does not enact substantive changes *sub silentio*." *United States v. O'Brien*, 560 U.S. 218, 231 (2010) (citing *Dir. of Revenue of Mo. v. CoBank ACB*, 531 U.S. 316, 323 (2001)). There is no evidence in the legislative history that the word "duration" was meant to connote an exact time period. Contemporaneous reports summarizing the 1988 amendments provide no evidence that Congress intended to require that the President proclaim the duration of the measures with more specificity than he did in *Proclamation 9705*. *See* H. Rep. No. 100-576 at 709-13; S. Rep. No. 100-71 at 21, 135-36 (summarizing the amendments to Section 232). The absence of legislative history regarding "duration" can be contrasted with the abundant legislative history relating to the other Section 232 amendments, which evinced Congressional concern with

Presidential delay in taking Section 232 action.¹⁷ We conclude that the change from “for such time” to “the . . . duration” was stylistic and not substantive. Therefore, we will grant the Government’s motion for judgment on the pleadings as to Count Two, paragraph 66, of the amended complaint.

IV. *Mandatory Timing Conditions and Tariffs Imposed Upon the EU, Canada, and Mexico*¹⁸

Finally, alleging that the President violated certain mandatory timing parameters of Section 232, Am. Compl. ¶ 70, Plaintiffs challenge *Proclamation 9759*, which modified previous Proclamations to impose tariffs on imports from Canada, Mexico, and the European Union, and imposed quotas on Brazil and Argentina based on agreements with those countries. Am. Compl. ¶ 49. Plaintiffs make the following allegations: (1) Section 232 precluded the President from letting the temporary exemption on tariffs for imports from Canada, Mexico, and the EU expire “earlier than 180 days after the announcement of the President’s decision”; and (2) the President violated Section 232 by extending the exemptions for one month after the fifteen-day period that the President had to act, after he concurred with the Secretary’s findings, but before the 180-day negotiation period had expired.

Plaintiffs have misinterpreted Section 232 in contending that subsection (c)(3)(A) requires the President to wait 180 days before determining that efforts at negotiation have been unsuccessful and choosing an alternative method of action. The relevant portion of the statute provides:

If—

(i) the action taken by the President . . . is the negotiation of an agreement which limits or restricts [] import[s] . . . to, the

¹⁷ The history of the 1988 amendments reveals that the amendments were motivated in no small part by a desire to accelerate Presidential action pursuant to Section 232. Congress had been frustrated by perceived undue Presidential delay in taking timely or effective action pursuant to the Secretary’s report that machine tools threatened to impair the national security. At the amendment hearings, Speaker of the House James Wright commented that “many of our trade problems can be directly traced back to the delays by those officially appointed to carry out American policy” and pointed to the “machine tools case” as an example. Hearings Before the Committee on Ways and Means on H.R. 3 Trade and International Economic Policy Other Proposals Reform Act, 100th Cong. (1987). The resulting amendments to Section 232 added various timing provisions to the statute, requiring the President to act within certain timeframes as a way to prevent “languishing negotiations” and undue delay. See Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100–418, Title I, § 1501, 102 Stat. 1107, 1257–60.

¹⁸ This section corresponds to Count Four of Plaintiffs’ amended complaint, except for paragraph 71 for which consideration was stayed. Am. Compl. ¶¶ 69–71.

United States of the article that threatens to impair national security, and . . .

(I) no such agreement is entered into before the date that is 180 days after the date on which the President makes the determination under paragraph (1)(A) to take such action . . .

the President shall take such other actions as the President deems necessary to adjust the imports of such article so that such imports will not threaten to impair the national security.

19 U.S.C. § 1862(c)(3)(A).

Plaintiffs suggest that “the only rational construction of [19 U.S.C. § 1862(c)(3)(A)] requires the President to negotiate for the entire 180-day period.” Pls.’ Br. at 43. However, consideration of the plain meaning of the statute’s text along with the legislative history of the 1988 amendments reveals that Plaintiffs are incorrect that this provision sets 180 days as a minimum amount of time that the President must wait before taking alternative action, rather than the maximum amount of time that he can wait. First, it is likely that Congress would have chosen language that more clearly required the President to negotiate for 180 days before choosing alternate action if that were Congress’s intention. For example, the statute might have stated, “If no agreement has been reached once 180 days have passed, the President may then consider taking other such actions . . .” or, perhaps, used even more explicit language such as: “The President must wait 180 days before choosing an alternative form of action.” By contrast, the language used, read plainly, does not suggest that waiting 180 days before modifying the action is a requirement. *See* 19 U.S.C. § 1862(c)(A)(3). Furthermore, the 1988 amendments to Section 232 were motivated by a desire to prevent Presidential inaction and inefficiency under Section 232.¹⁹ When viewed in this context, it would be contrary to Congressional intent and the overarching goal of the 1988 amendments to require the President to wait 180 days before acting if he found that attempts at negotiations were ineffective. Therefore, Plaintiffs’ argument on this aspect of the claim fails.

The remainder of Plaintiffs’ argument on this claim also turns upon their understanding of the 180-day provision as a minimum, not maximum, timing requirement. Plaintiffs argue that entering into negotiations pursuant to subsection (c)(3)(A) is the exclusive means of deferring action past the fifteen-day period after concurring with the Secretary’s finding. Pls.’ Br. at 43 (“ . . . without meeting the terms of the (c)(3)(A) exception, there are no exceptions to the 90-day and

¹⁹ *See* Sect. III, *supra*, for discussion of the legislative history of the 1988 amendments.

15-day deadlines.”). Plaintiffs argue that, therefore, *Proclamation 9711*, which exempted the EU and other countries from the twenty-five percent tariff, and *Proclamation 9740*, which extended the exemption on Canada, Mexico, and the EU for one month until June 1, 2018, were impermissible attempts to bypass the statutory time limits of Section 232. *Id.*; *Proclamation 9711*; *Proclamation 9740*. However, Plaintiffs’ claims fail because, in fact, the President declared that he planned to negotiate with Mexico, Canada, and the EU within fifteen days of concurring with the Secretary’s finding. *See Proclamation 9705*; *Proclamation 9711*. *Proclamation 9705*, in which the President concurred with the Secretary’s finding and established a twenty-five percent tariff on steel imports from most countries, was issued on March 8, 2018. *See Proclamation 9705*, ¶¶ 8–11. *Proclamation 9705* excluded Canada and Mexico from these tariffs, stating that instead the United States would attempt to negotiate with those countries. *Id.* Fourteen days later, on March 22, 2018, the President issued *Proclamation 9711*, which announced that the United States would attempt negotiations²⁰ with a number of other nations, including the EU, and thus that those countries would be temporarily exempted from the steel tariff along with Canada and Mexico. *See Proclamation 9711*, ¶¶ 6–9. This action was taken within fifteen days of the President concurring with the Secretary’s finding, and thus complied with the statutory requirements of 19 U.S.C. § 1862(c)(1)(B) (“the President shall implement that action no later than the date that is 15 days after the day on which the President determines to take action under subparagraph (A)”). Given that the action that the President chose with respect to those countries was to attempt negotiations, the statute grants him the authority to modify that action if negotiations fail to be successful within 180 days. 19 U.S.C. § 1862(c)(3)(A)(ii)(I). Because the tariffs that the President imposed upon Mexico, Canada, and the EU took effect on June 1, 2018, which was well within 180 days of March 8, 2018, these measures were not in violation of the statute. Hence, Count Four, insofar as it relies on the alleged failure to comply with Section 232’s timing provision, is not meritorious.

²⁰ Plaintiffs suggest that the President also failed to announce the intention to negotiate an agreement with the member nations of the European Union, but just announced “continuing discussions” with these countries to discuss “satisfactory alternative means” to address the threatened impairment to national security. Pls.’ Br. at 45. This argument does not hold water because “continuing discussions to discuss satisfactory alternative means” is in essence the definition of negotiation. Merriam-Webster’s online dictionary defines “negotiate” as “to confer with another so as to arrive at the settlement of some matter.” *Negotiate*, Merriam-Webster Online Dictionary, <https://www.merriam-webster.com/dictionary/negotiate> (last visited Jan. 27, 2021).

CONCLUSION

For the foregoing reasons, upon consideration of Plaintiffs' challenges to *Proclamation 9705* and its subsequent modifications, we conclude that the Government is entitled to judgment as a matter of law. Therefore, we grant the Government's motion for judgment on the pleadings and deny Plaintiffs' cross-motion for partial summary judgment.²¹ Accordingly, it is hereby

ORDERED that Defendants' motion for judgment on the pleadings is granted; and it is further

ORDERED that Plaintiffs' cross-motion for partial summary judgment is denied.

Dated: February 4, 2021

New York, New York

/s/ Gary S. Katzmann

GARY S. KATZMANN, JUDGE

/s/ M. Miller Baker

M. MILLER BAKER, JUDGE

/s/ Leo M. Gordon

LEO M. GORDON, JUDGE

²¹ Count Four, paragraph 71, will continue to be stayed pursuant to the court's previous order. *See* Scheduling Order, Mar. 10, 2020, ECF No. 26; Nt. 3, *supra*.

Katzmann, Judge, with whom Gordon, Judge joins, concurring:

Even in the early days of the Republic, the question of the connection between international trade and national defense was very much part of the public discourse. Two days after Congress first achieved a quorum, on April 8, 1789, James Madison introduced a bill to levy duties on imports, with the goal of generating revenue for the new nation.¹ Stating that he was a “friend to the very free system of commerce,” he admitted to three exceptions: revenue, navigation for foreign vessels whose home countries discriminated against American vessels, and national defense.² With respect to the national defense exception, though skeptical of its long-term applicability as the new nation grew stronger, Madison agreed with the principle that “each nation should have within itself, the means of defense independent of foreign supplies.”³ In January 1790, President Washington observed that the safety and interest of a free people “require that they should promote such manufactories as tend to render them independent of others for essential, particularly military supplies.”⁴ On January 15, 1790, the House of Representatives directed that the Secretary of the Treasury “appl[y] his attention . . . to the subject of Manufactures, and particularly to the means of promoting such as will tend to render the United States independent on foreign nations for military and other essential supplies[.]”⁵ In response, on December 5, 1791, Alexander Hamilton submitted the landmark *Report on Manufactures*. Therein he wrote:

Not only the wealth, but the independence and security of a country, appear to be materially connected with the prosperity of manufactures. Every nation, with a view to these great objects, ought to endeavor to possess within itself all the essentials of national supply. These compromise the means of subsistence, habitation, clothing and defence.⁶

Hamilton noted that “[t]he want of a navy, to protect our external commerce, as long as it shall continue, must render it a peculiarly precarious reliance for the supply of essential articles, and must serve

¹ Douglas A. Irwin, *Clashing Over Commerce: A History of US Trade Policy* 73 (2017).

² *Id.* at 74–75 (quoting 12 *Papers of James Madison, Congressional Series* 70–71 (William T. Hutchinson and William M.E. Rachel eds., 1979)).

³ *Id.* at 75 (quoting 12 *Papers of James Madison, supra*, at 71–72).

⁴ *Id.* at 80.

⁵ Alexander Hamilton, *Report on Manufactures: Made to Congress December 5, 1791, In His Capacity as Secretary of the Treasury* 5 (Home Market Club, 1892).

⁶ *Id.* at 45–46.

to strengthen prodigiously the arguments in favor of manufactures.”⁷ Concluding that “[t]he manufactures of [iron] are entitled to pre-eminent rank[,]” “[t]he only further encouragement of manufactories of this article, the propriety of which may be considered as unquestionable, seems to be an increase of the duties on foreign rival commodities.”⁸

Since the 1940’s, national defense has been imagined more broadly and robustly as “national security.”⁹ Today, international trade and national security are inextricably linked.¹⁰ That truth, of course, is evidenced by the statute before us — Section 232 — which authorizes the President to make adjustments on imports, including the tariffs at issue here, upon a determination that they threaten to impair national security. Section 232 was born during the Cold War.¹¹ In its first decades, on the few occasions when it was invoked by a President, it was for the most part to deal with the energy crisis facing America and to address the dangers to American self-sufficiency flowing from dependence on foreign oil.¹² In 2018, after some thirty-two years of dormancy,¹³ Section 232 was invoked by the President, concurring with the recommendation of the Secretary of Commerce, to

⁷ *Id.* at 46.

⁸ *Id.* at 63, 64.

⁹ See Andrew Preston, *Monsters Everywhere: A Genealogy of National Security*, 38 *Diplomatic Hist.* 477 (2014). According to one historian, the term “national security,” already rare, between World War I and 1931, was “uttered only four times, by two presidents, and mostly as rhetorical flourish.” *Id.* at 487. It was President Franklin Roosevelt, in his December 29, 1940 Fireside Chat specifically on national security, who “linking the Depression’s economic insecurity with the geopolitical insecurity spurred by World War II, announced the need for domestic mobilization, and reiterated his support for Great Britain.” Dexter Fergie, *Geopolitics Turned Inwards: The Princeton Military Studies Group and the National Security Imagination*, 43 *Diplomatic Hist.* 640, 649 (2019). President Roosevelt told the nation:

This is not a fireside chat on war. It is a talk on national security [N]o nation can appease the Nazis [A] dictated peace would be no peace at all. It would be only another armistice, leading to the most gigantic armament race the most devastating trade wars in all history We must be the great arsenal of democracy. For us this is an emergency as serious as war itself I have the profound conviction that the American people are now determined to put forth a mightier effort than they have every yet made . . . to meet the threat to our democratic faith.

Fireside Chat, December 29, 1940, *The Public Papers and Addresses of Franklin D. Roosevelt, 1940 Volume*, 633, 638–39, 643–44 (1941). Two years after the end of World War II, the term “national security” was given institutional infrastructure when President Truman signed the National Security Act of 1947, ch. 343, 61 Stat. 495 (1947).

¹⁰ See generally Kathleen Claussen, *Trade’s Security Exceptionalism*, 72 *Stan. L. Rev.* 1097 (2020).

¹¹ Cong. Rsch. Serv., R45279, *Section 232 Investigations: Overview and Issues for Congress 2* (2020), <https://crsreports.congress.gov/product/pdf/R/R45249/26>.

¹² *Id.* at 4. Prior to 2018, presidents took action six times under Section 232 after determinations by Commerce that certain imports threatened to impair national security. *Id.*

¹³ Prior to 2018, a president last imposed tariffs or other trade restrictions under Section 232 in 1986, based on a 1983 probe into imports of machine tools. *Id.*

apply tariffs on certain imports of steel and aluminum upon the Secretary's determination that the quantities and circumstances of the imports threatened to impair the national security. The revival of Section 232, as reflected in the various Proclamations noted in this opinion, and in the adjudication before the courts, has occasioned argument and commentary focusing on conceptions of Presidential and Congressional power.

In this case, we have been tasked, *inter alia*, with the interpretation of "duration" in Section 232. We have concluded that *Proclamation 9705*, though indefinite temporally, is defined and thus provides the "duration" required by the statute in that the higher tariffs remain in effect until the President determines that the threat to national security caused by steel imports no longer exists. What of the potential for abuse, namely that the tariffs may be continued in effect even when the conditions underlying their imposition — a threat to national security posed by importation — no longer exists? That concern, which in theory, may be a valid one, has not been squarely presented to us nor is there a claim in fact of overreaching by the President. Because no such claim of abuse has been asserted, it is not before the court. Nor do we consider whether it would be subject to our review. Nevertheless, there are certain observations that can be made.

The Supreme Court has stated that "[n]ational-security policy is the prerogative of the Congress and President." *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1861 (2017) (citing U.S. Const. art. I, § 8, art. II, § 1, § 2). *See generally* David Barron, *Waging War: The Clash Between Presidents and Congress, 1976 to ISIS* (2016). "Judicial inquiry into the national-security realm raises 'concerns for the separation of powers in trenching on matters committed to the other branches.'" *Ziglar*, 137 S. Ct. at 1861 (quoting *Christopher v. Harbury*, 536 U.S. 403, 417 (2002)). While, as noted below, the Presidential authority over international trade is largely statutory, the President does possess some independent constitutional authority over national security and dealings with foreign nations. *See, e.g., id.* (national security); *Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396, 415 (2003) (executive agreements). "Although the source of the President's power to act in foreign affairs does not enjoy any textual detail, the historical gloss on the 'executive Power' vested in Article II of the Constitution has recognized the President's 'vast share of responsibility for the conduct of our foreign relations.'" *Am. Ins. Ass'n*, 539 U.S. at 414 (quoting *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 610–11 (1952) (Frankfurter, J. concurring)). "[C]ourts have shown deference to what the Executive

Branch ‘has determined . . . is essential to national security.’” *Ziglar*, 137 S. Ct. at 1861 (alteration in original) (quoting *Winter v. Nat. Res. Def. Council*, 555 U.S. 7, 24, 26 (2008)). “[U]nless Congress specifically has provided otherwise, courts traditionally have been reluctant to intrude upon the authority of the Executive in military and national security affairs.” *Dept of Navy v. Egan*, 484 U.S. 518, 530 (1988) (citations omitted). Flexibility can be allowed the President in the conduct of foreign affairs, see *United States v. Curtiss-Wright Exp. Corp.*, 299 U.S. 304, 324–27 (1936), although that power is not unbounded, even in times of crisis. See *Hamdi v. Rumsfeld*, 542 U.S. 507, 535–36 (2004) (“[W]e necessarily reject the Government’s assertion that separation of powers principles mandate a heavily circumscribed role for the courts in such circumstances. . . . Whatever power the United States Constitution envisions for the Executive in its exchanges with other nations or with enemy organizations in times of conflict, it most assuredly envisions a role for all three branches when individual liberties are at stake.”) (citing *Mistretta v. United States*, 488 U.S. 361, 380 (1989); *Home Bldg. & Loan Ass’n v. Blaisdell*, 290 U.S. 398, 426 (1934)). See generally Harold Koh, *The National Security Constitution: Sharing Power after the Iran-Contra Affair* (1990). Ultimately, however, this case does not present the question of the review of the exercise of constitutional power that may be lodged in the Executive.

Trade statutes occupy a distinct place in the constellation of legislation. Under the Constitution, the power over trade is lodged solely in the Congress. Article I, Section 1 of the U.S. Constitution provides that “[a]ll legislative Powers herein granted shall be vested in a Congress of the United States.” U.S. Const. art. I § 1. Section 232 was enacted pursuant to the power granted exclusively to Congress by Article I, Section 8 of the Constitution, which provides: “The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises,” as well as “To regulate Commerce with foreign Nations.” U.S. Const. art. I § 8. There is no provision in the Constitution that vests in the President the same “Power To Lay and collect . . . Duties.” As one commentator has observed, “[t]he president has no similar grant of substantive authority over economic policy, international or domestic. Consequently, international trade policy differs substantially from other foreign affairs issues, such as war powers, where the president shares constitutional authority with Congress. Where international trade policy is concerned, the president’s authority

is almost entirely statutory.”¹⁴ In 1976, in the seminal case, the Supreme Court held that the President’s leeway under Section 232 was “far from unbounded,” and that the statute was a constitutionally permissible delegation of legislative power to the President, stating that Section 232(b) “establishes clear preconditions to Presidential action” in that Section 232(c) “articulates a series of specific factors to be considered by the President in exercising his authority under [Section 232(b)].” *Fed. Energy Admin. v. Algonquin SNG, Inc.*, 426 U.S. 548, 559 (1976). See generally *Am. Inst. for Int’l Steel, Inc. v. United States*, 43 CIT __, __, 376 F. Supp. 3d, 1335, 1346–53 (2019) (Katzmann, J., *dubitante*) (reviewing cases involving challenges to trade legislation raising the question of unconstitutional delegation of legislative power); *Transpacific Steel LLC v. United States*, 43 CIT __, __, 415 F. Supp. 3d 1267, 1277–78 (2019) (“*Transpacific Steel I*”) (Katzmann, J., concurrence). Forty-three years later — in a case where the President, invoking Section 232, imposed by proclamation a twenty-five percent tariff on certain imported steel products — this court bound by *Algonquin*, rejected a challenge to Section 232 based on the claim that it was an unconstitutional delegation of legislative power in violation of the separation of powers. *Am. Inst. for Int’l Steel*, 376 F. Supp. 3d 1335, *aff’d*, 806 Fed. App’x 982 (Fed. Cir. 2020) (citing *Algonquin* as controlling precedent), *cert. denied*, 141 S. Ct. 133 (2020). More recently, construing the statutory requirements under the scheme set forth in Section 232, the court determined that *Proclamation 9772* was unlawful and void because it was issued without following statutory procedures mandated by Section 232, including that the President acted outside the temporal investigative and consultative limits required by Section 232, and singled out imports of Turkish steel products in violation of the Equal Protection guarantees of the Fifth Amendment. *Transpacific Steel LLC v. United States*, 44 CIT __, __, 466 F. Supp. 3d 1246, 1260 (2020). See also *Transpacific Steel I*, 415 F. Supp. 3d at 1275–76 (“The procedural safeguards in section 232 [including temporal deadlines for Presidential actions] do not merely roadmap action; they are constraints on power” which, per *Algonquin*, 426 U.S. at 559, enable Section 232 to “avoid[] running afoul of the non-delegation doctrine because it establishes ‘clear preconditions to Presidential action.’”).

In sum, in this case we construe a domestic statute pertaining to international trade, a domain in which — unlike other foreign affairs

¹⁴ Timothy Meyer, *Trade, Redistribution, and the Imperial Presidency*, 44 Yale J. Int’l L. Online 21 (2018), https://cpb-us-w2.wpmucdn.com/campuspress.yale.edu/dist/8/1581/files/2019/02/3_Meyer_YJIL-Symposium_Redistribution-and-Imperial-Presidency_12.04.18-1zj65ya.pdf (footnotes omitted); see also Timothy Meyer & Ganesh Sitaraman, *Trade and the Separation of Powers*, 107 Cal. L. Rev. 583 (2019).

issues, such as war powers, where the President shares constitutional authority with Congress — Congress has exclusive constitutional authority. Congress has delegated power under Section 232 to the Executive. If nothing else, precedent affirms that in enacting such statutes, Congress can restrict the actions of the President in the delegation of its power of trade to the Executive; indeed, the constitutionality of that legislation is informed by restraints on that power. We have concluded that the duration as indicated in *Proclamation 9705* — defined by the end of the threat to national security but indefinite in temporal span — comports with the statute. It can be noted that with respect to Section 232 as currently written, that conclusion does not render meaningless the system of checks and balances — a system of differentiated institutions sharing power which undergirds our government. “While the Constitution diffuses power the better to secure liberty, it also contemplates that practice will integrate the dispersed powers into a workable government. It enjoins upon its branches separateness but interdependence, autonomy but reciprocity.” *Youngstown Sheet & Tube*, 343 U.S. at 635 (Jackson, J., concurring); see also *Mistretta*, 488 U.S. at 381 (quoting the same). There have been proposals put forward suggesting greater Congressional oversight, including hearings, or statutory amendments which would expand Congress’s role in the implementation and review of tariffs.¹⁵ Ultimately, of course, these are policy matters that fall within the province of the legislative branch; it is not the role of the court to opine about them. See *Silfab Solar, Inc. v. United States*, 892 F.3d 1340, 1349 (Fed. Cir. 2018) (“If Congress desires to eliminate these tariffs or to cabin the President’s authority, that is a matter for Congress to address in future legislation, not a matter for this court on this appeal”). We do not do so now.

/s/ Gary S. Katzmann

GARY S. KATZMANN, JUDGE

/s/ Leo M. Gordon

LEO M. GORDON, JUDGE

¹⁵ Cong. Rsch. Serv., R45529, *Trump Administration Tariff Actions: Frequently Asked Questions* 36–38 (2019), <https://crsreports.congress.gov/product/pdf/R/R45529/2>.

Baker, Judge, concurring in part and dissenting in part:

I join the *per curiam* opinion except as to footnotes 6 and 14 and Section III. I write separately to explain my view that (1) we have no jurisdiction to review the duration of Section 232 action set by the President and (2) we should dismiss the President from the case.

I.

Plaintiffs allege that the President violated Section 232 by failing “to specify the duration of” Proclamation 9705 and its subsequent modifications. Amended Complaint Count Two, ECF 11, at 16 ¶ 66. In their briefing, Plaintiffs elaborate on this claim, contending that the President acted unlawfully in failing to “set[] a termination date or . . . specify[] circumstances that would end the threat to impair national security.” ECF 35, at 45 (emphasis added).

The *per curiam* opinion rejects this claim on the merits. *Ante* at 19–24. I would reject it for lack of jurisdiction and not reach the merits.

Here, Plaintiffs’ briefing makes clear that their objection is not that the President failed to set a duration for the challenged import restrictions. After all, he *did* set a duration. Proclamation 9705 states that liability for duties on designated imports commenced on March 23, 2018, “and shall continue in effect, unless such [duties] are expressly reduced, modified, or terminated” by the President. Proclamation 9705 of March 8, 2018, *Adjusting Imports of Steel into the United States*, 83 Fed. Reg. 11,625, 11,627–28 (Mar. 15, 2018).¹

Plaintiffs instead object to the President’s choice of the condition or contingency that terminates those restrictions—his discretionary determination that such restrictions are no longer necessary. In effect, Plaintiffs contend that the President acted arbitrarily by reserving to himself the discretion to determine when to end import restrictions imposed by Proclamation 9705 and its modifications.

The problem with Plaintiffs’ argument is that nonstatutory review of Presidential action for violation of a statute is “only rarely available.” *Silfab Solar, Inc. v. United States*, 892 F.3d 1340, 1346 (Fed. Cir. 2018). Among other things, such review “is not available when the statute in question commits the decision to the discretion of the President.” *Motion Sys. Corp. v. Bush*, 437 F.3d 1356, 1360 (Fed. Cir. 2006) (en banc) (cleaned up) (quoting *Dalton v. Specter*, 511 U.S. 462, 474 (1994)).

Section 232 leaves the determination of the “duration” of action to the President’s “judgment.” 19 U.S.C. § 1862(c)(1)(A)(ii). To say—as

¹ The ensuing modifications to Proclamation 9705 used the same formulation for setting the applicable end date.

Plaintiffs in effect say here—that the President acted arbitrarily in setting the duration of import restrictions is to say that he abused his discretion, and “[h]ow the President chooses to exercise the discretion Congress has granted him is not a matter for [federal court] review.” *Dalton*, 511 U.S. at 476; *see also Motion Sys.*, 437 F.3d at 1361 (stating that the Supreme Court in *Dalton* and earlier decisions “insulated Presidential action from judicial review for abuse of discretion despite the presence of some statutory restrictions on the President’s discretion”). We have no authority to review the President’s discretionary choice among conditions or contingencies that might terminate import restrictions.

II.

I have previously explained at length my view that our Court lacks subject matter jurisdiction to enter relief against the President, and that we should dismiss him as a party when he is named as a defendant in our Court. *See PrimeSource Bldg. Prods., Inc. v. United States*, Ct. No. 20–00032, Slip Op. 21–8, at 64–74 (CIT Jan. 27, 2021) (Baker, J., concurring in part and dissenting in part). Although today we deny any relief against Defendants—including the President—by dismissing all but the stayed claim, *see ante* at 28, the President remains in the case as to that claim. I therefore respectfully dissent from our failure to *sua sponte* raise the jurisdictional question and dismiss the President from what is left of this case.²

/s/ M. Miller Baker

M. MILLER BAKER, JUDGE

² In footnote 6 of the *per curiam* opinion, my colleagues respond to my dissent on this jurisdictional point. *See ante* at 9 n.6. I would counter that Plaintiffs in this case *do* seek injunctive relief against the President. *See* Amended Complaint, ECF 11, at 17 (requesting as relief—without any disclaimer as to the President—“[a] permanent injunction against the enforcement of any quota or levying of any tariff imposed pursuant to the Report and the Proclamations”); *see also* Proposed Order, Plaintiffs’ Cross-Motion for Summary Judgment, ECF 56, at 2 (ordering without qualification “that Defendants are hereby enjoined from assessing or collecting duties from any Plaintiff pursuant to the purported authority of the Proclamations”). In addition, I acknowledge we have jurisdiction to enter the requested relief as to the *other* defendants, but the question I raise is whether we have jurisdiction to grant *any* relief against the President. If we don’t, then we should dismiss him from the case. Beyond that, my reply to my colleagues in *PrimeSource* applies with equal force here. *See PrimeSource*, Slip Op. 21–8, at 64 n.9 (Baker, J., concurring in part and dissenting in part).

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