U.S. Customs and Border Protection

PROPOSED REVOCATION OF FIVE RULING LETTERS, PROPOSED MODIFICATION OF TWO RULING LETTERS, AND REVOCATION OF TREATMENT RELATING TO THE TARIFF CLASSIFICATION OF HUMAN TISSUE SAMPLES AND OTHER HUMAN BODILY SPECIMENS NOT PREPARED FOR THERAPEUTIC OR PROPHYLACTIC USES

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

ACTION: Notice of proposed revocation of five ruling letters, proposed modification of two ruling letters and proposed revocation of treatment relating to the tariff classification of human tissue samples and other human bodily specimens not prepared for therapeutic or prophylactic uses.

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 five ruling letters and to modify two ruling letters concerning tariff classification of human tissue samples and other human bodily specimens not prepared for therapeutic or prophylactic uses 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 January 12, 2024.

ADDRESS: Written comments are to be addressed to U.S. Customs and Border Protection, Office of Trade, Regulations and Rulings, Attention: Shannon L. Stillwell, Commercial and Trade Facilitation Division, 90 K St., NE, 10th Floor, Washington, DC 20229–1177. CBP is also allowing commenters to submit electronic comments to the following email address: *1625Comments@cbp.dhs.gov*. All comments should reference the title of the proposed notice

at issue and the *Customs Bulletin* volume, number and date of publication. Arrangements to inspect submitted comments should be made in advance by calling Ms. Shannon L. Stillwell at (202) 325–0739.

FOR FURTHER INFORMATION CONTACT: Reema Bogin, Chemicals, Petroleum, Metals and Miscellaneous Articles Classification Branch, Regulations and Rulings, Office of Trade, at reema.bogin@cbp.dhs.gov

SUPPLEMENTARY INFORMATION:

BACKGROUND

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

Pursuant to 19 U.S.C. § 1625(c)(1), this notice advises interested parties that CBP is proposing to revoke five ruling letters and to modify two ruling letters pertaining to the tariff classification of human tissue samples, human fecal specimens, extracted human teeth, human urine specimens and other human bodily specimens not prepared for therapeutic or prophylactic uses. Although in this notice, CBP is specifically referring to New York Ruling Letter (NY) NY R03338, dated March 13, 2006 (Attachment A); NY C80101, dated October 3, 1997 (Attachment B); NY B80750, dated January 16, 1997 (Attachment C); NY B82258, dated March 3, 1997 (Attachment D); NY 870664, dated February 12, 1992 (Attachment E); NY N283432, dated March 15, 2017 (Attachment F); and NY R03056, dated February 1, 2006 (Attachment G), 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 five 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 R03338, CBP classified human tissue specimens in heading 9705, HTSUS, specifically in subheading 9705.00.00, HTSUS (2006), which provides for "Collections and collectors' pieces of zoological, botanical, mineralogical, anatomical, historical, archeological, paleon-tological, ethnographic or numismatic interest: [o]ther]." In NY C80101, NY B80750, NY B82258 and NY 870664, CBP classified human tissue samples and other human bodily specimens in heading 3001, HTSUS, specifically in subheading 3001.90.00, HTSUS, which provides for "[g]lands and other organs for organotherapeutic uses, dried, whether or not powdered; extracts of glands or other organs or of their secretions for organotherapeutic uses; heparin and its salts; other human or animal substances prepared for therapeutic or prophylactic uses, not elsewhere specified or included: [o]ther." CBP has reviewed NY C80101, NY B80750, NY B82258, NY 870664 and NY R033338, and has determined the ruling letters to be in error. It is now CBP's position that human tissue samples and other human bodily specimens not prepared for therapeutic or prophylactic uses are properly classified in heading 0511, HTSUS, specifically in subheading 0511.99.40, HTSUS, which provides for "[a]nimal products not elsewhere specified or included; dead animals of chapter 1 or 3, unfit for human consumption: [o]ther: [o]ther."

In NY 870664, CBP classified human urine samples in heading 3001, HTSUS, specifically in subheading 3001.90.00, HTSUS, which provides for "[g]lands and other organs for organotherapeutic uses, dried, whether or not powdered; extracts of glands or other organs or of their secretions for organotherapeutic uses; heparin and its salts; other human or animal substances prepared for therapeutic or prophylactic uses, not elsewhere specified or included: [o]ther." In NY N283432 and NY R03056, CBP classified human urine samples in heading 3825, HTSUS, specifically in subheading 3825.90.00, HTSUS, which provides for "[r]esidual products of the chemical or allied industries, not elsewhere specified or included; municipal waste; sewage sludge; other wastes specified in note 6 to this chapter: [o]ther." CBP has reviewed NY 870664, NY N283432, and NY R03056, and has

determined the ruling letters to be in error. It is now CBP's position that human urine samples not prepared for therapeutic or prophylactic uses are properly classified in heading 0511, HTSUS, specifically in subheading 0511.99.40, HTSUS, which provides for "[a]nimal products not elsewhere specified or included; dead animals of chapter 1 or 3, unfit for human consumption: [o]ther: [o]ther."

Pursuant to 19 U.S.C. § 1625(c)(1), CBP is proposing to revoke NY R033338, NY C80101, NY B80750, NY B82258, and NY N283432; to modify NY 870664 and NY R03056; and to revoke or modify any other ruling not specifically identified to reflect the analysis contained in the proposed Headquarters Ruling Letter ("HQ") H317142, set forth as Attachment H to this notice. Additionally, pursuant to 19 U.S.C. § 1625(c)(2), CBP is proposing to revoke any treatment previously accorded by CBP to substantially identical transactions.

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

YULIYA A. GULIS,
Director
Commercial and Trade Facilitation Division

Attachments

NY R03338

March 13, 2006
CLA-2–97:RR:NC:SP:233 R03338
CATEGORY: Classification
TARIFF NO.: 9705.00.0090

MR. JUSTIN MCCREARY
EMD BIOSCIENCES, INC.
10394 PACIFIC CENTER COURT
SAN DIEGO, CA 92121

RE: The tariff classification of Breast Invasive Ductal Carcinoma Sections from the United Kingdom.

DEAR MR. MCCREARY:

In your letter dated February 24, 2006, you requested a tariff classification ruling.

The articles under consideration are Breast Invasive Ductal Carcinoma Sections (paraffin tissue section slides) to be imported from Abcam PLC. Abcam's and EMD's equivalent product names and item codes for the specific quantity sizes are as follows:

> Abcam: ab4697, Breast tumor (human): ductal carcinoma (invasive) tissue slides, 5 slides, 5 grams
>
> EMD: 70332, Human Breast Invasive Ductal Carcinoma Sections, 5 slides, 5 grams.

Paraffin tissue sections are ideal for rapidly identifying cellular localization of RNA or protein. The tissues were excised, immediately fixed by formalin, and then pathologically identified. Each slide contains tissue from a single human tumor. A single tissue section with 5 microns thickness is mounted on a positively charged glass slide.

The paraffin tissue section slides will be sold in packages containing 5 slides each. The tissue slides are to be used for in vitro laboratory research only. Using these tissue slides scientists can further study the mechanisms by which cancer develops and proliferates.

The applicable subheading for the Breast Invasive Ductal Carcinoma Sections will be 9705.00.0090, Harmonized Tariff Schedule of the United States (HTSUS), which provides for "Collections and collectors' pieces of zoological, botanical, mineralogical, anatomical, historical, archeological, paleontological, ethnographic or numismatic interest, Other." The rate of duty will be Free.

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

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 Lawrence Mushinske at 646–733–3036.

Sincerely,

ROBERT B. SWIERUPSKI
Director,
National Commodity Specialist Division

NY C80101

October 3, 1997
CLA-2–30:RR:NC:2:238 C80101
CATEGORY: Classification
TARIFF NO.: 3001.90.0000

BRUCE H. CHIU, ESQ.
COHEN & GRIGSBY, P.C.
2900 CNG TOWER
625 LIBERTY AVENUE
PITTSBURGH, PA 15222–3115

RE: The tariff classification of human cancerous tumor tissue from Brazil, Canada, China, India, Italy, France, Turkey, Saudi Arabia, the Czech Republic, Russia, and South Africa

DEAR MR. CHIU:

In your letter dated September 25, 1997, on behalf of your client, Precision Therapeutics, Inc., you requested a tariff classification ruling.

The subject product consists of human cancerous tumor tissue, which, you indicate, will be imported by your client for use in the development of a new, in-vitro, testing procedure in order to determine the most effective treatment for a particular patient.

The applicable subheading for the subject product will be 3001.90.0000, Harmonized Tariff Schedule of the United States (HTS), which provides for: "Glands and other organs for organotherapeutic uses, ... ; other human or animal substances prepared for therapeutic or prophylactic uses, not elsewhere specified or included: Other." The rate of duty will be free.

The subject product may be subject to the regulations of the U.S. Department of Health and Human Services, Public Health Service, Centers for Disease Control and Prevention, Office of Health and Safety, Biosafety Branch. You may contact them at 1600 Clifton Road, Atlanta, GA 30333, telephone number 404–633–5313.

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 Cornelius Reilly at 212–466–5770.

Sincerely,

ROBERT B. SWIERUPSKI
Director,
National Commodity Specialist Division

NY B80750
January 16, 1997
CLA-2–30:RR:NC:2:238 B80750
CATEGORY: Classification
TARIFF NO.: 3001.90.0000

JOHN F. BRUNI, PH.D.
BIOSITE DIAGNOSTICS
11030 ROSELLE STREET
SAN DIEGO, CA 92121

RE: The tariff classification of human fecal specimens from Mexico

DEAR DR. BRUNI:

In your letter dated December 15, 1996, you requested a tariff classification ruling.

The subject product you wish to import consists of frozen, human fecal specimens containing or suspected of containing parasites, including: Entamoeba histolytica, Giardia lambia, Cryptosporidium parvum, and various helminths. According to your letter, these specimens will be used in the development of diagnostic tests to detect the presence of the aforementioned organisms.

The applicable subheading for the subject product will be 3001.90.0000, Harmonized Tariff Schedule of the United States (HTS), which provides for: "Glands ... ; other human or animal substances prepared for therapeutic or prophylactic uses, not elsewhere specified or included: Other." The general rate of duty will be free.

The subject product may be subject to the regulations of the U.S. Department of Health and Human Services, Public Health Service, Centers for Disease Control and Prevention, Office of Health and Safety, Biosafety Branch. You may contact them at 1600 Clifton Road, Atlanta, GA 30333, telephone number (404) 633–5313.

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 Cornelius Reilly at 212–466–5770.

Sincerely,

GWENN KLEIN KIRSCHNER
Chief,
Special Products Branch National Commodity Specialist Division

NY B82258

March 3, 1997
CLA-2–30:RR:NC:2:238 B82258
CATEGORY: Classification
TARIFF NO.: 3001.90.0000

DONNA R. HARVEY, ESQ.
2633 LINCOLN BOULEVARD, NO. 131
SANTA MONICA, CA 90405

RE: The tariff classification of extracted human teeth from Russia

DEAR MS. HARVEY:

In your letter dated February 6, 1997, on behalf of your client, Dental Care on Premises, you requested a tariff classification ruling.

According to your letter, the subject product consists of extracted human teeth, preserved in formaldehyde, to be used for dental research purposes.

The applicable subheading for the subject merchandise will be 3001.90.0000, Harmonized Tariff Schedule of the United States (HTS), which provides for other human or animal substances prepared for therapeutic or prophylactic uses, not elsewhere specified or included: Other. The rate of duty will be free.

The subject product may be subject to the regulations of the U.S. Department of Health and Human Services, Public Health Service, Centers for Disease Control and Prevention, Office of Health and Safety, Biosafety Branch. You may contact them at 1600 Clifton Road, Atlanta, GA 30333, telephone number (404) 633–5313.

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 Cornelius Reilly at 212–466–5770.

Sincerely,

GWENN KLEIN KIRSCHNER
Chief,
Special Products Branch National Commodity Specialist Division

N283432
March 15, 2017
CLA-2–38:OT:RR:NC:N1:239
CATEGORY: Classification
TARIFF NO.: 3825.90.0000

MR. LOGAN JETT
U.S. ANTI-DOPING AGENCY
555 TECH CENTER DRIVE, SUITE 200
COLORADO SPRINGS, CO 80919

RE: The Tariff Classification of Urine Samples from Brazil

DEAR MR. JETT:

In your letter dated February 10, 2017, you requested a tariff classification ruling for two human urine samples that will be imported from Brazil.

The applicable subheading for the urine samples will be 3825.90.0000, Harmonized Tariff Schedule of the United States (HTSUS), which provides for "Residual products of the chemical or allied industries, not elsewhere specified or included; municipal waste; sewage sludge; other wastes specified in note 6 to this chapter: Other." The rate of duty will be Free.

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

This merchandise is subject to The Public Health Security and Bioterrorism Preparedness and Response Act of 2002 (The Bioterrorism Act), which is regulated by the Food and Drug Administration (FDA). Information on the Bioterrorism Act can be obtained by calling FDA at telephone number (301) 575–0156, or at the Website: http://www.fdaimports.com/fda_requirements/imports/bioterrorism_act_compliance.php.

This merchandise may also be subject to the regulations of the U.S. Department of Health and Human Services, Public Health Service, Centers for Disease Control and Prevention, Office of Health and Safety, Biosafety Branch. You may contact them at 1600 Clifton Road, Atlanta, GA 30333, telephone number 404–633–5313.

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 Patrick Day at patrick.day@cbp.dhs.gov.

Sincerely

STEVEN A. MACK
Director
National Commodity Specialist Division

NY 870664
February 12, 1992
CLA-2–30:S:N:N1-F:238 870664
CATEGORY: Classification
TARIFF NO.: 3002.90.5010; 3001.90.0000

MR. MICHAEL T. GRADY
TAMPA PATHOLOGY LABORATORY
6515 NORTH ARMENIA AVENUE
TAMPA, FL 33604

RE: The tariff classification of human blood and urine specimens, and human tissue specimens consisting of skin biopsies, intestine and lung, from Germany, Spain, Venezuela, and Colombia.

DEAR MR. GRADY:

In your letter dated January 13, 1992, received on January 22, 1992, you requested a tariff classification ruling.

The specific items in question which you wish to import are as follows: specimens of human blood and urine, and tissue specimens of human skin biopsies, intestine and lung. You state that these items are for analysis only, and that a report on the chemical, biochemical or microscopic examination will be generated and reported to the requesting party in the country of origin.

The applicable subheading for the human blood specimens will be 3002.90.5010, Harmonized Tariff Schedule of the United States (HTS), which provides for human blood; animal blood prepared for therapeutic, prophylactic or diagnostic uses; antisera and other blood fractions; vaccines, toxins, cultures of micro-organisms (excluding yeasts) and similar products: other: other: whole human blood. The rate of duty will be free. The applicable subheading for the human urine specimens and the remaining human tissue specimens will be 3001.90.0000, HTS, which provides for glands and other organs for organotherapeutic uses, dried, whether or not powdered; ... ; other human or animal substances prepared for therapeutic or prophylactic uses, not elsewhere specified or included: other. The rate of duty will be free.

This merchandise may be subject to the regulations of the Food and Drug Administration. You may contact them at 5600 Fishers Lane, Rockville, Maryland 20857, telephone number (202) 443–3380.

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

A copy of this ruling letter should be attached to the entry documents filed at the time this merchandise is imported. If the documents have been filed without a copy, this ruling should be brought to the attention of the Customs officer handling the transaction.

Sincerely,

JEAN F. MAGUIRE
Area Director
New York Seaport

NY R03056
February 1, 2006
CLA-2–05: RR: NC: SP: 231 R03056
CATEGORY: Classification
TARIFF NO.: 0511.99.4070; 3825.90.0000

MR. PABLO FEL
PROST – DATA INC.
1854 AIRLINE DRIVE (SUITE 17A)
NASHVILLE, TN 37210

RE: The tariff classification of human tissue specimens and urine samples from China, Argentina and Israel.

DEAR MR. FEL:

In your letter dated January 06, 2006, you requested a tariff classification ruling.

The specific items in question consist of human prostate, bladder, gastrointestinal tract tissue specimens and urine samples from real patients that will be imported for diagnostic analysis only. You state that the tissue specimens will not be used for the purpose of developing any new drugs and will be shipped in formalin or in an alcohol - based fixative.

The applicable subheading for the prostate, bladder and gastrointestinal tract tissue specimens will be 0511.99.4070, Harmonized Tariff Schedule of the United States (HTSUS), which provides for "Animal products not elsewhere specified or included; dead animals of chapter 1 or 3, unfit fit for human consumption: Other, Other, Other, Other." The rate of duty will be 1.1 percent ad valorem. Note, however, that specimens of Israeli or Argentine origin may be eligible for preferential duty treatment under different trade programs.

First, articles classifiable under subheading 0511.99.4070, HTSUS, which are products of Israel may be entitled to duty free treatment under the United States-Israel Free Trade Agreement upon compliance with all applicable regulations.

Articles classifiable under subheading 0511.99.4070, HTSUS, which are products of Argentina may be entitled to duty free treatment under the Generalized System of Preferences (GSP) upon compliance with all applicable regulations. The GSP is subject to modification and periodic suspension, which may affect the status of your transaction at the time of entry for consumption or withdrawal from warehouse. To obtain current information on GSP, check our Web site at www.cbp.gov and search for the term "GSP".

The applicable subheading for the urine samples will be 3825.90.0000, Harmonized Tariff Schedule of the United States (HTSUS), which provides for "Residual products of the chemical or allied industries, not elsewhere specified or included; municipal waste; sewage sludge; other wastes specified in note 6 to this chapter: Other." The rate of duty will be Free.

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

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

This merchandise may also be subject to the regulations of the U.S. Department of Health and Human Services, Public Health Service, Centers for Disease Control and Prevention, Office of Health and Safety, Biosafety Branch. You may contact them at 1600 Clifton Road, Atlanta, GA 30333, telephone number 404–633–5313.

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 Thomas Brady at 646–733–3030.

Sincerely,

ROBERT B. SWIERUPSKI
Director,
National Commodity Specialist Division

HQ H317142
OT:RR:CTF:CPMMA H317142 RRB
CATEGORY: Classification
TARIFF NO.: 0511.99.40

MR. JUSTIN MCCREARY
EMD BIOSCIENCES, INC.
10394 PACIFIC CENTER COURT
SAN DIEGO, CA 92121

RE: Revocation of NY R03338, NY N283432; NY C80101, NY B80750, and NY B82258; Modification of NY 870664 and NY R03056; tariff classification of human tissue samples and other human bodily specimens not prepared for therapeutic or prophylactic uses

DEAR MR. MCCREARY:

This letter is in reference to New York Ruling Letter ("NY") R03338, dated March 13, 2006, regarding the classification of human tissue samples under the Harmonized Tariff Schedule of the United States ("HTSUS"). In NY R03338, U.S. Customs and Border Protection ("CBP") classified human tissue samples, specifically breast invasive ductal carcinoma sections, in subheading 9705.00.0090, HTSUSA ("Annotated") (2006), as "Collections and collectors' pieces of zoological, botanical, mineralogical, anatomical, historical, archeological, paleon-tological, ethnographic or numismatic interest: Other." After reviewing the ruling in its entirety, we find it to be in error. For the reasons set forth below, we are revoking NY R03338.

In NY C80101, dated October 3, 1997; NY B80750, dated January 16, 1997; and NY B82258, dated March 3, 1997, CBP classified certain human tissue samples and other bodily specimens not prepared for therapeutic or prophylactic uses under subheading 3001.90.00, HTSUS, as "Glands and other organs for organotherapeutic uses, dried, whether or not powdered; extracts of glands or other organs or of their secretions for organotherapeutic uses; heparin and its salts; other human or animal substances prepared for therapeutic or prophylactic uses, not elsewhere specified or included: Other." In NY N283432, dated March 15, 2017, CBP classified human urine samples not prepared for therapeutic or prophylactic uses in subheading 3825.90.00, HTSUS, as "Residual products of the chemical or allied industries, not elsewhere specified or included; municipal waste; sewage sludge; other wastes specified in note 6 to this chapter: Other." For the reasons set forth below, we are also revoking NY C80101, NY B80750, NY B82258, and NY N283432.

Similarly, in NY 870664, dated February 12, 1992, CBP classified human tissue and human urine specimens not prepared for therapeutic or prophylactic uses in subheading 3001.90.00, HTSUS, as "[g]lands and other organs for organotherapeutic uses, dried, whether or not powdered; extracts of glands or other organs or of their secretions for organotherapeutic uses; heparin and its salts; other human or animal substances prepared for therapeutic or prophylactic uses, not elsewhere specified or included: Other." In NY R03056, dated February 1, 2006, CBP classified human urine samples in subheading 3825.90.00, HTSUS. After reviewing NY 870664 in its entirety, we find it to be partially in error with respect to the classification of the human tissue and human urine specimens. We also find NY R03056 to be partially in error with respect to the classification of human urine samples. For the reasons set forth below, we hereby modify NY 870664 with respect to the classification of the human tissue and human urine specimens. We also

hereby modify NY R03056 with respect to the classification of the human urine samples. The remaining analyses of NY 870664 and NY R03056 remain unchanged.

FACTS:

In NY R03338, CBP described the subject merchandise as follows:

> The articles under consideration are Breast Invasive Ductal Carcinoma Sections (paraffin tissue section slides) to be imported from Abcam PLC. Abcam's and EMD's equivalent product names and item codes for the specific quantity sizes are as follows:
>
> > Abcam: ab4697, Breast tumor (human): ductal carcinoma (invasive) tissue slides, 5 slides, 5 grams
> >
> > EMD: 70332, Human Breast Invasive Ductal Carcinoma Sections, 5 slides, 5 grams.
>
> Paraffin tissue sections are ideal for rapidly identifying cellular localization of RNA or protein. The tissues were excised, immediately fixed by formalin, and then pathologically identified. Each slide contains tissue from a single human tumor. A single tissue section with 5 microns thickness is mounted on a positively charged glass slide.
>
> The paraffin tissue section slides will be sold in packages containing 5 slides each. The tissue slides are to be used for in vitro laboratory research only. Using these tissue slides scientists can further study the mechanisms by which cancer develops and proliferates.

In NY N283432, an entity known as the "US Anti-Doping Agency" asked for a ruling on the classification of human urine samples collected from athletes from Brazil for testing purposes.

In NY C80101, CBP described the subject merchandise as follows:

> The subject product consists of human cancerous tumor tissue, which, you indicate, will be imported by your client for use in the development of a new, in-vitro, testing procedure in order to determine the most effective treatment for a particular patient.

In NY B80750, CBP described the subject merchandise as follows:

> The subject product you wish to import consists of frozen, human fecal specimens containing or suspected of containing parasites, including: Entamoeba histolytica, Giardia lambia, Cryptosporidium parvum, and various helminths. According to your letter, these specimens will be used in the development of diagnostic tests to detect the presence of the aforementioned organisms.

In NY B82258, CBP described the subject merchandise as follows:

> According to your letter, the subject product consists of extracted human teeth, preserved in formaldehyde, to be used for dental research purposes.

In NY 870664, CBP described the subject merchandise as follows:

> The specific items in question which you wish to import are as follows: specimens of human blood and urine, and tissue specimens of human skin biopsies, intestine and lung. You state that these items are for analysis only, and that a report on the chemical, biochemical or microscopic examination will be generated and reported to the requesting party in the country of origin.

In NY R03056, CBP described the subject merchandise as follows:

> The specific items in question consist of human. . . urine samples from real patients that will be imported for diagnostic analysis only.

ISSUE:

Whether various human tissue samples, human fecal specimens, extracted human teeth, human urine specimens and other human bodily specimens not prepared for therapeutic or prophylactic uses are classified in heading 0511, HTSUS, as "animal products not elsewhere specified or included," in heading 3001, HTSUS, as "other human or animal substances prepared for therapeutic or prophylactic uses, not elsewhere specified or included," in heading 3825, HTSUS, as "residual products of the chemical or allied industries, not elsewhere specified or included; municipal waste; sewage sludge; other wastes specified in note 6 to this chapter," or in heading 9705, HTSUS, as "collections and collectors' pieces of zoological, botanical, mineralogical, anatomical, historical, archeological, paleontological, ethnographic or numismatic interest."

LAW AND ANALYSIS:

Classification under the HTSUS is made 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 2023 HTSUS headings under consideration are as follows:

0511	Animal products not elsewhere specified or included; dead animals of chapter 1 or 3, unfit for human consumption:
3001	Glands and other organs for organotherapeutic uses, dried, whether or not powdered; extracts of glands or other organs or of their secretions for organotherapeutic uses; heparin and its salts; other human or animal substances prepared for therapeutic or prophylactic uses, not elsewhere specified or included:
3825	Residual products of the chemical or allied industries, not elsewhere specified or included; municipal waste; sewage sludge; other wastes specified in note 6 to this chapter:
9705	Collections and collectors' pieces of zoological, botanical, mineralogical, anatomical, historical, archeological, paleontological, ethnographic or numismatic interest:

* * * *

Note 4 to chapter 38, HTSUS, defines "municipal waste" throughout the tariff schedule as follows:

> [W]aste of a kind collected from households, hotels, restaurants, hospitals, shops offices, etc., road and pavement sweepings, as well as construction and demolition waste. Municipal waste generally contains a large variety of materials. Municipal waste generally contains a large variety of materials such as plastics, rubber, wood, paper, textiles, glass, metals, food materials, broken furniture and other damaged or discarded articles. The term "*municipal waste*," does not cover:

...

(d) Clinical waste as defined in note 6(a), below.

Note 5 to chapter 38, HTSUS, defines "sewage sludge," for purposes of heading 3825, HTSUS, as follows:

> [S]ludge arising from urban effluent treatment plants and includes pretreatment waste, scourings and unstabilized sludge.

Under note 6 to chapter 38, HTSUS, the expression "other wastes" for purposes of headings 3825, HTSUS, applies to:

(a) Clinical waste, that is, contaminated waste arising from medical research, diagnosis, treatment or other medical, surgical, dental or veterinary procedures, which often contain pathogens and pharmaceutical substances and require special disposal procedures (for example, soiled dressings, used gloves and used syringes);

...

(d) Other wastes from chemical or allied industries.

The Explanatory Notes ("ENs") to the Harmonized Commodity Description and Coding System represent the official interpretation of the tariff at the international level. While neither legally binding nor dispositive, the ENs provide a commentary on the scope of each heading of the HTSUS and are generally indicative of the proper interpretation of these headings at the international level. *See* T.D. 89–80, 54 Fed. Reg. 35127, 35128 (Aug. 23, 1989).

The EN 38.25 states, in pertinent part, the following:

(D) OTHER WASTES SPECIFIED IN NOTE 6 TO THIS CHAPTER

The heading also covers a wide variety of other wastes specified in Note (6) to this Chapter. They include :

(1) **Clinical waste** which is contaminated waste arising from medical research, diagnosis, treatment or other medical, surgical, dental or veterinary procedures. Such waste often contains pathogens, pharmaceutical substances and body fluids and request special disposal procedures (e.g., soiled dressings, used gloves and used syringes).

...

(4) **Other wastes from the chemical or allied industries.** This group includes, *inter alia*, **wastes from the production, formulation and use of inks, dyes, pigments, paints, lacquers and varnishes, other than municipal waste and waste organic solvents.**

The EN 97.05 states, in pertinent part, the following:

These articles are very often of little intrinsic value but derive their interest from their rarity, their grouping or their presentation....

(A) **Collections and collectors' pieces of zoological, botanical, mineralogical or anatomical interest** , such as;

(1) Dead animals of any species preserved dry or in liquid; stuffed animal for collections.

(2) Blown or sucked eggs; insects in boxes, frames, etc. (**other than** mounted articles constituting imitation jewellery or trinkets);

empty shells, **other than** those of a kind suitable for industrial use.

(3) Seeds or plants, dried or preserved in liquid; herbariums.

(4) Specimens of mineral (**not being** precious or semi-precious stones falling in **Chapter 71**); specimens of petrification.

(5) Osteological specimens (skeletons, skulls, bones).

(6) Anatomical and pathological specimens.

* * * *

The articles in NY R03338, NY C80101, NY B80750, and NY B82258, and some of the articles in NY 870664 and NY R03056 consist of various types of human tissue samples, such as breast invasive ductal carcinoma sections, human cancerous tumor tissue, and tissue specimens of human skin biopsies, intestines and lung; human fecal specimens; and extracted human teeth. The articles in NY N238432, and some of the merchandise in NY 870664 and NY R03056 consist of human urine samples. The human tissue specimens in NY C80101, NY B80750, NY B82258, and NY 870664, and the human urine specimens in NY 870664 were classified in heading 3001, HTSUS, as "[o]ther human or animal substances prepared for therapeutic or prophylactic uses, not elsewhere specified or included." The human tissue specimens in NY R03338 were classified in heading 9705, HTSUS, as "[c]ollections and collectors' pieces of zoological, botanical, mineralogical, anatomical, historical, archeological, paleontological, ethnographic or numismatic interest."

Subheading 0511.99.40, HTSUS, which covers "[a]nimal products not elsewhere specified or included; ... [o]ther: [o]ther: [o]ther..." is a "basket provision," as indicated by the terms "not elsewhere specified or included." Similarly, subheading 3001.90.01, HTSUS, which covers "[o]ther human or animal substances prepared for therapeutic or prophylactic uses, not elsewhere specified or included: [o]ther" is also "basket provision." Classification in a basket provision is only appropriate if there is no tariff category that covers the merchandise more specifically. *See E.M. Industries v. U.S.*, 999 F. Supp. 1473, 1480 (CIT 1998) ("'Basket' or residual provisions of HTSUS headings ... are intended as a broad catch-all to encompass the classification of articles for which there is no more specifically applicable subheading"). On the other hand, heading 9705, HTSUS, specifically provides for "[c]ollections and collectors' pieces of ... anatomical interest." Therefore, we will first address whether the subject human tissue samples are more specifically classifiable under heading 9705, HTSUS."

The EN 97.05 states that articles in this heading "are very often of little intrinsic value but derive their interest from their rarity, their grouping or their presentation." The EN also provides for "collections and collectors' pieces of zoological, botanical, mineralogical or anatomical interest, such as. . . [a]natomical or pathological specimens." Within the context of an article's rarity, grouping and presentation, the EN 97.05(A)(1)-(6), HTSUS, describes various preservation techniques for preparing specimens as parts of collections or collectors' pieces. Along these lines, CBP have classified items such as natural fossils,[1] stuffed animals and animal heads,[2] and mounted animal

[1] In NY N004185, dated December 26, 2006, CBP classified natural fossils from Morocco in subheading 9705.00.0090, HTSUSA.

[2] In NY G81800, dated September 8, 2000, CBP classified stuffed animals and animal heads from Namibia, Zambia and South Africa in subheading 9705.00.0090, HTSUSA.

heads[3] in subheading 9705.00.00, HTSUS, based on their rarity and presentation as collectors' items. Unlike items such as natural fossils and stuffed animals or animal heads, which are noted for their rarity and are displayed as collectors' pieces, the human tissue samples, and other bodily specimens in NY R03338, NY C80101, NY B80750, NY B82258, and NY 870664 will not be preserved for longevity in a manner within the context of chapter 97, HTSUS, for collections and collectors' pieces. Moreover, unlike the fossils and stuffed animal heads, the human tissue samples and other bodily specimens in NY R03338, NY C80101, NY B80750, NY B82258, and NY 870664 will be further examined, analyzed, dissected, or otherwise adulterated for laboratory research and diagnostic purposes, rather than for preservation or display. Therefore, we find that the human tissue samples in NY R03338 were improperly classified in heading 9705, HTSUS. Similarly, none of the human tissue samples and other bodily specimens in NY C80101, NY B80750, NY B82258, and NY 870664 are classifiable in heading 9705, HTSUS.

Turning to heading 3001, HTSUS, we note that the terms "therapeutic" and "prophylactic" are not defined in chapter 30 of the HTSUS, nor are they defined elsewhere in the Nomenclature or the ENs. In the absence of a definition of a term in the HTSUS or ENs, the term's correct meaning is its common and commercial meaning. *Nippon Kogasku (USA), Inc. v. United States*, 69 CCPA 89, 673 F.2d 380 (1982). Common and commercial meaning may be determined by consulting dictionaries, lexicons, scientific authorities and other reliable sources. *C.J. Tower & Sons v. United States*, 69 CCPA 128, 673, F.2d 1268 (1982). The Court of Appeals for the Federal Circuit ("CAFC") has defined "therapeutic" as "having healing or curative powers." *See Lonza, Inc. v. U.S.* 46 F.3d 1098 (Fed. Cir. 1995). Additionally, according to Merriam-Webster's Online Dictionary, "prophylactic" means (1) "guarding from or preventing the spread of occurrence of disease or infection"; (2) "tending to prevent or ward off".[4] *See also* Headquarters Ruling Letter ("HQ") H095405, dated June 15, 2010.

Based on the above definitions, we find that the human tissue samples and other human bodily specimens, including human fecal specimens, extracted human teeth, and human urine samples, in NY C80101, NY B80750, NY 870664, and NY B82258 were wrongly classified in heading 3001, HTSUS, which is limited to human substances that are prepared for therapeutic or prophylactic uses. The human cancerous tumor tissue samples in NY C80101 are utilized for the development of *in vitro* diagnostic testing procedures for determining the most effective treatment for a particular patient. The human fecal specimens containing or suspected of containing parasites in NY B80750 will be used in the development of diagnostic tests to detect the presence of such parasites. The extracted human teeth, preserved in formaldehyde, in NY B82258, will be used for dental research purposes. The human urine samples in NY 870664 are used for laboratory analysis purposes only. Nowhere in the definition of therapeutic or prophylactic is use for dental research or *in vitro* laboratory research for purposes such as developing diagnostic tests to help determine effective treatment at a future, indefinite time included. Therefore, the human tissue samples and other human bodily

[3] In NY D88270, dated February 26, 1999, CBP classified mounted animal heads from South Africa in subheading 9705.00.0090, HTSUSA.

[4] MERRIAM-WEBSTER.COM, *https://www.merriam-webster.com/dictionary/prophylactic?src=search-dict-box* (last visited Feb. 1, 2021).

specimens in NY C80101, NY B80750, NY 870664, and NY B82258 are not prepared for therapeutic or prophylactic uses and are thus, precluded from classification in heading 3001, HTSUS. Likewise, none of the other human tissue samples and other human bodily specimens in the rulings at issue here, including those in NY R03338, NY R03056 and NY N283432, are prepared for therapeutic or prophylactic uses, and are also precluded from classification in heading 3001, HTSUS. Moreover, CBP recently affirmed in HQ H304055, dated March 31, 2021, that human tissue samples utilized for the development of in vitro diagnostic tests are precluded from classification in heading 3001, HTSUS, and are more appropriately classified in heading 0511, HTSUS. Much of our analysis in that ruling applies here.

Heading 3825, HTSUS, covers "[r]esidual products of the chemical or allied industries, not elsewhere specified or included; municipal waste; sewage sludge; other wastes specified in note 6 to this chapter." In NY N283432 and NY R03056, the human urine samples were specifically classified in subheading 3825.90, HTSUS, as "[r]esidual products of the chemical or allied industries" *other than* "municipal waste" (subheading 3825.10), "sewage sludge" (subheading 3825.20), "clinical waste" (3825.30), "waste organic solvents" (subheadings 3825.41 and 3825.49), "wastes of metal-pickling liquors, hydraulic fluids, brake fluids and anti-free fluids" (subheading 3825.50), "other wastes from the chemical or allied industries" (subheadings 3825.61 and 3825.69).

Notes 4, 5, and 6 to chapter 38 define the terms "municipal waste," "sewage sludge," and "other wastes" in heading 3825, HTSUS, but do not provide guidance as to what is meant by "residual products." Note 4 to chapter 38 describes municipal waste as the type of waste that is "collected from households, hotels, restaurants, hospitals, shops offices, etc., road and pavement sweepings, as well as construction and demolition waste. . .[and] generally contains a large variety of materials such as plastics, rubber, wood, paper, textiles, glass, metals, food materials, broken furniture and other damaged or discarded articles." Note 5 defines "sewage sludge" as "[s]ludge arising from urban effluent treatment plants." Note 6 states that "other wastes" applies to "[c]linical waste, that is, contaminated waste arising from medical research, diagnosis, treatment or other medical, surgical, dental or veterinary procedures, which often contain pathogens and pharmaceutical substances and require special disposal procedures (for example, soiled dressings, used gloves and used syringes)." Pursuant to EN 38.25, the phrase "other wastes from the chemical or allied industries. . . includes, *inter alia*, wastes from the production, formulation and use of inks, dyes, pigments, paints, lacquers and varnishes, other than municipal or waste organic solvents."

First, we note that the human urine specimens in N283432 and NY R03056, which were classified in heading 3825, HTSUS, bear no resemblance to the exemplars of municipal and sewage waste in notes 4 and 5 to chapter 38, HTSUS. The exemplars of "other wastes from the chemical or allied industries" in EN 38.25 refer to by-products of industrial production processes rather than bodily specimens such as human urine samples. Clinical waste as defined in note 6 to chapter 38 and EN 38.25 is also inapplicable to the human urine samples at issue. These urine samples are not discarded waste as a result of medical research, diagnosis, treatment, or other medical procedures. Rather, the specimens in N283432 and NY R03056, as well as those in NY 870664, are being imported for diagnostic and testing purposes

to be performed after importation. They do not potentially become waste until after importation once testing has been completed. Heading 3825, HTSUS, on the other hand, describes materials that are *imported as waste*, following the performance of any testing procedures prior to importation.

The term "residual product" is not statutorily defined in the HTSUS. In 2001, Presidential Proclamation 7515, issued pursuant to the Omnibus Trade and Competitive Act of 1988, created heading 3825, HTSUS, to cover environmentally sensitive and hazardous waste products. *See* HQ H018547, dated December 12, 2007. In HQ 967288, dated March 10, 2005, we noted that chapter 38 was suggested by the United States to track certain environmentally sensitive substances important to international trade. The importation of human urine specimens for testing and diagnostic analysis to be completed post-importation does not involve environmentally sensitive substances important to international trade for purposes of heading 3825, HTSUS.

In sum, based on the legal notes to chapter 38, EN 38.25, and the legislative history of heading 3825, HTSUS, we find that human urine samples imported for testing and diagnostic analysis post-importation are precluded from classification in heading 3825, HTSUS.

Having excluded the subject human tissue samples, human urine samples and other human bodily specimens from classification in headings 9705, 3001, and 3825, HTSUS, we turn to heading 0511, HTSUS. As we noted in HQ H304055, the term "human" is not defined in chapter 5 of the HTSUS, nor is it defined elsewhere in the Nomenclature or the ENs. The EN 05.11(1)-(14) identifies examples of products covered under this heading, which are derived from animals. Nowhere in the EN is there reference to products derived from human tissue. In HQ H304055, dated March 31, 2021, CBP noted that the Encyclopedia Britannica defines human being as a "culture-bearing primate classified in the genus *Homo*, especially the species *H. sapiens*. Human beings are anatomically similar and related to the great apes but are distinguished by a more highly developed brain and a resultant capacity for articulate speech and abstract reasoning." Additionally, "a primate is any mammal of the group that includes lemurs, lorises, tarsiers, monkeys, apes, and humans."

Furthermore, there is clear precedence in CBP's past rulings for classifying human tissue samples and other human bodily specimens within chapter 5, heading 0511, HTSUS. For example, in NY 887293, dated June 29, 1993, and in NY H82224, dated June 28, 2001, CBP classified human embryos that were frozen and shipped to the United States in heading 0511, HTSUS. In NY R03056, dated February 1, 2006, CBP classified human prostrate, bladder, and gastrointestinal tract tissue specimens, imported in formalin or in an alcohol-based fixative, which were intended for diagnostic analysis only—and not for therapeutic or prophylactic uses such as the development of new drugs—in heading 0511, HTSUS. Similarly, in NY N003566, dated December 14, 2006, CBP classified human dental pulp cells in vials and human colon carcinoma tissue arrays in paraffin-embedded blocks, which were used solely for non-clinical research, in heading 0511, HTSUS. Moreover, in NY N133477, dated December 13, 2010, CBP classified samples of human fecal matter imported for laboratory testing in heading 0511, HTSUS, while in NY N284008, dated March 28, 2017, CBP also classified human placenta tissue specimens used in non-clinical research in heading 0511, HTSUS.

Based on the foregoing, we find that the human tissue samples and other human bodily specimens, including human fecal specimens, extracted human teeth and human urine samples not prepared for therapeutic or prophylactic uses are properly classified in subheading 0511.99.4070, HTSUSA, as "[a]nimal products not elsewhere specified or included; dead animals of chapter 1 or 3, unfit for human consumption: [o]ther: [o]ther: [o]ther...[o]ther.

HOLDING:

By application of GRIs 1 and 6, the human tissue samples, human fecal specimens, extracted human teeth, human urine specimens and other human bodily specimens not prepared for therapeutic or prophylactic uses are classified in heading 0511, HTSUS, specifically under subheading 0511.99.4070, HTSUSA, which provides for "[a]nimal products not elsewhere specified or included; dead animals of chapter 1 or 3, unfit for human consumption: [o]ther: [o]ther: [o]ther...[o]ther." The 2023 column one, general rate of duty is 1.1% *ad valorem*.

EFFECT ON OTHER RULINGS:

NY R03338, dated March 13, 2006; NY C80101, dated October 3, 1997; NY B80750, dated January 16, 1997; and NY B82258, dated March 3, 1997; and NY N283432, dated March 15, 2017, are hereby revoked.

NY 870664, dated February 12, 1992, is hereby modified with respect to the classification of the human urine specimens and human tissue specimens only. NY R03056, dated February 1, 2006, is hereby modified with respect to the classification of the human urine samples only.

Sincerely,

YULIYA A. GULIS,
Director
Commercial and Trade Facilitation Division

Cc: Bruce H. Chiu, Esq.
Cohen & Grigsby, P.C.
2900 CNG Tower
625 Liberty Avenue
Pittsburgh, PA 15222–3115

John F. Bruni, Ph.D.
Biosite Diagnostics
11030 Roselle Street
San Diego, CA 92121

Donna R. Harvey, Esq.
2633 Lincoln Boulevard, No. 131
Santa Monica, CA 90405

Mr. Logan Jett
U.S. Anti-Doping Agency
555 Tch Center Drive, Suite 200
Colorado Springs, CO 80919

Mr. Michael T. Grady
Tampa Pathology Laboratory
6515 North Armenia Avenue
Tampa, FL 33604

Mr. Pablo Fel
Prost – Data Inc.
1854 Airline Drive (Suite 17A)
Nashville, TN 37210

PROPOSED REVOCATION OF THREE RULING LETTERS AND PROPOSED MODIFICATION OF TWO RULING LETTERS AND PROPOSED REVOCATION OF TREATMENT RELATING TO THE TARIFF CLASSIFICATION OF COATED OR LAMINATED WOVEN TEXTILE FABRICS OF STRIP OF AN APPARENT WIDTH NOT EXCEEDING 5 MM

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

ACTION: Notice of proposed revocation of three ruling letters and modification of two ruling letters and proposed revocation of treatment relating to the tariff classification of coated or laminated woven textile fabrics of strip of an apparent width not exceeding 5 mm.

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 three ruling letters and modify two ruling letters concerning the tariff classification of coated or laminated woven textile fabrics of strip of an apparent width not exceeding 5 mm 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 January 12, 2024.

ADDRESS: Written comments are to be addressed to U.S. Customs and Border Protection, Office of Trade, Regulations and Rulings, Attention: Shannon L. Stillwell, Commercial and Trade Facilitation Division, 90 K St., NE, 10th Floor, Washington, DC 20229–1177. CBP is also allowing commenters to submit electronic comments to the following email address: *1625Comments@cbp.dhs.gov*. All comments should reference the title of the proposed notice at issue and the *Customs Bulletin* volume, number and date of publication. Arrangements to inspect submitted comments should be made in advance by calling Ms. Shannon L. Stillwell at (202) 325–0739.

FOR FURTHER INFORMATION CONTACT: Parisa J. Ghazi, Food, Textiles, and Marking Branch, Regulations and Rulings, Office of Trade, at (202) 325–0272.

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 three ruling letters and modify two ruling letters pertaining to the tariff classification of coated or laminated woven textile fabrics of strip of an apparent width not exceeding 5 mm. Although in this notice, CBP is specifically referring to New York Ruling Letter ("NY") N325833, dated May 25, 2022 (Attachment A), NY N250680, dated March 25, 2014 (Attachment B), NY N250876, dated March 25, 2014 (Attachment C), Headquarters Ruling Letter ("HQ") H310928, dated June 11, 2021 (Attachment D), HQ H305437, dated December 18, 2020 (Attachment E), 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 five 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 N325833, NY N250680, and NY N250876, HQ H310928, and HQ H305437, CBP classified certain coated or laminated woven textile fabrics of strip of an apparent width not exceeding 5 mm in heading 5903, HTSUS, specifically in subheading 5903.90.2500, HTSUSA ("Annotated"), which provides for "Textile fabrics impregnated, coated, covered or laminated with plastics, other than those of heading 5902: Other: Of man-made fibers: Other: Other." CBP has reviewed NY N325833, NY N250680, and NY N250876, HQ H310928, and HQ H305437, and has determined the ruling letters to be in error. It is now CBP's position that the coated or laminated woven textile fabrics of strip of an apparent width not exceeding 5 mm are properly classified, in heading 5903, HTSUS, specifically in subheading 5903.90.30, HTSUS, which provides for "Textile fabrics impregnated, coated, covered or laminated with plastics, other than those of heading 5902: Other: Other."

Pursuant to 19 U.S.C. § 1625(c)(1), CBP is proposing to revoke NY N325833, NY N250680, and NY N250876, and modify HQ H310928 and HQ H305437, and to revoke or modify any other ruling not specifically identified to reflect the analysis contained in the proposed HQ H328910, set forth as Attachment F to this notice. Additionally, pursuant to 19 U.S.C. § 1625(c)(2), CBP is proposing to revoke any treatment previously accorded by CBP to substantially identical transactions.

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

YULIYA A. GULIS,
Director
Commercial and Trade Facilitation Division

Attachments

N325833

May 25, 2022
CLA-2–59:OT:RR:NC:N3:350
CATEGORY: Classification
TARIFF NO.: 5903.90.2500

MR. TODD SCHUHARDT
UNITED BAGS INC.
1355 N. WARSON RD.
ST. LOUIS, MO 63132

RE: The tariff classification of a laminated box sleeve woven of polypropylene strip from India

DEAR MR. SCHUHARDT:

In your letter dated May 2, 2022, you requested a tariff classification ruling. A sample was submitted to this office.

The product, described as "100% Woven Polypropylene Box Sleeves" are tubular laminated fabrics constructed of woven textile strip. You state that the fabric is woven wholly of polypropylene and that its purpose is to provide rigidity when placed over corrugated cardboard boxes at food packaging plants. In follow-up correspondence, you indicate that the fabric is laminated on one surface with a plastic film composed of polypropylene and polyethylene. The film is applied to the fabric after being extruded and is then pressed and cooled to permanently bond the materials.

Note 3 to Chapter 59, effective as of January 27th, 2022, states:

> For the purposes of heading 5903, "textile fabrics laminated with plastics" means products made by the assembly of one or more layers of fabrics with one or more sheets or film of plastics which are combined by any process that bonds the layers together, whether or not the sheets or film of plastics are visible to the naked eye in the cross-section.

The introduction of this Note removes the requirement that any plastic lamination layer be visible to the naked eye for a fabric to be classified in Heading 5903, Harmonized Tariff Schedule of the United State ("HTSUS"). The means by which this fabric is constructed is consistent with the language provided for in Note 3 to Chapter 59, hence the blue box sleeve fabrics imported from India are considered to be laminated for the purposes of the HTSUS.

The applicable subheading for the "100% Woven Polypropylene Box Sleeves," will be 5903.90.2500, HTSUS, which provides for "Textile fabrics impregnated, coated, covered or laminated with plastics, other than those of heading 5902: Other: Of man-made fibers: Other: Other." The rate of duty will be 7.5 percent ad valorem.

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

This ruling is being issued under the assumption that the subject goods, in their condition as imported into the United States, conform to the facts and the description as set forth both in the ruling request and in this ruling. In the event that the facts or merchandise are modified in any way, you should bring this to the attention of Customs and you should resubmit for a new

ruling in accordance with 19 CFR 177.2. You should also be aware that the material facts described in the foregoing ruling may be subject to periodic verification by Customs.

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 Michael Capanna via email at michael.s.capanna@cbp.dhs.gov.

Sincerely,

STEVEN A. MACK
Director
National Commodity Specialist Division

N250680

March 25, 2014
CLA-2–59:OT:RR:NC:T3:350
CATEGORY: Classification
TARIFF NO.: 5903.90.2500

BRAD ALLSHOUSE
TECHNO LOGIC FILMS & FABRICS, LLC
525 LAYTON DRIVE
COPPELL, TX 75019

RE: The tariff classification of roof underlayment material from China

DEAR MR. ALLSHOUSE:

In your letter received in our office on February 24, 2014, you requested a tariff classification ruling.

The sample submitted with your request was not identified with a name or style number. Your letter states the material is composed of a polyester scrim weighing 30 g/m^2, and both a top and bottom coating layer of polypropylene weighing a total of 50 g/m^2. The material will be imported in rolls wound on paper cores and will be used for roof underlayment. No laboratory analysis has been done by Customs and Border Protection on the sample. The polypropylene coating is only visible on one side of the material.

The applicable subheading for the roofing underlayment material will be 5903.90.2500, Harmonized Tariff Schedule of the United States (HTSUS), which provides for Textile fabrics impregnated, coated, covered or laminated with plastics, other than those of heading 5902: Other: Of man-made fibers: Other. The rate of duty will be 7.5 percent ad valorem.

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

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 Deborah Walsh at (646) 733–3044.

Sincerely,

GWENN KLEIN KIRSCHNER
Acting Director
National Commodity Specialist Division

N250876
March 25, 2014
CLA-2–39:OT:RR:NC:N3:350
CATEGORY: Classification
TARIFF NO.: 5903.90.2500

CLAUDIA FREDERICK
JUMPSTART CONSULTANTS, INC.
4649 CAROLINA AVENUE, BLDG. 1
RICHMOND, VA 23222

RE: The tariff classification of roofing underlayment material from India, Korea or China

DEAR MS. FREDERICK:

In your letter dated February 13, 2014, you requested a tariff classification ruling.

A sample of **RUWFLT** was submitted with your request. Your letter describes the material as being comprised of two layers. The first layer is stated to be woven of polypropylene strip less than 5mm in width, with the second layer stated to be composed of a polypropylene coating. The weight of the woven layer is given as 104 g/m^2 and the coating layer is given as 50 g/m^2. The coating material is visible to the naked eye on the one side where it was applied.

In your request letter you have cited a previous ruling, which you have listed as both N284155 and N248155, issued by this office. We cannot find either of those numbered letters in our ruling letters database. Without the actual sample to review we must assume that the coating material was sufficiently different from the instant sample before us today and that has resulted in a different classification.

The applicable subheading for the RUWFLT will be 5903.90.2500, Harmonized Tariff Schedule of the United States (HTSUS), which provides for Textile fabrics impregnated, coated, covered or laminated with plastics, other than those of heading 5902: Other: Of man-made fibers: Other. The rate of duty will be 7.5 percent ad valorem.

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

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 Deborah Walsh at (646) 733–3044.

Sincerely,

GWENN KLEIN KIRSCHNER
Acting Director
National Commodity Specialist Division

HQ H310928
June 11, 2021
OT:RR:CTF:FTM H310928 MJD
CATEGORY: Classification
TARIFF NO.: 5903.90.25

CENTER DIRECTOR
PHARMACEUTICAL, HEALTH AND CHEMICAL CENTER
1100 RAYMOND BLVD 4TH FLOOR
NEWARK, NJ 07102

Attn: Lisa Olsen, Supervisory Import Specialist; Angela Hultz, Supervisory Import Specialist; and Stephen Bono, Import Specialist

Re: Application for Further Review of Protest No. 3004–20–100247; Classification of Roofing Underlayments

DEAR CENTER DIRECTOR:

This is in reference to the Application for Further Review ("AFR") of Protest No. 3004–20–100247 ("Protest"), timely filed by Crowell & Moring LLP, on February 5, 2020, on behalf of their client, DuPont Specialty Products USA, LLC., (hereinafter "Protestant" or "DuPont"), contesting U.S Customs and Border Protection's ("CBP") tariff classification of several roofing underlayments under the Harmonized Tariff Schedule of the United States ("HTSUS"). This Protest pertains to four multi-layered textile underlayments for use in roofing projects to protect the construction from water damage and moisture infiltrations while also providing a nonslip feature for those working on the roof construction and grip to the shingles to keep them from sliding. The instant AFR concerns ten entries made between February 13, 2019 and March 29, 2019, and liquidated on August 23, 2019 at the Port of Blaine, Washington. Protestant requested, and CBP granted, a teleconference that was held on May 14, 2021. Our decision is set forth below.

Protestant has asked that certain information submitted in connection with this Protest be treated as confidential, pursuant to 19 C.F.R. § 177.2(b)(7). The request for confidentiality is approved. Information regarding the weight of each layer in the roofing underlayments, will not be released to the public and will be withheld from published versions of this decision.

FACTS:

At issue in this AFR are four multi-layered roofing underlayments products: (1) Roof Pro, (2) ProTec 120, (3) ProTec 160, and (4) ProTec 200. Protestant provides that the Roof Pro and ProTec product lines have the same four layers of construction, which serve the same function, but the weight of the layers varies depending on the type of product. The top and third layers of each roofing underlayment are 25% or more of the overall weight of each product, and the second and bottom layers of each roofing underlayment are less than 25% of the overall weight of each product. The following is a description of each layer of the Roof Pro and ProTec products, according to Protestant:

1. The top layer is a nonwoven fabric, comprised of nonwoven polypropylene, an ultraviolet light ("UV") protection additive, and a pigment. The function of this layer is to provide grip to a person walking on the roof surface while shingling the roof, and to provide grip to the shingles to keep them from sliding. These are easily the most important func-

tions of the underlayment. They provide for safety of the roofer, to keep them from falling off the roof and harming themselves; and they provide grip to the shingles to hold them in place and prevent water intrusion into the structure.

2. The second layer is a bonding layer, comprised of polypropylene, low density polyethylene ("LDPE"), a UV additive, and pigment. The function is to bond the top and third layers together, and to provide a water barrier.

3. The third layer is a woven scrim layer, comprised of woven polypropylene, calcium carbonate, and a UV additive. The function of the scrim layer is to provide mechanical strength and dimensional stability to the product.

4. The fourth layer is a grip coating, comprised of polypropylene, LDPE, a thermoplastic elastomer, and a pigment. This layer provides grip from the underlayment to the roof surface.

At the time of entry, DuPont classified the Roof Pro and ProTec roofing underlayments under subheading 5603.13.0090, HTSUSA ("Annotated"), which provides for "[n]onwovens, whether or not impregnated, coated, covered or laminated: Of man-made filaments: Weighing more than 70 g/m^2 but not more than 150 g/m^2: Other." On April 9, 2019, CBP sent DuPont a Request for Information (CBP Form 28) concerning the Roof Pro 42/1067 L286/87 P49 ("Roof Pro") product. The CBP laboratory tested a sample of the Roof Pro underlayment via laboratory report no. SF20190542, dated June 26, 2019, and found that the sample is a "multi-layered fabric . . . coated with plastic on one side . . . [and] composed wholly of polypropylene textile and plastic." The lab report also stated that the fabric has three layers by weight consisting of [**]% polypropylene nonwoven, not felt, textile fabric; [**]% polypropylene woven synthetic textile strip; and [**]% polypropylene plastic coating. Moreover, the laboratory report stated that most of the Roof Pro sample is composed of "two polypropylene textile fabric. . . [and] less than 70% plastic." The Roof Pro and ProTec products were then reclassified under subheading 5903.90.3090, HTSUSA, which provides for "[t]extile fabrics impregnated, coated, covered or laminated with plastics, other than those of heading 5902: Other: Other: Other."

Subsequently, the CBP laboratory tested samples of the ProTec 120, ProTec 160, and ProTec 200 and found that like the Roof Pro product, the underlayments were "multi-layered fabric . . . coated with plastic on one side . . . [and] composed wholly of polypropylene textile and plastic." Similarly, like the Roof Pro product, the ProTec products have three layers, and most of the roofing underlayments are comprised of "two polypropylene textile fabric layers . . . [and] less than 70% plastic." Specifically, laboratory report no. SF20200225, dated March 23, 2020, reported that the ProTec 120 is composed of [**]% polypropylene nonwoven, not felt textile fabric; [**]% polypropylene woven synthetic textile strips; and [**]% polypropylene plastic coating by weight. Laboratory report no. SF20200226, dated March 23, 2020, reported that the ProTec 160 is composed of [**]% polypropylene nonwoven, not felt, textile fabric; [**]% polypropylene woven synthetic textile strips; and [**]% polypropylene plastic coating by weight. Laboratory report no. SF20200227, dated March 23, 2020, stated that the ProTec 200 is composed of [**]% polypropyl-

ene nonwoven, not felt, textile fabric; [**]% polypropylene woven textile strips; and [**]% polypropylene plastic coating by weight.

ISSUE:

What is the tariff classification of the Roof Pro and ProTec roofing underlayments at issue?

LAW AND ANALYSIS:

Initially, we note that the matter is protestable under 19 U.S.C. § 1514(a)(2) as a decision on classification. The Protest was timely filed, within 180 days of liquidation of the entries. (Miscellaneous Trade and Technical Corrections Act of 2004, Pub. L. 108–429, § 2103(2) (B) (ii), (iii) (codified as amended at 19 U.S.C. § 1514(c) (3) (2006)).

Further Review of Protest No. 3004–20–100247 is properly accorded to Protestant pursuant to 19 C.F.R. § 174.24(b) because Protestant alleges that the decision against which the protest was filed involves questions of law or fact which have not been ruled upon by the Commissioner of CBP or his designee or by the Customs courts.

The 2019 HTSUS provisions under consideration are as follows:

5603 Nonwovens, whether or not impregnated, coated, covered or laminated:

* * * * *

5903 Textile fabrics impregnated, coated, covered or laminated with plastics, other than those of heading 5902:

* * * * *

GRI 3(a) and (b) provide as follows:

3. 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:

(a) The heading which provides the most specific description shall be preferred to headings providing a more general description. However, when two or more headings each refer to part only of the materials or put substances contained in mixed or composite goods or to part only of the items in a set up for retail sale, those headings are to be regarded as equally specific in relation to those goods, even if one of them gives a more complete or precise description of the goods.

(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.

* * * * *

In addition, in interpreting the HTSUS, the Explanatory Notes ("ENs") of the Harmonized Commodity Description and Coding System may be utilized. The ENs to the Harmonized Commodity Description and Coding System represent the official interpretation of the tariff at the international level.

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

The EN to GRI 3(b) state, in pertinent part:

(VI) This second method relates only to:

(i) Mixtures.

(ii) Composite goods consisting of different materials.

(iii) Composite goods consisting of different components.

(iv) Goods put up in sets for retail sales.

It applies only if Rule 3(a) fails.

(VII) In all these cases the goods are to be classified as if they consisted of the material or component **which gives them their essential character**, insofar as this criterion is applicable.

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

(IX) For the purposes of this Rule, composite goods made up of different components shall be taken to mean not only those in which the components are attached to each other to form a practically inseparable whole but also those with separable components, provided these components are adapted one to the other and are mutually complementary and that together they form a whole which would not normally be offered for sale in separate parts.

[...]

* * * * *

It should be noted at the onset that Protestant describes the Roof Pro, ProTec 120, ProTec 160, and ProTec 200 roofing underlayments as having four layers: a nonwoven fabric layer, a bonding layer, a woven scrim layer, and a grip coating layer. However, CBP tested the Roof Pro and ProTec products and found them to have three layers, not four. According to the CBP laboratory, the Roof Pro and ProTec products have a nonwoven, not felt, textile fabric layer; a layer of woven synthetic strips; and a layer of plastic coating. The CBP laboratory measured the plastic material i.e., what the Protestant calls the bonding layer and the grip coating layer as one. As a result, we will rely on CBP's laboratory results of these products for this Protest. *See* Headquarters Ruling Letter ("HQ") 955711, dated July 21, 1994, (stating that CBP will rely on their laboratory results absent evidence that shows the testing procedures or methodologies utilized by CBP were flawed).

All four roofing underlayments are composite goods made up of a plastic-coated woven scrim layer classified in heading 5903, HTSUS, and a nonwoven textile fabric layer classified in heading 5603, HTSUS. When a textile fabric is visibly coated with plastic, as is the case here, the textile fabric and plastic material is classified as a single material for tariff purposes under Chapter 59, specifically in this case, heading 5903, HTSUS. The roofing underlayments also contain a nonwoven textile fabric layer classified in heading 5603, HTSUS. Since the roofing underlayments are made up of

different components that are classified in more than one heading, GRI 1 does not apply. Instead, we look to GRI 2 which directs us to GRI 3, specifically GRI 3(b) in this instance. GRI 3(b) provides that composite goods made up of different components should be classified as if they consisted of the material or component that gives them their essential character. According to EN IX for GRI 3(b), a composite good is a good that is made up of different components that are attached to each other to form a practically inseparable whole. The subject roofing underlayments are composite goods because they are multi-layered underlayments made up of different components, a plastic-coated woven scrim layer and a nonwoven textile fabric. GRI 3(b) provides that a composite good is classified "as if they consisted of the material or component which gives them their essential character." Therefore, GRI 3(b) requires that classification of the Roof Pro and ProTec products be based on the material or component that imparts the goods with their essential character.

The "essential character" of an article is "that which is indispensable to the structure, core or condition of the article, i.e., what it is." *Structural Industries v. United States,* 360 F. Supp. 2d 1330, 1336 (Ct. Int'l Trade 2005). EN VIII to GRI 3(b) explains that "[t]he factor which determines essential character will vary as between different kinds of goods. It may, for example, be determined by the nature of the material or component, its bulk, quantity, weight or value, or by the role of the constituent material in relation to the use of the goods." Court decisions on the essential character for GRI 3(b) purposes have looked primarily to the role of the constituent material in relation to the use of the goods. *See Estee Lauder, Inc. v. United States*, 815 F. Supp. 2d 1287, 1296 (Ct. Int'l Trade 2012); *Structural Industries*, 360 F. Supp. 2d 1330; *Conair Corp. v. United States*, 29 CIT 888 (2005); *Home Depot USA, Inc. v. United States*, 427 F. Supp. 2d 1278 (Ct. Int'l Trade 2006), *aff'd* 491 F.3d 1334 (Fed. Cir. 2007).

Protestant provides that the essential character of the Roof Pro and ProTec products is the nonwoven top layer of the products classified in heading 5603, HTSUS, because it is the layer that "provides grip to a person walking on the roof surface while shingling the roof, and . . . grip to the shingles to keep them from sliding." DuPont says that these are "easily the most important functions of the underlayment. They provide for safety of the roofer, to keep them from falling off the roof and harming themselves; and they provide grip to the shingles to hold them in place and prevent water intrusion into the structure." Moreover, DuPont states that the factors listed in EN (VII) to GRI 3 weigh in favor of the nonwoven top layer of the ProTec products as the essential character of the products because the nonwoven top layer weighs more and cost more. With respect to the Roof Pro product, Protestant claims that although the woven scrim layer is higher in weight and cost than the nonwoven top layer, the function of the nonwoven layer i.e., the safety it provides and grip to the shingles is more important to the function of the underlayments then the woven scrim layer. Therefore, Protestant asserts that the essential character of the Roof Pro and ProTec products is the nonwoven top layer classified in heading 5603, HTSUS.

We disagree with Protestant's assertion that the nonwoven top layer of the roofing underlayments classified in heading 5603, HTSUS, is the essential character of the products. While the gripping functions of the nonwoven top layer are important to the roofing underlayments at issue, we find that they are an additional feature of the roofing underlayments, and not the most

essential aspect for GRI 3(b) purposes. The essential character of a product is that which is "indispensable" to the product, what makes the product "what it is." *See Structural Industries*, 360 F. Supp. 2d 1330. In the instant case, what makes the Roof Pro and ProTec products "indispensable," and what makes the products roofing underlayments is not their griping abilities, it is their primary function, which is to protect a roof from water damage and moisture infiltration from the effects of snow, rain, wind, etc. Consumers purchase roofing underlayments precisely for this reason; because they function as a layer of protection against weather conditions that can cause water damage and moisture infiltration to roofs. When the woven scrim layer is coated with plastic it becomes a much stronger material, which provides protection against the elements of whether, creating a nearly waterproof layer. As a result, it is the plastic-coated woven scrim layer classified in heading 5903, HTSUS, that provides this water resistance to the roofing underlayments and thus functions as the essential character of the products. Therefore, the essential character of all four roofing underlayments is the plastic-coated woven scrim layer classified in heading 5903, HTSUS, because of its water resistance capabilities.

CBP has previously considered the classification of multi-layered roofing underlayment wherein the component materials were predominated by textile fabrics, which are coated or laminated with plastics. For example, in HQ H305437, dated December 18, 2020, CBP classified the Pro-20, Gold, Silver, and Platinum multi-layered roofing underlayments of FT Synthetics under heading 5903, HTSUS.[1] The underlayments had a top layer of nonwoven fabric, a middle (polyolefin) lamination layer, a woven textile (scrim layer), and a back/bottom (polyolefin) coating layer. We found that the laminated and coated woven textile fabrics classified in heading 5903, HTSUS, imparted the essential character of the roofing underlayments. We stated that "when assessing the role of the top spun bond nonwoven layer, with its "non-slip" technology and the role of the polyolefin and the polypropylene layers, we find that the polyolefin construction is more essential to the functioning of the roofing materials as a whole." Moreover, we stated that the "role served by the polyolefin construction's water resistance capacity is vital to protecting the underlying roof structure against water penetration. As with roofing materials generally, protecting against weather conditions and water (rain) penetration is a role that contributes to the very essence and purpose of a roof." *See also* New York Ruling Letter ("NY") N305964, dated September 25, 2019; NY N300457, dated October 2, 2018; NY N255065, dated August 6, 2014; NY N253035, dated May 13, 2014; NY N250680, dated March 25, 2014; NY N250876, dated March 25, 2014; NY N217610, dated June 8, 2012; NY N104376, dated May 27, 2010; NY N098937, dated April 23, 2010; NY N055596, dated April 23, 2009 (classifying material "A" roofing underlayment under heading 5903, HTSUS); NY N052923, dated March 26, 2009 (classifying material "A" roofing underlayment under heading 5903, HTSUS); NY N049058, dated February 11, 2009; and NY M82062, dated April 11, 2006. We find that like the roofing underlayments in the above mentioned cases, the Roof Pro and ProTec Products in this case are classified in heading 5903, HTSUS.

[1] It should be noted that DuPont purchased the roofing underlayments in this case from FT Synthetics.

Based on the foregoing, we conclude that the Roof Pro, ProTec 120, ProTec 160, and ProTec 200 are classified under heading 5903, HTSUS, and specifically under subheading 5903.90.2500, HTSUSA, which provides for "[t]extile fabrics impregnated, coated, covered or laminated with plastics, other than those of heading 5902: Other: Of man-made fibers: Other: Other."

HOLDING:

By application of GRI 3(b), we find that the Roof Pro, ProTec 120, ProTec 160, and ProTec 200 are classified under heading 5903, HTSUS, and specifically under subheading 5903.90.2500, HTSUSA, which provides for "[t]extile fabrics impregnated, coated, covered or laminated with plastics, other than those of heading 5902: Other: Of man-made fibers: Other: Other." The 2019 column one, general rate of duty is 7.5%.

Since the rate of duty under the classification indicated above is more than the liquidated rate, you are instructed to **DENY** the protest in full.

In accordance with Sections IV and VI of the CBP Protest/Petition Processing Handbook (HB 3500–08A, December 2007, pp. 24 and 26), you are to mail this decision, together with the CBP Form 19, to the Protestant no later than 60 days from the date of this letter. Any reliquidation of the entry or entries in accordance with the decision must be accomplished prior to mailing the decision.

Sixty days from the date of the decision, the Office of Trade, Regulations and Rulings will make the decision available to CBP personnel, and to the public on the Customs Rulings Online Search System (CROSS) at https://rulings.cbp.gov/ which can be found on the U.S. Customs and Border Protection website at http://www.cbp.gov and other methods of public distribution.

Sincerely,
For

CRAIG T. CLARK,
Director
Commercial and Trade Facilitation Division

HQ H305437
December 18, 2020
OT:RR:CTF:FTM H305437 JER
CATEGORY: Classification
TARIFF NO.: 5603, 5903, 5907

CENTER DIRECTOR
CEE-APPAREL, FOOTWEAR & TEXTILES
U.S. CUSTOMS AND BORDER PROTECTION
SAN FRANCISCO, CA

ATTN: Kristen F. Tessenear, Supervisory Import Specialist

RE: Application for Further Review of Protest No. 3004–19–100105; Classification of Roofing Underlayments

DEAR CENTER DIRECTOR:

This is in reference to the Application for Further Review ("AFR") of Protest No. 3004–19–100105 ("Protest"), dated June 3, 2019, filed by the law firm of Cassidy Levy Kent, LLP, on behalf of FT Synthetics Inc. ("FT Synthetics" or "Protestant"), contesting U.S. Customs and Border Protection's ("CBP") tariff classification of roofing underlayments under the Harmonized Tariff Schedule of the United States ("HTSUS"). The Protest requests review of six multi-layered textile underlayments for use in roofing projects to protect the construction from water damage and moisture infiltrations while also providing a nonslip feature for those working on the roof construction. The instant AFR concerns fifty-five entries made between January 3, 2018 and May 17, 2018 at the Port of San Francisco. Our decision is set forth below.

FACTS:

There are six products covered in this AFR: Gold, Hydra, Platinum, Platinum HT-SA, Pro-20, and Silver.[1] Protestant divides these six products into two groups. The first group of roof underlayments are mechanically fastened products, which are fastened to roofs with hammer, nails and staples. The five types of mechanically fastened products are Gold, Silver, Platinum, Pro-20, and Hydra. The Pro-20, Gold, Silver and Platinum underlayments are of nearly identical construction and material. The visual layer of coating on the Pro-20, Gold, Silver, and Platinum is composed of polyolefin. The lamination layers on all products are composed of polyolefin. The Platinum HT-SA is similar to the above four products, however, it also contains additional layers laminated to the woven scrim, specifically, a layer of bitumen (adhesive) and a layer of release "paper" (or release liner), which serves merely as packaging to protect the qualities of the bitumen layer prior to adherence to the construction materials. The Hydra contains a nonwoven "nonslip" layer, laminated to a similar nonwoven layer. The Hydra does not contain a layer of coated woven scrim like that of all other five products. Protestant submits that all of the mechanically fastened products, except Hydra, are comprised of the following four layers:

[1] We use these names for the six products rather than the invoice descriptions listed in the Protest because FT Synthetics used more than one invoice description to designate the same product. Further, these names correspond to the six samples that were provided to CBP.

Layer	Materials	Weight g/m2 (% of total)
1	top spun bond nonwoven fabric	35–65 g/m2 33%-38%
2	middle (polyolefin) lamination layer	17–33 g/m2 16%-20%
3	woven textile (scrim) made of 3 mm strips of polypropylene	35–50 g/m2 29%-33%
4	back/bottom (polyolefin) coating layer	18–22 g/m2 13%-17%
	Total Weight:	105–170 g/m2

Protestant submits that Hydra is comprised of the following three layers:

Layer	Materials	Weight g/m2 (% of total)
1	top spun bond nonwoven fabric	365 g/m2 37%
2	middle (polyolefin) lamination layer	23 g/m2 13%
3	back/bottom spun bond nonwoven fabric	90 g/m2 51%
	Total Weight:	478 g/m2

The second group of roofing underlayments are peel-and-stick products, which contain their own adhesive material for fastening to roofs and therefore hammers, nails and staples are unnecessary. There is only one type of peel-and-stick product at issue, Platinum HT-SA, which is comprised of the following six layers:

Layer	Materials	Weight g/m2 (% of total)
1	top spun bond nonwoven fabric	65 g/m2
2	first (polyolefin) lamination layer	25 g/m2 2%
3	woven textile made of 3 mm strips of polypropylene	35 g/m2 4%
4	second (polyolefin) lamination layer	35 g/m2 4%
5	SBS (styrene-butadiene-styrene) modified bitumen blend	720 g/m2 76%
6	Release liner (polyethylene) film	35 g/m2 4%
	Total Weight:	915 g/m2

At the time of entry, FT Synthetics classified the instant roofing underlayments in subheadings 5603.13.00, 5603.14.90, and 6807.10.00, HTSUS. CBP conducted a verification of a preferential tariff treatment claim under the

North American Free Trade Agreement ("NAFTA") for one of the entries, which is not at issue here. During that verification, FT Synthetics notified CBP that the correct classification for that entry should have been subheading 6807.10.00, HTSUS, instead of subheading 5603.13.00, HTSUS. CBP issued a Notice of Action advising FT Synthetics of its decision to change the classification of the merchandise examined during verification from subheading 5603.13.00, HTSUS, to subheading 5602.90.60, HTSUS. CBP then liquidated the entries covered by Protest.

CBP classified and liquidated all of the six products under heading 5602, HTSUS, and specifically, in subheading 5602.90.6000, Harmonized Tariff Schedule of the United States Annotated ("HTSUSA"), which provides for "Felt, whether or not impregnated, coated, covered or laminated: Other: Other: Of man-made fibers." The duty rate applicable to this subheading is 6.3% *ad valorem*. However, we note that CBP classified the subject merchandise under heading 5602, HTSUS, as "felt" based on the description of the merchandise as provided in the commercial invoices and entry documents. CBP did not have a sample of the merchandise and relied solely on the description provided by Protestant in the commercial invoices. The commercial invoices described each of the six types of roofing underlayments as felt.

On October 7, 2020, CBP held a telephone conference with Protestant's counsel, the law firm of Cassidy Levy Kent, LLP, to discuss the tariff classification of the products in question. On October 15, 2020, counsel for Protestant provided a supplemental submission, explaining why the essential character of its Pro-20, Gold, Silver, and Platinum roofing underlayments is imparted by their nonwoven weather-protection and anti-slip top layer material and identifying previously published CBP ruling letter that allegedly classifies substantially similar nonwoven laminated roofing underlayments under heading 5603, HTSUS, as laminated nonwovens.

ISSUE:

What is the tariff classification of the Gold, Platinum, Silver, Pro-20, Platinum HT-SA, and Hydra roofing underlayment products?

LAW AND ANALYSIS:

We first note that the matter is protestable under 19 U.S.C. § 1514(a)(2) as a decision on classification. The protest was timely filed within 180 days of liquidation of the entry. *See* 19 U.S.C. § 1514(c)(3).

Classification under the HTSUS is made in accordance with the General Rules of Interpretation ("GRI"). GRI 1 provides that the classification of goods shall be determined according to the terms of the headings of the tariff schedule and any relative section or chapter notes. In the event that the goods cannot be classified solely on the basis of GRI 1, and if the headings and legal notes do not otherwise require, the remaining GRI may then be applied in order. Pursuant to GRI 6, classification at the subheading level uses the same rules, *mutatis mutandis*, as classification at the heading level.

The 2018 HTSUSA headings under consideration are the following:

5602:	Felt, whether or not impregnated, coated, covered or laminated:
	* * *
5602.90	Other:

	* * *
	Other:
5602.90.6000	Of man-made fibers
	* * *
5603:	Nonwovens, whether or not impregnated, coated, covered or laminated:
	Of man-made filaments:
	* * *
5603.13.00	Weighing more than 70 g/m2 but not more than 150 g/m2
5603.13.0090	Other
5603.14	Weighing more than 150 g/m2
5603.14.3000	Laminated fabrics
	* * *
	Other:
5603.94	Weighing more than 150 g/m2
	* * *
	Other:
5603.94.3000	Laminated fabrics
	* * *
5903	Textile fabrics impregnated, coated, covered or laminated with plastics, other than those of heading 5902
	* * *
5903.90	Other:
	Of man-made fibers:
	Other:
5903.90.2500	Other
	* * *
5907.00	Textile fabrics otherwise impregnated, coated or covered; painted canvas being theatrical scenery, studio back-cloths or the like:
	* * *
	Other:
	* * *
5907.00.6000	Of man-made fibers

* * * * *

Protestant asserts that the five mechanically fastening roofing underlayments are properly classified in heading 5603, HTSUS. Specifically, Protestant contends that, depending on the weight, these five underlayments are classified in either subheading 5603.13.0090, HTSUSA, which provides for "Nonwovens, whether or not impregnated, coated, covered or laminated: Of man-made filaments: Weighing more than 70 g/m2 but not more than 150 g/m2: Other" – or subheading 5603.14.3000, HTSUSA, which provides for "Nonwovens, whether or not impregnated, coated, covered or laminated: Of man-made filaments: Weighing more than 150 g/m2: Laminated fabrics."

Protestant claims that the five mechanically fastened roofing underlayment products are "nonwovens covered on one side with a women textile fabric, and [therefore the] nonwoven lawyer conveys their essential character."

Protestant further asserts that the peel-and-stick product at issue, Platinum HT-SA, should be classified in heading 5907, HTSUS, "because it is a textile (a nonwoven) coated or covered on one side with bitumen." Specifically, Protestant contends that the Platinum HT-SA is classified under subheading 5907.00.6000, HTSUSA, which provides for "Textile fabrics otherwise impregnated, coated or covered; painted canvas being theatrical scenery, studio back-cloths or the like: Other: Of man-made fibers."

Each of the six subject roofing underlay items Hydra, Platinum HT-SA, Gold, Platinum, Silver and Pro-20, consist of a top surface layer that features Protestant's patented "non-slip" GRIPSPOT Technology™. This GRIPSPOT Technology™ is represented by the top layer of nonwoven fabric and as the surface layer of each item is marketed as creating a "slip resistant top surface for superior walkability during installation." Because of the slip resistant capacity of the top surface layer, Protestant contends that the nonwoven fabric layer imparts the essential character for each roofing underlayment. This top surface layer is essential to creating a slip resistant surface during installation.

However, contrary to Protestant's position, each roofing underlay item is composed of multiple layers of varying materials, with each individual material providing its own unique contribution toward the functioning of roofing underlayment and their overall intended use. The nonwoven fabric layer, which features the "non-slip" GRIPSPOT Technology™, is laminated atop three or more underlying layers of different materials giving each individual roofing underlayment uniquely different capacities. For instance, the weight (or g/m^2) of spun bound nonwoven fabric for each of the six roofing underlay items is different. Hence, the layer of spun bound nonwoven fabric is not predominant for each item. Secondly, each of the roofing underlay items is composed of different percentages of spun bound nonwoven fabric relative to the materials of the underlying layers. As such each of layer of material warrant consideration. Thirdly, once the roofing installation is complete, the other the materials of the underlying layers contribute to the ventilation and water resistant functions of the product as a whole. Because each material used to make up the subject roofing underlayments is uniquely different, with each material being described by different HTSUS headings, these are composite goods. As composite goods made up of different constituent materials, each individual roofing underlayment is *prima facie* classifiable in two or more different headings. Accordingly, GRI 3(b) applies to determine classification.

GRI 3(b) provides, in relevant part, that composite goods consisting of different materials or are made up of different components, 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. The Explanatory Note to GRI 3(b) (VII) provides in relevant part, that: "The factor which determines essential character will vary as between different kinds of goods. It may, for example, be determined by the nature of the material or component, its bulk, quantity, weight or value, or by the role of a constituent material in relation to the use of the goods." Likewise, the "Essential character is that which is indispensable to the structure, core or condition of the article, i.e., what it is." *Home Depot USA, Inc. v. United States*, 427 F. Supp.

2d at 1293 quoting *A.N. Deringer, Inc. v. United States*, 66 Cust. Ct. 378, 383 (1971). The Court has also noted that "an essential character inquiry requires a fact intensive analysis." *Home Depot USA, Inc. v. United States*, 427 F. Supp. 2d 1278, 1284 (Ct. Int'l Trade 2006).

THE MECHANICALLY FASTENED ROOFING UNDERLAYMENT PRODUCTS

GOLD, PLATINUM, SILVER and PRO-20

In its October 2020 submission, Protestant asserts the following:

> "The "essential character" of the Pro-20, Gold, Silver, and Platinum products is imparted by their nonwoven top layer, because this layer is the only material that directly contributes to the combined weather protection and anti-slip characteristics of the products. The lamination of the nonwoven top layer to its polyolefin film further enhances its weather-protecting qualities, such that the laminated top layer material performs the core protective functions of these products."

Protest further contends that textile scrim layer is a subsidiary, non-protective material that is merely a structural reinforcement material that provides no independent weather protection or anti-slip qualities. Protestant adds that the weight of the materials should not be included when calculating the weight of the scrim reinforcement material.

In the case of the Gold, Platinum, Silver and Pro-20 (*hereinafter*, GPS & Pro 20), the component materials which facilitate its water resistant capacity is as vital to the product's function as is the top spun bond nonwoven layer which facilitates the "non-slip" " GRIPSPOT Technology™. For purposes of classification, the component materials of the GPS & Pro 20 layers implicate heading 5603, HTSUS, which provides, in relevant part for, nonwoven fabrics and heading 5903, HTSUS, which provides, in part, for textile fabrics that have been impregnated, coated, covered or laminated with plastics. As previously stated, because the GPS & Pro 20 are composed of multiple layers which are prima facie classifiable under more than one heading, GRI 3 and in particular, GRI 3(b) is required to determine classification.

By weight, the constituent fabrics of the Gold, Platinum, Silver and Pro-20, consist of a top spun bond nonwoven fabric layer which weighs 35–65 g/m2 totaling 33% to 38% of the total weight of the item. The second layer of the GPS & Pro 20 underlayments is a polyolefin lamination layer, which constitutes 16% to 20% of the total weight, followed by a woven textile (scrim) made of 3 mm strips of polypropylene, which constitutes 35% to 50% of the total weight. The final layer of the GPS & Pro 20 underlayments is a polyolefin coating layer making up 13% to 17% of the total weight. Each nonwoven layer is laminated to a scrim woven of polypropylene strip, which is coated with a polyolefin plastic material.

CBP has previously considered the classification of multi-layered roofing underlayment wherein the component materials were predominated by textile fabrics, which are coated or laminated with plastics. In New York Ruling Letter ("NY") N300457, dated October 2, 2018, CBP classified a multi-layered roofing underlayment in heading 5903, HTSUS. The roofing underlayment in NY N300457 consisted of four layers: a nonwoven polypropylene fabric, a polypropylene/polyethylene copolymer film bonding layer, a plain weave base fabric woven of polypropylene strip, and a black anti-slip coating layer composed chiefly of polyethylene. Based on the constituent materials, the coated

and laminated textile fabric layers predominated by weight and made up the majority of the constituent material of the whole.

Similarly, in NY N305964, dated September 25, 2019, CBP classified a similar multi-layered roofing underlayment in heading 5903, HTSUS. The multi-layered roofing underlayment in NY N305964 consisted of four layers: a spun-bond nonwoven polypropylene fabric, weighing approximately 18 g/m^2; a layer of polypropylene lamination, weighing approximately 20 g/m^2; a plain weave base scrim of polypropylene strip (in widths of 3.15 mm), weighing approximately 41 g/m^2; and a fourth layer of lamination material weighing 23 g/m^2. This is what we consider a bonded (or laminated) fabric. In NY N305964, the plastic coated woven scrim was bonded to a nonwoven layer; resulting in a component material classifiable in accordance with GRI 3. CBP determined that because the woven fabric was visibly coated with plastic it was explicitly provided for in heading 5903, HTSUS.

Protestant asserts that CBP should allow the protest, because in NY N186636, dated October 27, 2011, CBP classified a nonwoven roofing underlayment in heading 5603, HTSUS. Protestant argues that the top nonwoven layer of the "Delta Trella" roofing underlayment in NY N186636 imparted the essential character of the underlayment in its entirety. In asserting that the subject roofing underlayments are substantially similar to the "Delta Trella", Protestant argues that the subject roofing underlayment should also be classified heading 5603, HTSUS.

Contrary to Protestant's assertions regarding the "Delta Trella" roofing underlayment in NY N186636, none of the aforementioned FT Synthetics' roofing are similar to the "Delta Trella"; most emphatically, the subject Platinum HT-SA underlayment (discussed *infra*). The "Deltra Trella" did not contain a layer of coated woven scrim as is the case with the Gold, Platinum, Silver and Pro-20. Rather the "Deltra Trella" was composed of two nonwovens which were laminated together with a layer of plastic (i.e., bonded by a plastic layer). The fourth layer was a plastic monofilament "mesh" layer. The record reflects that the "mesh" layer, which measured approximately one quarter (1/4) inch thick was specifically designed to reduce the noise of rainfall. None of the FT Synthetic roofing materials has a plastic mesh layer and none of the layers was designed to reduce noise levels. The remaining styles in NY N186636, the Delta® -Maxx Titan, Delta® -Footing Barrier, Delta® -Vent S, and Delta® -Foxx, are substantially dissimilar in composition, number of layers and material than the subject roofing materials – with the exception of the Hydra.

Under our facts, the laminated and coated textile fabrics are the predominant fabrics of the Gold, Platinum, Silver and Pro-20 underlayments. The weight and representative percentages of the three laminated and coated textile fabrics surpass the remaining spun bond nonwoven component materials. Each nonwoven layer of the GPS & Pro 20 underlayment items is laminated to a scrim woven of polypropylene strip, which, itself, is coated with a polyolefin plastic material. Contrary to Protestant's assertions, the plastic coated textile scrim is not a subsidiary, non-protective material. Instead, the functionality of the textile scrim becomes apparent when laminated with the remaining layer of plastic. Once combined with the nonwoven plastic layer, it forms a much stronger material, which is nearly waterproof. As such, it is the plastic coatings combined with the woven textile scrim, which provide the desired result of this of water resistance. Moreover, the coated and laminated textile fabrics combine to make up a maximum of 70%

of the total weight of the combined component materials for the GPS & Pro 20 underlayments. Much like the multi-layered roofing underlayments classified in NY N300457 and NY N305964, the laminated and coated woven textile fabrics make up the bulk of the underlayment as a whole and are therefore the predominant fabrics.

Additionally, when assessing the role of the top spun bond nonwoven layer, with its "non-slip" technology and the role of the polyolefin and the polypropylene layers, we find that the polyolefin construction is more essential to the functioning of the roofing materials as a whole. The top spun bond nonwoven layer provides a non-slip surface which is beneficial during installation. According to FT Synthetics, the raised fibrous spots enhance traction and slip resistance for roofing contractors and installers. Likewise, the bottom polyolefin coating layer also provides underside slip resistance. The top layer nonwoven fabric is also vital to the 90-day Ultraviolet Light ("UV") protection. By contrast, the polyolefin construction provides the Gold, Platinum, Silver and Pro-20 roofing underlayment series with its water resistance capacity. The polyolefin construction consists of three layers: the (middle) polyolefin lamination layer, which is laminated to the woven textile, made strips of polypropylene, and the (bottom) polyolefin coating layer.

Lastly, according to FT Synthetics marketing, the polyolefin construction is 100% water resistant. The role served by the polyolefin construction's water resistance capacity is vital to protecting the underlying roof structure against water penetration. As with roofing materials generally, protecting against weather conditions and water (rain) penetration is a role that contributes to the very essence and purpose of a roof. Moreover, FT Synthetics marketing states the Pro-20 series provides a 20-year warranty. The 100% water resistance provided by the polyolefin construction likely contributes to that 20-year warranty. As between the two roles (non-slip and water resistance), the longevity and function of water resistance surpasses the temporary function of the non-slip top surface and the 90-day UV protection. Combined the three layers which make up the polyolefin construction are the predominant fabrics by weight and provide a role, which is vital to the long-term use and purpose of the roofing underlayment. Accordingly, we find that the laminated and coated textile fabrics impart the essential character of the Pro-20 Gold, Silver and Platinum roofing underlayment. Laminated and coated textile fabrics are provided for in heading 5903, HTSUS.

HYDRA

Unlike the other roofing underlayments, the three-layered Hydra consists of a top surface layer made up of a spun bound nonwoven fabric and a bottom layer that is also made up of a spun bound nonwoven fabric. The top spun bond nonwoven layer provides a non-slip surface which is beneficial during installation. The middle layer, which is a laminated woven polyolefin, is referred to by FT Synthetics as the "breathable barrier layer." As a whole, the Hydra is marketed as a "breathable" underlayment as it is said to prevent water penetration while helping to release trapped moisture. The middle laminated woven polyolefin layer contributes greatly to releasing trapped moisture making the product "breathable." Accordingly, the purpose and role of laminated woven polyolefin layer is essential to the overall functioning of the Hydra underlayment. On the other hand, the top surface layer enhances "superior walkability during installation." Of the two distinct functions, both serve significant roles. Yet, as a constituent material of the top and bottom

layers, the spun bound nonwoven fabric makes up 455 g/m ^{2} or 88% of the total weight of the Hydra compared to the 23 g/m ^{2} or 13% of which consists of laminated woven polyolefin. As such, the Hydra is predominantly made of spun bound nonwoven fabric.

The spun bound nonwoven fabric layers of the Hydra are described by the terms of heading 5603, HTSUS. In particular, the Explanatory Notes to heading 5603, HTSUS, explain, in relevant part, that "A nonwoven is a sheet or web of predominantly textile fibres oriented directionally or randomly and bonded. These fibres may be of natural or man-made origin." More importantly, Note 3 to Chapter 56, HTSUS, provides that, heading 5603, HTSUS, covers nonwovens, which are impregnated, coated, covered or laminated with plastics or rubber. The heading also includes nonwovens in which plastics or rubber forms the bonding substance. Inasmuch as the Hydra is predominantly composed of nonwoven fabric and such nonwoven fabric is specifically provided for in heading 5603, HTSUS, it is our position that the Hydra is classified in heading 5603, HTSUS.

THE PEEL-AND-STICK ROOFING UNDERLAYMENT PRODUCTS

PLATINUM HT-SA

As concerns the Platinum HT-SA underlayment, the HTSUS headings under consideration are heading 5603, HTSUS, and heading 5907, HTSUS. The six-layer Platinum HT-SA underlayment consists of a top layer of nonwoven "non-slip" fabric, which is classifiable under heading 5603, HTSUS, as a nonwoven fabric. On the other hand, the bottom layer of the Platinum HT-SA is a styrene-butadiene-styrene (SBS) modified bitumen blend material, which is classifiable under heading 5907, HTSUS, as an otherwise coated fabric. The top layer of nonwoven fabric is important because it creates a non-slip surface during installation. By contrast, the peel-and-stick SBS bitumen layer is designed to be self-adhering, and therefore does not require the use of nails or staples during installation. Because both roles are vital to the overall use of the Platinum HT-SA underlay, both HTSUS headings warrant equal consideration.

The role of the nonwoven fabric (i.e., the "non-slip" GRIPSPOT Technology™) is critical to the marketing of the product as it provides a slip-resistant surface during the installation of the roofing materials. The top layer nonwoven fabric is also vital to the 180-day Ultraviolet Light ("UV") protection. Likewise, the self-adhering peel-and-stick SBS bitumen blend material is essential to the product's overall function and intended use. In addition to being self-adhering, the SBS bitumen blend material presents as a rubberized asphalt – which also contributes to the slip-resistant capacity of the Platinum HT-SA (during installation). Both constituent layers are marketed by FT Synthetics as being advantages during installation. Combined the constituent layers are marketed as inhibiters to mold growth. Yet, the bitumen based peel-and-stick layer makes up 76% of the total weight of the Platinum HT-SA underlayment; while the top layer of nonwoven fabric only makes up 7% of the total weight of the Platinum HT-SA underlayment. Similarly, the construction of the SBS bitumen blend layer provides permanent low temperature (40 degrees Fahrenheit) and high temperature flow stability (up to 240° F.) that contributes, along with the other layers, to protection against rain, standing water, snow and ice. The SBS bitumen blend material serves multiple functions, which include slip-resistance, self-adhering installation and protection against weather conditions. The SBS

bitumen blend material also predominates by weight (76% of the total weight). Accordingly, we find that SBS bitumen blend material imparts the essential character of the Platinum HT-SA roofing underlayment.

This determination is consistent with CBP's position concerning substantially similar roofing underlayment. For instance, in NY N284719, dated April 4, 2017, CBP classified a similar peel-and-stick, multi-layered roofing underlayment under heading 5907, HTSUS. The self-adhering roofing underlayment in NY N284719 consisted of a top surface layer of nonwoven spun bond polypropylene fabric and two bottom layers of polymer-modified bitumen and a polyethylene release liner. The polymer modified bitumen layer with adhesive, with a polyethylene based release liner made 800 g/m ^{2}, of the total weight of the roofing underlayment; while the nonwoven spun bound polypropylene fabric only 35 g/m ^{2} . Based on value, weight and predominance of the constituent material, CBP classified the roofing underlayment according to the predominant self-adhering bitumen component material.

HOLDING:

By application of GRI 3(b), the Pro-20, Gold, Silver, Platinum roofing underlayments are classified in heading 5903, HTSUS. Specifically, they are classified in subheading 5903.90.2500, HTSUSA, which provides for: Textile fabrics impregnated, coated, covered or laminated with plastics, other than those of heading 5902: Other: Of man-made fibers: Other: Other. The duty rate is 7.5% *ad valorem*.

By application of GRI 3(b), the Hydra roofing underlayment is classified in heading 5603, HTSUS, and specifically under subheading 5603.94.3000, HTSUSA, which provides for: Nonwovens, whether impregnated, coated, covered or laminated: Other: Weighing more than 150 g/m ^{2}: Other: Laminated fabrics. The duty rate is Free.

By application of GRI 3(b), the Platinum HT-SA roofing underlayment is classified in heading 5907, HTSUS, and specifically in subheading 5907.00.6000, HTSUSA, which provides for: Textile fabrics otherwise impregnated, coated or covered... Other: Of man-made fibers. The duty rate is Free.

You are instructed to Deny the protest, except to the extent reclassification of the merchandise as indicated above results in a net duty reduction and partial allowance. In accordance with Sections IV and VI of the CBP Protest/Petition Processing Handbook (HB 3500–08A, December 2007, pp. 24 and 26), you are to mail this decision, together with the CBP Form 19, to the protestant no later than 60 days from the date of this letter.

In accordance with Sections IV and VI of the CBP Protest/Petition Processing Handbook (HB 3500–08A, December 2007, pp. 24 and 26), you are to mail this decision, together with the CBP Form 19, to the Protestant no later than 60 days from the date of this letter. Any re-liquidation of the entry or entries in accordance with the decision must be accomplished prior to mailing the decision.

Sixty days from the date of the decision, the Office of Trade, Regulations and Rulings will make the decision available to CBP personnel, and to the public on the Customs Rulings Online Search System ("CROSS") at https://rulings.cbp.gov/ which can be found on the U.S. Customs and Border Protection website at http://www.cbp.gov and other methods of public distribution.

Sincerely,
For

CRAIG. T. CLARK,
Director
Commercial and Trade Facilitation Division

HQ H328910
OT:RR:CTF:FTM H328910 PJG
CATEGORY: Classification
TARIFF NO.: 5903.90.30

MR. TODD SCHUHARDT
UNITED BAGS INC.
1355 N. WARSON ROAD
ST. LOUIS, MISSOURI 63132

RE: Revocation of NY N325833, NY N250680, NY N250876, NY I80730, NY I88153, NY E86552, HQ 956946, HQ 957915, HQ 957850, and HQ 958462; Modification of HQ H310928, HQ H305437, NY M87513, NY M83066, NY L87626, NY L85660, NY L80040, NY A85760, NY 889417, NY 892226, and HQ 086130; Tariff Classification of Coated or Laminated Woven Textile Fabrics of Strip of an Apparent Width Not Exceeding 5 mm; Revoked or Modified by Operation of Law

DEAR MR. SCHUHARDT:

This is in reference to New York Ruling Letter ("NY") N325833, dated May 25, 2022, issued to you concerning the tariff classification of a laminated box sleeve woven of polypropylene strip of an apparent width not exceeding 5 mm, under the Harmonized Tariff Schedule of the United States Annotated ("HTSUSA").

In NY N325833, U.S. Customs and Border Protection ("CBP") classified the laminated box sleeve woven of polypropylene strip in heading 5903, HTSUS, and specifically in subheading 5903.90.2500, HTSUSA, which provides for "Textile fabrics impregnated, coated, covered or laminated with plastics, other than those of heading 5902: Other: Of man-made fibers: Other: Other." We have reviewed NY N325833 and find it to be in error regarding the tariff classification at the eight-digit level.

We have also reviewed NY N250680, dated March 25, 2014, and NY N250876, dated March 25, 1994, which concerned the tariff classification of roofing underlayment materials composed of coated woven textile fabrics of strip of an apparent width not exceeding 5 mm in width. For the reasons set forth below, we are revoking NY N325833, NY N250680, and NY N250876.

For the reasons set forth below, we are also modifying the following two decisions: Headquarters Ruling Letter ("HQ") H310928, dated June 11, 2021, and HQ H305437, dated December 18, 2020. HQ H310928 was a decision on an Application for Further Review ("AFR") of protest number 3004–20–100247 with respect to the tariff classification of four styles of roofing underlayments, specifically, the Roof Pro, ProTec 120, ProTec 160, and ProTec 200. In HQ H310928, CBP determined that the essential character of the four products was imparted by the layer of woven plastic-coated scrim of strip of an apparent width not exceeding 5 mm. The modification for HQ H310928 concerns the legal analysis applied and the tariff classification determination made at the eight-digit level for the four products, which were originally classified in subheading 5903.90.25, HTSUS. The identified articles are still properly classified subject to GRI 3(b) and 6.

HQ H305437 was an AFR decision concerning the tariff classification of six styles of roofing underlayments subject to protest number 3004–19–100105. Only four of those styles are subject to modification, specifically, the Pro-20, Gold, Silver, and Platinum styles. In HQ H305437, CBP determined that the laminated and coated textile fabrics imparted the essential character of these

four products. The nonwoven layer of the underlayment was laminated to a coated scrim woven of 3 mm polypropylene strip. The modification concerns the legal analysis applied and the tariff classification determination made at the eight-digit level for the four styles of roofing underlayments, which were originally classified in subheading 5903.90.25, HTSUS. The identified articles are still properly classified subject to GRI 3(b) and 6.

We note that under *S.F. Newspaper Printing Co. v. United States*, 9 Ct. Int'l Trade 517, 620 F. Supp. 738 (1985), the decisions on the merchandise which was the subject of protest numbers 3004–20–100247 and 3004–19–100105 were final and binding on both the protestant and CBP. Therefore, while we may review the law and analysis of HQ H310928 and HQ H305437, any decision taken herein do not impact the entries subject to those decisions.

Finally, this ruling identifies sixteen rulings issued by CBP prior to 2007 that are revoked or modified by operation of law. Rulings concerning the tariff classification of coated or laminated woven textile fabrics of strip of an apparent width not exceeding 5 mm that were issued prior to 2007 are revoked or modified by operation of law because they pre-date the amendment to Note 1 to Chapter 54, HTSUS, which effectively precluded "[s]trip and the like of heading 5404 or 5405" from "man-made fibers." We have identified eleven rulings that meet these terms.

The following nine rulings are modified by operation of law: NY M87513, dated October 24, 2006 (with respect to Sample #1); NY M83066, dated May 5, 2006 (with respect to style EH63–060403); NY L87626, dated September 16, 2005 (with respect to style "Vietnam 7 x 7 CIS"); NY L85660, dated June 15, 2005 (with respect to items "C" and "D"); NY L80040, dated October 28, 2004 (with respect to Samples "E,"[1] "F" and "G"); NY A85760, dated August 14, 1996 (with respect to the laminated woven bulk container bag fabric); NY 892226, dated December 1, 1993 (with respect to the first item); NY 889417, dated September 1, 1993 (with respect to Sample #2); and HQ 086130, dated March 1, 1990 (with respect to "Sample 2 from the second letter").

The following seven rulings are revoked by operation of law: NY I80730[2] , dated May 7, 2002, NY I88153, dated November 25, 2002; NY E86552, dated September 8, 1999; HQ 956946, dated April 6, 1995; HQ 957915, dated July 28, 1995; HQ 957850, dated July 5, 1995; and HQ 958462, dated November 2, 1995.

FACTS:

In NY N325833, the fabric at issue was tubular laminated fabric constructed wholly of woven polypropylene strip. You indicated to CBP that the purpose of the product is to provide rigidity when placed over corrugated

[1] With respect to Sample "E", we have provided the additional reasons for modification in the Law and Analysis section below.

[2] NY I80730 concerned Samples #1, 2, and 3 consisted of woven polypropylene textile strips of an apparent width not exceeding 5 mm. Samples #1 and 2 were coated/laminated on one side. Sample #3 was coated/laminated on one side with polypropylene plastic film that was not visible to the naked eye. Samples #1 and 2 were classified in subheading 5903.90.2500, HTSUSA. Sample #3 was classified under heading 5407, HTSUS, and specifically in subheading 5407.20.0000, HTSUSA, which provides for "Woven fabrics of synthetic filament yarn, including woven fabrics obtained from materials of heading 5404: Woven fabrics obtained from strip or the like." We have reviewed NY I80730 and find it to be in error regarding the tariff classification all three products. For the reasons set forth in this ruling, NY I80730 is revoked by operation of law.

cardboard boxes at food packaging plants. You further indicated that the fabric is laminated on one surface with a plastic film composed of polypropylene and polyethylene and that the film is applied to the fabric after being extruded and is then pressed and cooled to permanently bond the materials. You also provided that the polypropylene strip measures 2.3 mm in width. CBP determined that the fabric was laminated in accordance with the requirements of Note 3 to Chapter 59, HTSUS, and that the product is classified under heading 5903, HTSUS, and specifically, in subheading 5903.90.2500, HTSUSA.

ISSUE:

Whether the fabric is classified as a product of subheading 5903.90.2500, HTSUSA, which provides for "Textile fabrics impregnated, coated, covered or laminated with plastics, other than those of heading 5902: Other: Of man-made fibers: Other: Other," or as a product of subheading 5903.90.30, HTSUS, which provides for "Textile fabrics impregnated, coated, covered or laminated with plastics, other than those of heading 5902: Other: Other."

LAW AND ANALYSIS:

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

The 2023 HTSUS provisions under consideration are as follows:

3921	Other plates, sheets, film, foil and strip, of plastics:
	Cellular:
	* * *
3921.19.00	Of other plastics
*	* *
5407	Woven fabrics of synthetic filament yarn, including woven fabrics obtained from materials of heading 5404:
	* * *
5407.20.00	Woven fabrics obtained from strip or the like
*	* *
5903	Textile fabrics impregnated, coated, covered or laminated with plastics, other than those of heading 5902:
	* * *
5903.90	Other:
	* * *
	Of man-made fibers:
	* * *
	Other:
	* * *

5903.90.2500	Other
5903.90.30	Other:

Note 1 to Chapter 54, HTSUS, provides as follows:

> Throughout the tariff schedule, the term "man-made fibers" means staple fibers and filaments of organic polymers produced by manufacturing processes, either:
>
> (a) By polymerization of organic monomers to produce polymers such as polyamides, polyesters, polyolefins or polyurethanes, or by chemical modification of polymers produced by this process (for example, poly-(vinyl alcohol) prepared by the hydrolysis of poly(vinyl acetate)); or
>
> (b) By dissolution or chemical treatment of natural organic polymers (for example, cellulose) to produce polymers such as cuprammonium rayon (cupro) or viscose rayon, or by chemical modification of natural organic polymers (for example, cellulose, casein and other proteins, or alginic acid), to produce polymers such as cellulose acetate or alginates.
>
> The terms "synthetic" and "artificial", used in relation to fibers, mean: synthetic: fibers as defined at (a); artificial: fibers as defined at (b). Strip and the like of heading 5404 or 5405 are not considered to be man-made fibers.
>
> The terms "man-made", "synthetic" and "artificial" shall have the same meanings when used in relation to "textile materials".

Note 1 to Chapter 59, HTSUS, provides as follows:

> Except where the context otherwise requires, for the purposes of this chapter the expression "textile fabrics" applies only to the woven fabrics of chapters 50 to 55 and headings 5803 and 5806, the braids and ornamental trimmings in the piece of heading 5808 and the knitted or crocheted fabrics of headings 6002 to 6006.

Note 3 to Chapter 59, HTSUS, provides as follows:

> For the purposes of heading 5903, "textile fabrics laminated with plastics" means products made by the assembly of one or more layers of fabrics with one or more sheets or film of plastics which are combined by any process that bonds the layers together, whether or not the sheets or film of plastics are visible to the naked eye in the cross-section.

The Harmonized Commodity Description and Coding System Explanatory Notes ("EN") constitute the "official interpretation of the Harmonized System" at the international level. *See* 54 Fed. Reg. 35127, 35128 (Aug. 23, 1989). While neither legally binding nor dispositive, the EN "provide a commentary on the scope of each heading" of the HTSUS and are "generally indicative of [the] proper interpretation" of these headings. *See id.*

The EN to 54.04 provides, in relevant part, as follows:

> This heading covers:
>
> (1) Synthetic monofilament. These are filaments extruded as single filaments. They are classified here only if they measure 67 decitex or more and do not exceed 1 mm in any cross-sectional dimension. Monofilaments of this heading may be of any cross-sectional configuration and may be obtained not only by extrusion but by lamination or fusion.

(2) Strip and the like, of synthetic textile materials. The strips of this heading are flat, of a width not exceeding 5 mm, either produced as such by extrusion or cut from wider strips or from sheets.

The fabric at issue in NY N325833 was properly classified in heading 5903, HTSUS. Heading 5903, HTSUS, provides for "Textile fabrics impregnated, coated, covered or laminated with plastics, other than those of heading 5902." Note 3 to Chapter 59, HTSUS, defines "textile fabrics laminated with plastics" as "products made by the assembly of one or more layers of fabrics with one or more sheets or film of plastics which are combined by any process that bonds the layers together, whether or not the sheets or film of plastics are visible to the naked eye in the cross-section." The product in NY N325833 was a textile fabric laminated with plastics in accordance with Note 3 to Chapter 59, HTSUS, because it was a textile fabric, composed of polypropylene strips woven together, assembled with a plastic film (composed of polypropylene and polyethylene) and bonded together by pressing and cooling the materials. Note 1 to Chapter 59, HTSUS, states, in relevant part, that the term "'textile fabrics' applies only to the woven fabrics of chapters 50 to 55."[3] In accordance with Note 1 to Chapter 59, HTSUS, the polypropylene strips are considered "textile fabric" because the strips are woven. Moreover, they are classified in Chapter 54, HTSUS, specifically, under heading 5404, HTSUS, which provides, in relevant part, for "strip and the like (for example, artificial straw) of synthetic textile materials of an apparent width not exceeding 5 mm" because the strip measures 2.33 mm in width.

In NY N325833, the fabric was also properly classified at the six-digit level under subheading 5903.90, HTSUS, which provides for "Textile fabrics impregnated, coated, covered or laminated with plastics, other than those of heading 5902: Other." This basket provision provides for textile fabrics of heading 5903, HTSUS, that are not impregnated, coated, covered or laminated with poly(vinyl chloride) (subheading 5903.10, HTSUS) or with polyurethane (subheading 5903.20, HTSUS). The subject fabric is laminated with polypropylene and polyethylene and, therefore, is properly classified in the basket provision, specifically, subheading 5903.90, HTSUS.

NY N325833 is being revoked because of the classification of the subject fabric at the eight-digit level in subheading 5903.90.25, HTSUSA. The subject merchandise in NY N325833 is not constructed of cotton and therefore is not classifiable in subheading 5903.90.10, HTSUS. The subject merchandise is also not classifiable under the provisions for "Of man-made fibers" (5903.90.15–5903.90.25, HTSUS) because the subject fabric consists of strips of heading 5404, HTSUS, and Note 1 to Chapter 54, HTSUS, which defines the term "man-made fibers" for the entirety of the tariff schedule, states that "[s]trip and the like of heading 5404 or 5405 are not considered to be man-made fibers." Accordingly, the subject fabric cannot be classified as a fabric of man-made fibers in subheading 5903.90.2500, HTSUSA, or in any of the other man-made fiber provisions under subheading 5903.90, HTSUS. The subject merchandise is therefore classified in the basket provision that provides for fabrics of other fibers, specifically, in subheading 5903.90.30, HT-

[3] Note 9 to Section XI, HTSUS, also provides that "[t]he woven fabrics of chapters 50 to 55 include fabrics consisting of layers of parallel textile yarns superimposed on each other at acute or right angles. These layers are bonded at the intersections of the yarns by an adhesive or by thermal bonding." Note 9 to Section XI, HTSUS, is not pertinent to the subject merchandise in NY N325833.

SUS, which provides for "Textile fabrics impregnated, coated, covered or laminated with plastics, other than those of heading 5902: Other: Other."

With regard to NY I80730, it is revoked by operation of law with respect to Samples #1–3 for the aforementioned reasons and additionally, for Sample #3, it is revoked by operation of law because of a change to Note 3 to Chapter 59, HTSUS, that was made in January 2022. Specifically, effective January 27, 2022, Note 3 to Chapter 59, HTSUS, states as follows:

> For the purposes of heading 5903, "textile fabrics laminated with plastics" means products made by the assembly of one or more layers of fabrics with one or more sheets or film of plastics which are combined by any process that bonds the layers together, whether or not the sheets or film of plastics are visible to the naked eye in the cross-section.

The introduction of this new language indicates that the sheets or film of plastic are not required to be seen with the naked eye for the product to be considered "textile fabrics laminated with plastics" for purposes of classification in heading 5903, HTSUS. In NY I80730, CBP classified Sample #3 under heading 5407, HTSUS, rather than under heading 5903, HTSUS, because the plastic film was not visible to the naked eye. Under the new Note 3 to Chapter 59, HTSUS, Sample #3 is classified under heading 5903, HTSUS, and specifically in subheading 5903.90.30, HTSUS.

NY L80040 is being modified with respect to Samples "E," "F" and "G." Samples "F" and "G" were originally classified in subheading 5903.90.25, HTSUS, and the reasoning for modifying their classification is consistent with the analysis provided above concerning Note 1 to Chapter 54, HTSUS. Sample "E" was originally classified in subheading 3921.19.00, HTSUS, which provides for "Other plates, sheets, film, foil and strip, of plastics: Cellular: Of other plastics." With respect to Sample "E," NY L80040 indicated that the "resulting material has been visibly coated on one side with what you indicate is a microporous (cellular) polyethylene plastics film." The classification of Sample "E" is modified by operation of law because of the amendment to Note 1 to Chapter 54, HTSUS, as explained above, and also because Note 10 to Chapter 39, HTSUS, indicates in relevant part that the expression "plates, sheets, film, foil and strip" in heading 3921, HTSUS, "applies only to ...film...and strip (other than those of chapter 54)." The strip in Sample "E" is within the scope of the type of strip classified in heading 5404, HTSUS, and is therefore excluded from heading 3921, HTSUS. Sample "E" is instead classified in subheading 5903.90.30, HTSUS.

HOLDING:

By application of GRI 1 and 6, the laminated box sleeve woven of polypropylene strip is classified under heading 5903, HTSUS, and specifically, in subheading 5903.90.30, HTSUS, which provides for "Textile fabrics impregnated, coated, covered or laminated with plastics, other than those of heading 5902: Other: Other." The 2023 column one, general rate of duty is 2.7 percent *ad valorem*.

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

EFFECT ON OTHER RULINGS:

NY N325833, dated May 25, 2022, NY N250680, dated March 25, 2014, NY N250876, and dated March 25, 2014, are REVOKED.

HQ H310928, dated June 11, 2021, is MODIFIED with respect to the legal analysis applied at the eight-digit level in the tariff classification of four styles of roofing underlayments, specifically, the Roof Pro, ProTec 120, ProTec 160, and ProTec 200. The identified articles are still classified subject to GRI 3(b) and 6.

HQ H305437, dated December 18, 2020, is MODIFIED with respect to the legal analysis applied at the eight-digit level in the tariff classification of four styles of roofing underlayments, specifically, the Pro-20, Gold, Silver and Platinum styles. The identified articles are still classified subject to GRI 3(b) and 6.

NY I80730, dated May 7, 2002, NY I88153, dated November 25, 2002, NY E86552, dated September 8, 1999, HQ 956946, dated April 6, 1995, HQ 957915, dated July 28, 1995, HQ 957850, dated July 5, 1995, and HQ 958462, dated November 2, 1995, are REVOKED by operation of law.

NY M87513, dated October 24, 2006 (with respect to Sample #1), NY M83066, dated May 5, 2006 (with respect to style EH63–060403), NY L87626, dated September 16, 2005 (with respect to style "Vietnam 7 x 7 CIS"), NY L85660, dated June 15, 2005 (with respect to items "C" and "D"), NY L80040, dated October 28, 2004 (with respect to Samples "E," "F" and "G"), NY A85760, dated August 14, 1996 (with respect to the laminated woven bulk container bag fabric), NY 889417, dated September 1, 1993 (with respect to Sample #2), NY 892226, dated December 1, 1993 (with respect to the first item in the clear material only), and HQ 086130, dated March 1, 1990, (with respect to the item identified as "Sample 2 from the second letter"), are MODIFIED by operation of law.

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

Sincerely,

YULIYA A. GULIS,
Director
Commercial and Trade Facilitation Division

CUSTOMS BROKER PERMIT USER FEE PAYMENT FOR 2024 AND ANNOUNCEMENT OF eCBP PORTAL PAYMENT OPTION

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

ACTION: General notice.

SUMMARY: This document provides notice to customs brokers that the annual user fee that is assessed for each permit held by a customs broker, whether it may be an individual, partnership, association, or corporation, is due no later than February 9, 2024. Pursuant to fee adjustments required by the Fixing America's Surface Transportation Act (FAST Act) and the U.S. Customs and Border Protection (CBP) regulations, the customs broker permit user fee payable for calendar year 2024 will be $174.80. CBP is also announcing that customs brokers may pay the fee electronically via the electronic Customs and Border Protection (eCBP) portal.

DATES: Payment of the 2024 Customs Broker Permit User Fee is due no later than February 9, 2024.

FOR FURTHER INFORMATION CONTACT: Mohammad O. Qureshi, Chief, Broker Management Branch, Office of Trade, (202) 909–3753, or *mohammad.o.qureshi@cbp.dhs.gov.*

SUPPLEMENTARY INFORMATION:

Background

Customs Broker Permit User Fee Payment for 2024

Pursuant to section 111.96 of title 19 of the Code of Federal Regulations (CFR) (19 CFR 111.96(c)), U.S. Customs and Border Protection (CBP) assesses an annual user fee for each customs broker permit granted to an individual, partnership, association, or corporation. The CBP regulations provide that this fee is payable each calendar year for a national permit held by a customs broker and must be paid by the due date published annually in the **Federal Register**. *See* 19 CFR 24.22(h) and (i); 19 CFR 111.96(c).

Section 24.22 of title 19 of the CFR (19 CFR 24.22) sets forth the terms and conditions for when fees for certain services, including specific customs user fees, are required. The specific customs user fee amounts that appear in 19 CFR 24.22 are not the actual fees but represent the base year amounts that are subject to adjustment each fiscal year in accordance with the Fixing America's Surface Transportation Act (FAST Act) (Pub. L. 114–94, December 4, 2015). Section

32201 of the FAST Act amended section 13031 of the Consolidated Omnibus Budget Reconciliation Act (COBRA) of 1985 (19 U.S.C. 58c) by requiring the Secretary of the Treasury to adjust certain customs COBRA user fees and corresponding limitations to reflect certain increases in inflation. Paragraph (k) of section 24.22 of title 19 of the CFR (19 CFR 24.22(k)) sets forth the methodology to adjust fees for inflation and to determine the change in inflation, including the factor by which the fees and limitations will be adjusted, if necessary.

Customs brokers are subject to an annual customs broker permit user fee calculated using the base year amount in appendix A to 19 CFR part 24, as adjusted by the terms in 19 CFR 24.22(k). *See* 19 U.S.C. 58c(a)(7) and 19 CFR 24.22(h). In accordance with 19 CFR 24.22, CBP determines annually whether an adjustment to the fees and limitations is necessary and publishes a **Federal Register** notice specifying the amount of the fees and limitations for each fiscal year. On July 28, 2023, CBP published a **Federal Register** notice, entitled COBRA Fees to be Adjusted for Inflation in Fiscal Year 2024 (CBP Dec. 23–08), which announced, among other fee adjustments, that the annual customs broker permit user fee will increase to $174.80 for calendar year 2024. *See* 88 FR 48900.

Thus, as required by 19 CFR 24.22, CBP provided notice in the **Federal Register** of the annual fee amount at least 60 days prior to the date that the payment is due for each customs broker national permit. This document notifies customs brokers that, for calendar year 2024, the due date for payment of the annual customs broker permit user fee is February 9, 2024. If a customs broker fails to pay the annual customs broker permit user fee by February 9, 2024, the national permit is revoked by operation of law. *See* 19 CFR 111.45(b) and 111.96(c).

Announcement of eCBP Portal Payment Option

On October 18, 2022, CBP published a final rule titled "Modernization of the Customs Broker Regulations" in the **Federal Register** (87 FR 63267), which announced the deployment of the electronic Customs and Border Protection (eCBP) portal, an online system for processing electronic payments of licensed customs broker fees and submissions, and stated that CBP would announce additional eCBP functionalities, including an enhancement allowing the payment of annual permit user fees, in the **Federal Register**. Accordingly, in this document, CBP is announcing the deployment of new eCBP functionality allowing the payment of the annual customs broker permit user fee. CBP anticipates that the eCBP portal will be open for the collection of annual customs broker permit user fee payments starting on November 29, 2023.

With this new functionality, customs brokers may either submit the fee through the eCBP portal or submit the fee at the processing

Center, as defined in 19 CFR 111.1, in accordance with the remittance procedures in 19 CFR 24.22(i). The eCBP portal streamlines the payment process, allows for easy collection of fees, and offers customs brokers the flexibility and convenience to pay licensed customs broker fees easily and effectively. Thus, CBP encourages customs brokers to pay the annual customs broker permit user fee electronically via the eCBP portal. Customs brokers who wish to use the eCBP portal, located on CBP's website or at *https://e.cbp.dhs.gov/brokers/#/home,* must create a *Login.gov* account as a first-time user. Instructions and training resources, such as user and quick reference guides, for customs brokers on how to create a *Login.gov* account and how to use the eCBP portal can be found on CBP's website.

JOHN P. LEONARD,
Acting Executive Assistant Commissioner,
Office of Trade.

U.S. Court of International Trade

Slip Op. 23–166

KUMAR INDUSTRIES, Plaintiff, v. UNITED STATES, Defendant.

Before: Timothy C. Stanceu, Judge
Court No. 21–00622

[Sustaining an agency decision concluding an administrative review of an antidumping duty order]

Dated: November 22, 2023

Lizbeth R. Levinson, Fox Rothschild LLP, of Washington, D.C., for plaintiff. With her on the briefs were *Ronald M. Wisla* and *Brittney R. Powell*.

Kelly Geddes, 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 *Brian M. Boynton*, Principal Deputy Assistant Attorney General, *Patricia M. McCarthy*, Director, and *Claudia Burke*, Assistant Director, Commercial Litigation Branch. Of counsel on the brief was *Jared M. Cynamon*, Attorney, Office of the Chief Counsel for Trade Enforcement & Compliance, U.S. Department of Commerce.

OPINION

Stanceu, Judge:

Plaintiff contests a determination the International Trade Administration, U.S. Department of Commerce ("Commerce" or the "Department") issued to conclude the first administrative review of an antidumping duty ("AD") order on imported glycine from India. In the contested determination, Commerce assigned Kumar an antidumping duty rate of 13.61%.

Before the court is Kumar's motion for judgment on the agency record, submitted under USCIT Rule 56.2. The court denies the motion and sustains the Department's determination.

I. BACKGROUND

A. The Parties to this Action

Kumar, an Indian manufacturer and exporter of glycine, was a mandatory respondent in the underlying antidumping duty investigation and in the first administrative review. Summons 1 (Dec. 10, 2021), ECF No. 1; Compl. ¶ 4 (Jan. 10, 2022), ECF No. 8. Defendant is the United States.

B. The Contested Determination

Commerce published the determination at issue (the "Final Results") in 2021 to conclude an antidumping duty administrative review on glycine from India (the "subject merchandise"). *Glycine From India: Final Results of Antidumping Duty Administrative Review; 2018–2020*, 86 Fed. Reg. 62,508 (Int'l Trade Admin. Nov. 10, 2021) ("*Final Results*").

The Final Results incorporated by reference an explanatory document, the "Final Issues and Decision Memorandum." *Glycine from India: Issues and Decision Memorandum for Final Results of Antidumping Duty Administrative Review; 2018–2020* (Int'l Trade Admin. Nov. 4, 2021), P.R. Doc. 200 ("*Final I&D Mem.*").[1]

C. Proceedings before Commerce

Commerce concluded an antidumping duty investigation of glycine from India in 2019, determining that the subject merchandise was being sold in the United States at less than fair value. *Glycine From India: Final Determination of Sales at Less Than Fair Value*, 84 Fed. Reg. 18,487 (Int'l Trade Admin. May 1, 2019). After the U.S. International Trade Commission (the "ITC") determined that imports of glycine were injuring the domestic glycine industry, *Glycine from China, India, and Japan; Determinations*, 84 Fed. Reg. 29,238 (Int'l Trade Comm'n June 21, 2019), Commerce issued an amended final affirmative less than fair value determination ("Amended Final LTFV Determination") and issued antidumping duty orders, including an order on glycine from India (the "Order"). *Glycine From India and Japan: Amended Final Affirmative Antidumping Duty Determination and Antidumping Duty Orders*, 84 Fed. Reg. 29,170 (Int'l Trade Admin. June 21, 2019).[2] In the Amended Final LTFV Determination, Commerce assigned Kumar a weighted average dumping margin of 13.61%. *Id.*, 84 Fed. Reg. at 29,171.

In 2020, Commerce initiated the first administrative review of the Order, designating the period of review ("POR") as October 31, 2018 to May 31, 2020. *Initiation of Antidumping and Countervailing Duty Administrative Reviews*, 85 Fed. Reg. 47,731, 47,734 (Int'l Trade Admin. Aug. 6, 2020). Commerce issued "Preliminary Results" and an

[1] Documents in the Joint Appendix (Dec. 5, 2022), ECF Nos. 35, 36, 37, 41 (Conf.), 38, 39, 42 (Public) are cited as "P.R. Doc __." All citations are to the public versions of these documents.

[2] The scope of the antidumping duty order includes "glycine," an amino acid, "at any purity level or grade" and "all forms of crude or technical glycine including, but not limited to, sodium glycinate, glycine slurry and any other forms of amino acetic acid or glycine." *Glycine From India and Japan: Amended Final Affirmative Antidumping Duty Determination and Antidumping Duty Orders*, 84 Fed. Reg. 29,170, 29,172 (Int'l Trade Admin. June 21, 2019).

accompanying "Preliminary Decision Memorandum" for the first administrative review in 2021, in which Commerce preliminarily assigned Kumar an antidumping duty rate of 13.61%. *Glycine From India: Preliminary Results of Antidumping Duty Administrative Review; 2018–2020*, 86 Fed. Reg. 35,733, 35,734 (Int'l Trade Admin. July 7, 2021) ("*Prelim. Results*"); *Glycine from India: Decision Memorandum for Preliminary Results of Antidumping Duty Administrative Review; 2018–2020* at 5–8 (Int'l Trade Admin. June 30, 2021), P.R. Doc. 164 ("*Prelim. Decision Mem.*"). Commerce assigned the same 13.61% rate in the Final Results. *Final Results*, 86 Fed. Reg. at 62,509; *Final I&D Mem.* at 35–36.

D. Proceedings before the Court

Plaintiff commenced this action on January 10, 2022. Summons; Compl. Before the court is Kumar's motion for judgment on the agency record under USCIT Rule 56.2 and accompanying brief. Pl.'s 56.2 Mot. for J. on the Agency R. (July 27, 2022), ECF Nos. 23 (Conf.), 24 (Public); Mem. of Points and Authorities in Supp. of Pl.'s 56.2 Mot. for J. on the Agency R. (July 27, 2022), ECF Nos. 23 (Conf.), 24 (Public) ("Kumar's Br.").

Defendant United States opposes Kumar's motion. Def.'s Resp. in Opp'n to Pl.'s Mot. for J. Upon the Agency R. (Sept. 26, 2022), ECF Nos. 25 (Conf.), 26 (Public). Plaintiff replied to defendant's opposition. Pl.'s Reply Br. (Nov. 18, 2022), ECF No. 32.

II. DISCUSSION

A. Jurisdiction and Standard of Review

The court exercises jurisdiction according to section 201 of the Customs Courts Act of 1980, 28 U.S.C. § 1581(c),[3] pursuant to which the court reviews actions commenced under section 516A of the Tariff Act of 1930 ("Tariff Act"), *as amended*, 19 U.S.C. § 1516a, including actions contesting final affirmative determinations that Commerce issues to conclude administrative reviews of antidumping duty orders. *See id*. §§ 1516a(a)(2)(B)(iii), 1675.

In reviewing an agency determination, the court "shall hold unlawful any determination, finding, or conclusion found . . . to be unsupported by substantial evidence on the record, or otherwise not in accordance with law." *Id*. § 1516a(b)(1). Substantial evidence refers to "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *SKF USA, Inc. v. United States*, 537

[3] Citations herein to the United States Code are to the 2018 edition. Citations to the Code of Federal Regulations are to the 2021 edition.

F.3d 1373, 1378 (Fed. Cir. 2008) (quoting *Consol. Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)).

B. Antidumping Duties under the Tariff Act

The Tariff Act provides for an "antidumping duty" to be assessed on imported merchandise if Commerce determines that the merchandise is being sold at less than fair value and if the ITC determines that an industry in the United States is materially injured or is threatened with material injury by reason of that merchandise or by reason of sales (or the likelihood of sales) of that merchandise for importation. 19 U.S.C. § 1673. The statute provides that the antidumping duty shall equal the "amount by which the normal value exceeds the export price (or the constructed export price) for the merchandise." *Id*. In the ordinary circumstance, "[t]he normal value of the subject merchandise shall be the price . . . at which the foreign like product is first sold . . . for consumption in the exporting country, in the usual commercial quantities and in the ordinary course of trade." *Id*. §§ 1677b(a)(1)(A), (B)(i).

C. Derivation of the 13.61% Rate in the Final Results

The 13.61% antidumping duty rate Commerce assigned Kumar in the Final Results was not a dumping margin calculated from Kumar's sales during the POR. Instead, Commerce assigned Kumar a rate based on what it described as "total adverse facts available," or "total AFA." This term is a shorthand reference to the use of "facts otherwise available" under section 776(a) of the Tariff Act, 19 U.S.C. § 1677e(a), when applied with "adverse inferences" under section 776(b) of the Tariff Act, 19 U.S.C. § 1677e(b). *See, e.g.*, *Glycine from India: Preliminary Application of Adverse Facts Available to Kumar Industries* at 1 (Int'l Trade Admin. June 30, 2021), P.R. Doc. 167 ("*Prelim. AFA Mem*."). Commerce resorted to what it termed "total adverse facts available" based on several findings, including a finding that necessary information was not on the record and that Kumar failed to cooperate when it did not act to the best of its ability in responding to the Department's requests for information.

The dispute in this case is over the issue of whether Commerce lawfully invoked its authority under the facts otherwise available and adverse inference provisions. Kumar contests the various factual findings upon which Commerce relied, Kumar's Br. 4, arguing specifically that "Kumar provided all information requested in the form and manner requested in the initial questionnaire response and four supplemental questionnaire responses," *id*. (citing its responses to the Department's five questionnaires). Kumar maintains that Commerce should have reviewed Kumar's sales and calculated an actual

weighted average dumping margin based on its sales. *Id*. at 13.

As an adverse inference, Commerce chose a rate equal to the estimated weighted average dumping margin it calculated for Kumar in the Amended Final LTFV Determination, which was 13.61%. *Final I&D Mem*. at 34–35.

D. The "Affiliation" Issue in the First Review

"Affiliated persons" are defined by section 771(33) of the Tariff Act to include: "[m]embers of a family;" "[a]ny officer or director of an organization and such organization;" "[p]artners;" and "[a]ny person who controls any other person and such other person." 19 U.S.C. § 1677(33). "In determining whether control over another person exists, within the meaning of section 771(33) of the Act, the Secretary will consider the following factors, among others: Corporate or family groupings; franchise or joint venture agreements; debt financing; and close supplier relationships." 19 C.F.R. § 351.102(b)(3).

An affiliation of a foreign exporter or producer with its home market customers or its input suppliers affects significantly the Department's method of calculating normal value, and therefore, the dumping margin. For example, transactions "between affiliated persons may be disregarded" as transactions occurring outside the "ordinary course of trade." 19 U.S.C. §§ 1677b(a)(1)(B)(i) and (f)(2), 1677(15). The statute further provides that "sales at less than cost of production" may be disregarded when determining normal value, *id*. § 1677b(b), including "in the case of a transaction between affiliated persons involving the production by one of such persons of a major input to the merchandise" where the "amount represented as the value of such input is less than the cost of production of such input," *id*. § 1677b(f)(3) (describing the "major input rule"). Thus, to determine a proper dumping margin for Kumar, Commerce would need to be informed of, and conduct an inquiry on, indicia of possible affiliation between Kumar and its home market customers and its input suppliers.

It is uncontested that in the first review, "a substantial portion of Kumar's home market sales" were made to a single company (to which the parties refer as "Company A"), and another single company ("Company B") "accounted for a substantial portion of Kumar's purchases of inputs necessary to produce glycine."[4] Kumar's Br. 2; *see Final I&D Mem*. at 29 ("Company A accounts for a substantial quantity and value of Kumar's home market sales and Company B accounts for a substantial quantity and value of Kumar's purchases of major inputs.") (footnotes omitted).

[4] The names of the companies are claimed by Kumar, and treated by the parties, as business proprietary information.

Commerce found that Kumar, in its responses to the Department's initial questionnaire, "did not identify two companies, Company A and Company B, as its affiliates," "reported its home market sales to Company A as sales to an unaffiliated home market customer," and "reported its purchases of major inputs from Company B as purchases from an unaffiliated supplier." *Final I&D Mem*. at 28 (footnotes omitted). Kumar does not dispute these findings and maintains, instead, that "[a] review of the record shows that Kumar responded unequivocally and consistently throughout the proceeding that Kumar was not affiliated with Companies A and B" and that "[t]here is no ambiguity with respect to this point." Kumar's Br. 9; *see also id*. at 13 ("Kumar never waivered [*sic*] from its firm representation that it was not affiliated with Companies A and B."). Kumar argues, further, that it "reported all of its U.S. sales, home market sales and all cost data necessary to calculate the antidumping margin," *id*. at 13, including "explanations regarding all major elements required to accurately report the cost of production of glycine," *id*. at 13–14.

In supplemental questionnaires, Commerce inquired further about possible affiliations between Kumar (which is a partnership) and Companies A and B. Commerce stated that "[i]n our second supplemental questionnaire, we asked Kumar whether Companies A and B are affiliated with Kumar" and that "[i]n response, Kumar denied its affiliation with Companies A and B" and "explained that its partners sold their shares of Companies A and B prior to the POR." *Prelim. Decision Mem*. at 6 (footnotes omitted); *Second Suppl. Questionnaire* (Int'l Trade Admin. Feb. 1, 2021), P.R. Doc. 117. Kumar reported, specifically, that its partners previously had owned Company A and had jointly owned Company B but had sold their ownership in both companies before the start of the POR. *Kumar's Second Suppl. Questionnaire Resp*. at 6 (Feb. 24, 2021), P.R. Doc. 125 ("*Second Suppl. Questionnaire Resp*."); *see also* Kumar's Br. 10. Commerce stated that "[t]o support its explanation, Kumar provided retirement deeds showing that its partners sold their shares of Companies A and B before the POR." *Prelim Decision Mem*. at 6 (footnote omitted); *Second Suppl. Questionnaire Resp*. at Exs. A-18, A-18(a) ("*Retirement Deeds*"). In response to the Department's request, Kumar also provided Commerce a list of its partners and their shares in other companies. *Second Suppl. Questionnaire Resp*. at Ex. A-13.

Commerce made further inquiries in a third supplemental questionnaire. Commerce asked that Kumar "describe the nature of" any income received by Kumar's partners "from any of the companies for which you provided a retirement deed" and, as to any such income, "explain why they continued to receive income from any of these

companies." *Third Suppl. Questionnaire* at 3 (Int'l Trade Admin. Apr. 1, 2021), P.R. Doc. 137. Kumar responded that none of the partners "have received any income from any of the companies" for which it provided retirement deeds and that "[h]ence, this question is not applicable." *Kumar's Third Suppl. Questionnaire Resp*. at 3 (Apr. 22, 2021), P.R. Doc. 146 ("*Third Suppl. Questionnaire Resp*."). In response to the Department's request, Kumar provided copies of tax returns of the partners. *Id*. at Exs. A-21.1–A-21.4.

Commerce sought information on the nature of the income reported on the submitted copies of tax return documents in a fourth supplemental questionnaire. *Fourth Suppl. Questionnaire* (Int'l Trade Admin. May 10, 2021), P.R. Doc. 151. Commerce focused in particular on Kumar's main partner (who is identified in the submissions as "Partner 2," and for whose identity Kumar claims business proprietary treatment). Kumar's Br. 11; *see Kumar's Section A Questionnaire Response* at Ex. A-4 (Oct. 20, 2020), P.R. Doc. 35. Kumar previously had reported that Partner 2 was also formerly a partner in Companies A and B but informed Commerce that Partner 2 had retired from the partnerships of Company A and Company B before the start of the POR. *Second Suppl. Questionnaire Resp*. at 6; *Retirement Deeds*. Kumar submitted a response to the fourth supplemental questionnaire on May 24, 2021. *Kumar's Fourth Suppl. Questionnaire Resp*., P.R. Doc. 157 ("*Fourth Suppl. Questionnaire Resp*.").

E. Kumar's Inadequate Explanations Pertaining to Income-Tax-Related Documentation for Partner 2

The issue presented by this case arises principally from copies of documents pertaining to Partner 2's income tax return for the 2020–2021 Indian tax assessment year (April 1, 2020 to March 31, 2021), which Kumar submitted to Commerce as an exhibit to its response to the third supplemental questionnaire. *Third Suppl. Questionnaire Resp*. at Ex. A-21.1. The documentation consists of a one-page document and three pages of computations. Commerce concluded from this document (and Partner 2's tax return for the previous tax assessment year) that Partner 2's "tax returns show that during the POR, this partner received income from Companies A and B as a partner of these two companies." *Final I&D Mem*. at 29. The three-page computation Kumar submitted, in response to the third supplemental questionnaire, for tax assessment year 2020–2021 (which overlapped the POR by two months, April and May of 2020), identifies significant amounts of income directly identified as having been sourced from Company A and from Company B. *See id*.; *Prelim. AFA Mem*. at 1–2 (explaining that "[Partner 2's] 2020–2021 indi-

vidual tax return" submitted in response to the third supplemental questionnaire "shows that he received share incomes from [Company A] and [Company B].").[5]

Kumar's response to the fourth supplemental questionnaire did not dispute that the three-page computation identifies income sourced from Companies A and B. Instead, Kumar maintained in the response that these amounts were listed in error and that the "amounts were in fact interest on the loans and payment of consideration for transfer of shares" due upon the November 6, 2007 retirement from Company A[6] and the May 11, 2013 retirement from Company B.[7] *Fourth Suppl. Questionnaire Resp*. at 4. The response explained, further, that the "tax consultant" of Partner 2 "has wrongly classified the interest income from advance and capital due in [Company A] and [Company B] as income from operation of the partnership in their draft income tax computation for the years 2019–2020 and 2020–2021." *Id*. Kumar submitted a different three-page document as an exhibit to its response to the fourth supplemental questionnaire that it labeled "Final Computation of Partner 2." *Id*. at Ex. A-28. In contrast to the "draft computation," the "final computation" does not list any income from Company A or Company B but lists an amount of "share" income and an amount of "interest" income and identifies the source for both as the transferee of the shares.

Commerce made several findings related to the affiliation issue in support of its use of "facts otherwise available" under 19 U.S.C. § 1677e(a), including that Kumar "withheld requested information, failed to provide information by the established deadlines, and significantly impeded this administrative review within the meaning of sections 776(a)(2)(a)-(c) of the [Tariff] Act [19 U.S.C. §§ 1677e(a)(2)(A)–(C)]." *Final I&D Mem*. at 28. The court need not consider whether these findings are supported by substantial record

[5] The tax return documentation for Partner 2's 2019–2020 taxes that Kumar submitted as an exhibit to its response to the third supplemental questionnaire does not identify specifically any income from Company A or Company B. Commerce speculated that a relationship to Companies A and B existed from certain income listed on a three-page computation for which no sources were specified.

[6] Kumar reported that Partner 2 retired from Company A on November 6, 2007. *Kumar's Fourth Suppl. Questionnaire Resp*. at 4 (May 24, 2021), P.R. Doc. 157. However, the Retirement Deeds indicate that Partner 2 retired from Company A on November 6, 2012. *Kumar's Second Suppl. Questionnaire Resp*. at Exs. A-18, A-18(a) (Feb. 24, 2021), P.R. Doc. 125.

[7] A term in the retirement deeds appears to be inconsistent with the deferred payments, as noted in the final Issues & Decision Memorandum. *Glycine from India: Issues and Decision Memorandum for Final Results of Antidumping Duty Administrative Review; 2018–2020* at 29 (Int'l Trade Admin. Nov. 4, 2021), P.R. Doc. 200 (citing *Glycine from India: Preliminary Application of Adverse Facts Available to Kumar Industries* (Int'l Trade Admin. June 30, 2021), P.R. Doc. 167)).

evidence, for it is sufficient for the purpose of invoking section 776(a) of the Tariff Act that, as Commerce also found, "necessary information is not available on the record." *Id*. (citing 19 U.S.C. § 1677e(a)(1)). The "necessary information" Commerce sought but did not obtain—in particular, in the fourth supplemental questionnaire—was information needed to allow Commerce to determine whether Kumar was affiliated with Company A or Company B during the POR. Commerce could reach a valid finding on that issue only if it knew whether Partner 2 "received income from Companies A and B as a partner of these two companies." *Final I&D Mem*. at 29; *see* 19 U.S.C. § 1677(33). But Commerce lacked the determinative information it needed to resolve that issue.

Notably, the record lacked the information needed to reconcile the record evidence of the termination of the ownership interests of Partner 2 in Companies A and B with the conflicting information presented by the "draft computation" Kumar submitted for this partner in response to the third supplemental questionnaire. Instead of providing a reconciliation, Kumar's response to the fourth supplemental questionnaire raised more questions than it answered. For example, if, as Kumar told Commerce, Partner 2's tax consultant erroneously prepared the draft computation to include the income from Company A and Company B, then Commerce was left to question how this tax consultant could have come into possession of this detailed income information pertaining to Companies A and B and erroneously attribute it to Partner 2. Commerce reasonably could infer from Kumar's explanation that Kumar possessed, or at least readily could have obtained, the answer to that question.

The court need not conclude that substantial evidence supported the Department's finding that Partner 2 actually received the income on the "draft computation" from Companies A and B during the POR. *Final I&D Mem*. at 29. It is sufficient for purposes of 19 U.S.C. § 1677e(a)(1) that information Commerce needed to reconcile the conflicting record information was not provided to it despite its inquiries. The missing information was "necessary information" within the meaning of that term as used in 19 U.S.C. § 1677e(a)(1).

The court also concludes that substantial evidence supports the Department's finding that Kumar's inadequate responses to the Department's inquiries on the affiliation issue "amount to a failure to cooperate to the best of its ability in responding to a request for information, within the meaning of section 776(b) of the Act [19 U.S.C. § 1677e(b)(1)]." *Final I&D Mem*. at 29. A party responding to a request for information must exert a "maximum effort to provide

Commerce with full and complete answers." *Nippon Steel Corp. v. United States*, 337 F.3d 1373, 1382 (Fed. Cir. 2003). Kumar's responses to the Department's requests for information on the affiliation issue fell short of this standard. Kumar reasonably should have known that its responses to the Department's bringing the conflicting information to Kumar's attention were insufficient and, on the whole, unsatisfactory.

Kumar's argument that that the record contained all information necessary for Commerce to calculate a dumping margin is belied by the presence on the record of the conflicting, and unreconciled, evidence pertaining to the affiliation issue. As explained above, the method of calculating a margin would vary significantly depending on whether or not Kumar was affiliated with Company A or Company B, or both. At the end of the questionnaire process, and even by the end of the review, Commerce was left with no way to resolve the affiliation issue factually in accordance with the record evidence. As a result, Commerce could not calculate an individual dumping margin for Kumar based on record evidence pertaining to the POR.

Kumar's argument that it fully cooperated in responding to the Department's information requests, such that Commerce lacked an evidentiary basis to invoke the "adverse inference" provision, is also unconvincing. Commerce reasonably could infer from the record evidence that the information needed to resolve the affiliation issue either was in Kumar's possession or was readily available to it.

III. CONCLUSION

The court holds that the resort to what Commerce termed "total adverse facts available" was supported by the evidentiary record and 19 U.S.C. § 1677e. As discussed in the foregoing, Commerce permissibly found that the record lacked necessary information and that Kumar did not act to the best of its ability to respond to the Department's efforts to obtain that information. Therefore, the court will deny Kumar's motion for judgment on the agency record, sustain the Final Results, and enter judgment accordingly.

Dated: November 22, 2023
New York, New York

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

Slip Op. 23–167

KAPTAN DEMIR ÇELIK ENDUSTRISI VE TICARET A.Ş., Plaintiff, and ÇOLAKOĞLU DIŞ TICARET A.Ş. and ÇOLAKOĞLU METALURJI A.Ş., Plaintiff-Intervenors, v. UNITED STATES, Defendant, and REBAR TRADE ACTION COALITION, BYER STEEL GROUP, INC., COMMERCIAL METALS COMPANY, GERDAU AMERISTEEL U.S. INC., NUCOR CORPORATION, and STEEL DYNAMICS, INC., Defendant-Intervenors.

Before: Gary S. Katzmann, Judge
Court No. 21–00565

[The court sustains the Department of Commerce's remand redetermination.]

Dated: November 27, 2023

Andrew T. Schutz, Grunfeld Desiderio Lebowitz Silverman & Klestadt, LLP, of Washington, D.C., for Plaintiff Kaptan Demir Celik Endustrisi ve Ticaret A.S.

Matthew M. Nolan, *Jessica R. DiPietro* and *Leah N. Scarpelli*, ArentFox Schiff LLP, of Washington, D.C., for Plaintiff-Intervenors Çolakoğlu Diş Ticaret A.Ş. and Çolakoğlu Metalurji A.Ş.

Sosun Bae, Senior 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 *Brian M. Boynton*, Principal Deputy Assistant Attorney General, *Patricia M. McCarthy*, Director, *L. Misha Preheim*, Assistant Director. Of counsel on the briefs was *W. Mitch Purdy*, Attorney, Office of the Chief Counsel for Trade Enforcement and Compliance, U.S. Department of Commerce, of Washington, D.C.

John R. Shane, *Alan H. Price*, and *Maureen E. Thorson*, Wiley Rein, LLP, of Washington, D.C., for Defendant-Intervenors Rebar Trade Action Coalition, Byer Steel Group, Inc., Commercial Metals Company, Gerdau Ameristeel U.S. Inc., Nucor Corporation, and Steel Dynamics, Inc.

OPINION

Katzmann, Judge:

The court returns to litigation arising from a challenge to the Department of Commerce's ("Commerce") 2018 administrative review of the countervailing duty order on rebar[1] from Turkey. *See Steel Concrete Reinforcing Bar from the Republic of Turkey: Final Results of Countervailing Duty Administrative Review and Rescission, in Part; 2018*, 86 Fed. Reg. 53279 (Dep't Com. Sept. 27, 2021), P.R. 288 ("*AR Results*"). Now before the court is a challenge to Commerce's *Final Results of Redetermination Pursuant to Court Remand* (Dep't Com. July 24, 2023), ECF No. 66 ("*Remand Results*"). Resolving this

[1] "Rebar," which is a portmanteau of "reinforcing" and "bar," refers to rods of steel that are embedded into concrete as a means of strengthening the resulting structure. *See Rebar*, Merriam-Webster Dictionary, https://www.merriam-webster.com/dictionary/rebar (last updated Nov. 4, 2023); *Reinforced Concrete*, Merriam-Webster Dictionary, https://www.merriamwebster.com/dictionary/reinforced%20concrete (last visited Nov. 9, 2023).

challenge implicates the trade law applications of the proverbial wisdom that one man's trash is another's treasure: on remand, Commerce determined that a shipbuilder's sale of steel scrap to an affiliated rebar manufacturer did not warrant the attribution of Turkish government subsidies from seller to buyer. The court concludes that this redetermination is both adequately explained and supported by substantial evidence on the record, and accordingly sustains the *Remand Results* in their entirety.

BACKGROUND

I. Legal Background

Commerce is directed by statute to assess countervailing duties on the basis of the countervailable subsidies provided "directly or indirectly" with respect to "the manufacture, production, or export of a class or kind of merchandise imported . . . into the United States." 19 U.S.C. § 1671(a)(1). As this provision is silent on the question of how Commerce is to attribute countervailable subsidies to products, *see id.*, Commerce in 1998 promulgated a series of gap-filling regulations on the subject. Relevant here is Commerce's regulation with respect to "Input suppliers," which reads as follows:

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

19 C.F.R. § 351.525(b)(6)(iv) (emphasis added).

This provision leaves open the question of when the production of an input product is "primarily dedicated" to the production of a downstream product. Commerce provided the following illustrations in the preamble to the *Federal Register* notice in which it promulgated § 351.525:

> The main concern we have tried to address is the situation where a subsidy is provided to an input producer whose production is dedicated almost exclusively to the production of a higher value added product—the type of input product that is merely a link in the overall production chain. This was the case with stumpage subsidies on timber that was primarily dedicated to

> lumber production and subsidies to semolina primarily dedicated to pasta production. We believe that in situations such as these, the purpose of a subsidy provided to the input producer is to benefit the production of both the input and downstream products.

Countervailing Duties, 63 Fed. Reg. 65348, 65401 (Dep't Com. Nov. 25, 1998) ("*Preamble*") (citations omitted).

Commerce also laid out the following contrasting scenario:

> Where we are dealing with input products that are not primarily dedicated to the downstream products, however, it is not reasonable to assume that the purpose of a subsidy to the input product is to benefit the downstream product. For example, it would not be appropriate to attribute subsidies to a plastics company to the production of cross-owned corporations producing appliances and automobiles.

Id.

As Commerce's reference to illustrative examples in its explanation suggests, Commerce's "primarily dedicated" analyses are highly fact-specific and defy attempts to trace universally applied decisional principles. *See Nucor Corp. v. United States* ("*Nucor I*"), 46 CIT __, __, 600 F. Supp. 3d 1225, 1238 (2022). In some cases Commerce has focused on the nature of the business entity producing the input product, finding production of that product not to be "primarily dedicated" to the downstream product where the entity's business is largely dedicated to matters other than production of the product. *See, e.g.*, *Certain Glass Containers from the People's Republic of China: Final Affirmative Countervailing Duty Determination*, 85 Fed. Reg. 31141 (Dep't Com. May 22, 2020) and accompanying Issues and Decisions Mem. cmt. 12 (declining to attribute subsidies for glass machinery where an input supplier's business license listed "several kinds of business activities beyond merely glass equipment manufacturing, such as rubber machinery and winery equipment"). In other cases Commerce has analyzed the nature of the input product itself, finding production of the input not to be "primarily dedicated" to the downstream product where the input product has many other potential applications besides incorporation into the downstream

product.[2] *See Final Affirmative Countervailing Duty Determination and Final Negative Critical Circumstances Determination: Certain Lined Paper Products from Indonesia*, 71 Fed. Reg. 47174 (Dep't Com. Aug. 16, 2006) and accompanying Issues and Decisions Mem. cmt. 3 (finding that production of pulp logs was primarily dedicated to production of downstream paper products because "pulp logs are used to make pulp which, in turn, is used to make paper"). This court will uphold such differing modes of "primarily dedicated" analysis—and indeed differing conclusions with respect to the same input product in different cases, see *Nucor I*, 46 CIT at __, 600 F. Supp. 3d at 1238—so long as Commerce's conclusion in each case rests on substantial evidence and Commerce reasonably explains the basis for its decision. *See NMB Sing. Ltd. v. United States*, 557 F.3d 1316, 1319 (Fed. Cir. 2009)); *see also Save Domestic Oil, Inc. v. United States*, 357 F.3d 1278, 1283–84 (Fed. Cir. 2004) (citing *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 42 (1983)); *see also SKF USA Inc. v. United States*, 630 F.3d 1365, 1373 (Fed. Cir. 2011) ("When an agency changes its practice, it is obligated to provide an adequate explanation for the change." (citing *Motor Vehicle Mfrs.*, 463 U.S. at 42)).

II. Procedural Background

The court presumes familiarity with the background of this case as discussed in the court's review of challenges to the AR Results. See Kaptan Demir Celik Endustrisi ve Ticaret A.S. v. United States

[2] Commerce's differing focus from analysis to analysis can be (at least partially) explained by the appearance in § 351.525(b)(6)(iv) of the phrase "production of the input product." This phrase could conceivably refer to two distinct things. First, it could refer to the general act of producing the input product, as in the sentence "production of textiles involves fibers and dye." This reading invites a focus on inherent attributes of the input product, whereby any production of that product would necessarily be primarily dedicated to a downstream product. But "production of the input product" could also conceivably refer to a specific supplier's actual process of producing an input product, as in the sentence, "my neighbor's backyard production of chemical solvents causes a nuisance." This reading invites a focus on attributes of the supplier's specific act of producing the input product when determining whether input production is primarily dedicated to downstream production.

Commerce's examples in the *Preamble* appear to resolve this ambiguity in favor of the first reading, as Commerce singles out a "type of input product" and seems to suggest (for example) that semolina production necessarily implies primary dedication to the downstream production of pasta. *See Preamble*; *see also Gujarat Fluorochemicals Ltd. v. United States*, 47 CIT __, __, 617 F.Supp.3d 1328, 1336–37 (2023). On the other hand, the *Preamble* also states that Commerce's "main concern" is with subsidies provided to "an input producer whose production is dedicated almost exclusively to the production of a higher value added production." *Preamble*. This grammatically definite focus on the actions of the input's producer appears to support the second reading.

These readings are not necessarily mutually exclusive, and the question of which is more compelling is not squarely before the court. *See infra* Part II.A. The court simply notes the conundrum as a means of sketching out the background against which Commerce relies on multiple factors in its "primarily dedicated" determinations. *Remand Results* at 8, 17–18.

("Kaptan I"), 47 CIT __, 633 F. Supp. 3d 1276 (2023). In that proceeding, Plaintiff Kaptan Demir Celik Endustrisi ve Ticaret A.S. ("Kaptan"), a Turkish producer and exporter of rebar, brought a motion for judgment on the agency record on the basis of two challenges to Commerce's determinations in the *AR Results*. *Id.* at 1281. Kaptan specifically challenged Commerce's determination that subsidies received by Nur Gemicilik ve Ticaret A.S. ("Nur"), a shipbuilding company affiliated with Kaptan, were properly attributed to Kaptan on the basis of a cross-owned input supplier relationship as defined by 19 C.F.R. § 351.525(b)(6)(iv).[3] Defendant the United States ("the Government") and domestic producers, Defendant-Intervenors Rebar Trade Action Coalition, Byer Steel Group, Inc., Commercial Metals Company, Gerdau Ameristeel U.S. Inc., Nucor Corporation, and Steel Dynamics, Inc., ("Domestics"), opposed Kaptan's motion. The court concluded that Commerce had failed to properly explain how Nur's production of steel scrap, which Kaptan bought and melted down to produce rebar, constituted "production of the input product [that] is primarily dedicated to production of the downstream product." *Id.* at 1280, 1285 (quoting 19 C.F.R. § 351.525(b)(6)(iv)). The court remanded Commerce's finding for "further explanation and review." *Kaptan I*, 633 F. Supp. 3d at 1285.

On remand, Commerce initially indicated that it would reaffirm its determination that Nur is Kaptan's cross-owned input supplier. *Draft Results of Redetermination Pursuant to Court Remand* (Dep't. Com. June 26, 2023), P.R.R. 1 ("*Draft Remand Results*").[4] But following the submission of comments from interested parties on the *Draft Remand Results*, *see* Letter from Kaptan to G. Raimondo, Sec'y of Com., re: Kaptan Comments on Draft Remand (July 7, 2023), P.R.R. 6 ("Kaptan's Cmts. on *Draft Remand Results*"); Letter from Domestics to G. Raimondo, Sec'y of Com., re: Comments on Draft Results of Redetermination (July 7, 2023), P.R.R. 5 ("Domestics' Cmts. on *Draft Remand Results*"), Commerce changed course and determined that Nur is not Kaptan's cross-owned input supplier with respect to steel scrap. *See Remand Results*. Commerce explained that it "reexamined the facts on the record of this proceeding" and changed its subsidy attribution

[3] Kaptan also challenged Commerce's finding that Nur's participation in a land rent exemption program with the Turkish government was a countervailable subsidy within the meaning of section 771 of the Tariff Act, 19 U.S.C. § 1677. *See Kaptan I*, 633 F. Supp. 3d at 1281–82. Because the court remanded for further explanation on the threshold question of whether to attribute Nur's subsidies to Kaptan, the court did not address this challenge. *See id.* at 1285 n.4. Nor is that challenge at issue on remand.

[4] "P.R.R." and "C.R.R." respectively refer to the Public Remand Record and Confidential Remand Record in this case. *See* Pub. Remand Joint App'x., October 6, 2023, ECF No. 74; Confidential Remand Joint App'x., October 6, 2023, ECF No. 73.

determination "upon further consideration of those facts in conjunction with Commerce's regulations." *Id.* at 1.

Domestics now challenge these *Remand Results*. Def.-Inters.' Cmts. on Remand Redetermination, Aug. 23, 2023, ECF No. 68 ("Domestics' Br."). Kaptan and the Government oppose this challenge, *see* Pl.'s Reply Cmts. in Support of Remand Redetermination, Sept. 22, 2023, ECF No. 70 ("Kaptan's Br."); Def.'s Resp. to Cmts. on Remand Redetermination, Sept. 22, 2023, ECF No. 72 ("Gov't Br.").

III. Factual Background

Commerce adopted a multifactor approach in preparing the *Remand Results* at issue in this case. Drawing on these past determinations (among others), Commerce provided the following set of factors as a "general outline of our considerations in our examination of the record in determining whether to attribute Nur's subsidies to Kaptan":

1. Whether an input supplier produced the input;
2. Whether the input could be used in the production of downstream products including subject merchandise, regardless of whether the input is actually used for the production of the subject merchandise;
3. Whether the input is merely a link in the overall production chain, as stumpage is to lumber production or semolina is to pasta production as described in the *Preamble*, or whether the input is a common input among a wide variety of products and industries and it is not the type of input that is merely a link in the overall production chain, as plastic is to automobiles;
4. Whether the downstream producers in the overall production chain are the primary users of the inputs produced by the input producer and whether the production of the inputs by the input producers is exclusively for the overall production chain; and
5. Examining a company's business activities to assess whether an input supplier's production is "dedicated almost exclusively to the production of a higher value-added product" in the manner suggested by the *Preamble* such that the purpose of any subsidy provided to the company would be "to benefit the production of both the input and downstream products."

Remand Results at 12–13 (bullets in original presented here as ordinals).[5]

Commerce determined on the basis of these factors that Nur's production of steel scrap was not primarily dedicated to Kaptan's production of rebar. *Remand Results* at 16–19. On Factors 1 and 2, which Commerce described as "threshold factor[s]," Commerce acknowledged that Nur supplied Kaptan with all of its steel scrap and that steel scrap generally can be used in the production of rebar.[6] *Id.* at 16. But on Factor 3, Commerce noted that unprocessed steel scrap is "a common input among a variety of products and industries and used in a variety of production processes." *Id.* at 17. Commerce explained that Nur's steel scrap could be distinguished on this basis from the examples of semolina and stumpage—which are limited in their downstream applications to pasta and lumber, respectively. *Id.*

On Factor 5, Commerce noted that Nur's primary business activity is shipbuilding, not steel scrap production. *Id.* at 19. Commerce explained that it would accordingly be inappropriate to consider Nur's production of ships as "primarily dedicated" to Kaptan's production of rebar, as ships are "much further downstream" than rebar. *Id.* "Nur's business activity," Commerce concluded, "is not 'dedicated almost exclusively to the production of a higher value-added product' in the manner suggested by the *Preamble*." *Id.*

Commerce's ultimate conclusion can be summarized as resting on two grounds: first, that unprocessed steel scrap can be used for many purposes and is thus not the type of input product that is inherently "primarily dedicated" to a single downstream product. Second, that the steel scrap that Nur provided to Kaptan was merely a byproduct of Nur's main business activity of shipbuilding—in other words, that Nur's production of steel scrap was "primarily dedicated" to producing ships and not rebar.

JURISDICTION AND STANDARD OR REVIEW

The court has jurisdiction over this action pursuant to 28 U.S.C. § 1581(c) and 19 U.S.C. § 1516a(a)(2)(A)(i)(I), (a)(2)(B)(ii). Under § 1516a(b)(l)(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," *see also Huaiyin Foreign Trade Corp. v. United States*, 322 F.3d 1369, 1374 (Fed. Cir. 2003) (quoting 19 U.S.C. § 1516a(b)(l)(B)(i)), "which

[5] These factors are identical to those on which Commerce based its analysis in the *Draft Remand Results. Draft Remand Results* at 12.

[6] As Commerce noted in the *Draft Remand Results*, there is "no debate among the parties" as to these points. *Draft Remand Results* at 13.

includes compliance with the court's remand order," *see SMA Surfaces, Inc. v. United States*, 47 CIT __, __, Slip Op. 23–137, at 5 (Sept. 20, 2023); *see also Xinjiamei Furniture (Zhangzhou) Co. v. United States*, 38 CIT __, __, 968 F. Supp. 2d 1255, 1259 (2014). Substantial evidence refers to "such evidence that a reasonable mind might accept as adequate to support a conclusion." *SeAH Steel VINA Corp. v. United States*, 950 F.3d 833, 840 (Fed. Cir. 2020) (internal quotation marks and citation omitted).

DISCUSSION

Domestics assert that the *Remand Results* "raise the same concerns" that led the court to remand the *AR Results*. They argue that Commerce's reconsidered conclusion—that Nur's production of steel scrap is not "primarily dedicated" to Kaptan's production of rebar under § 351.525(b)(6)(iv) and its accompanying *Preamble* in the *Federal Register*—is insufficiently explained and unsupported by substantial evidence on the record. 19 U.S.C. § 1516a(b)(l)(B)(i); Domestics' Br. at 7, 12.

Referencing the examples that Commerce offered in the *Preamble*, Domestics argue that Commerce erred in finding the relationship of Nur's scrap to Kaptan's rebar to be more similar to that of plastic to appliances and automobiles than the relationship of timber to lumber, or of semolina to pasta. Domestics' Br. at 12. Domestics further argue that Commerce "inappropriately focused" on the fact that Nur is a shipbuilding company, and should have instead focused on "record evidence regarding Nur's production of scrap, and the relationship between scrap and Kaptan's downstream production." *Id.*

The court finds these arguments unavailing for the reasons set forth below.

I. Commerce's Characterization of Nur's Steel Scrap as Not Necessarily Primarily Dedicated to Kaptan's Rebar Production Is Lawful

As an initial matter, Commerce's determination of whether steep scrap is primarily dedicated to downstream steel production is a fact-specific inquiry unique to each case. Domestics cite several prior administrative decisions that purportedly show that "Commerce has repeatedly found that steel scrap—without any consideration of its processing level—is primarily dedicated to downstream steel production." Domestics' Br. at 12–14. Domestics appear to suggest that against this background, Commerce's findings that steel scrap is a "common input among a variety of products and industries and used in a variety of production processes" and that "the scrap that Nur sold

to Kaptan was not 'generated or otherwise prepared for downstream products'" are anomalous and thus require additional explanation. Domestics' Br. at 12 (quoting *Remand Results* at 12–18, 28). The existence of an agency practice would saddle Commerce with the burden of explaining its departure from that practice. *See Save Domestic Oil*, 357 F.3d at 1283–84. But Domestics' cited examples do not establish a practice whereby Commerce has reflexively treated steel scrap as a primarily dedicated input of rebar. In none of the cited determinations did Commerce expressly commit itself to such a categorical rule. Domestics' Br. at 12. Commerce has in fact stated elsewhere that it does not adhere to such a rule. *See, e.g.*, *Certain Carbon and Alloy Steel Cut-to-Length Plate from the Republic of Korea, Final Results of Redetermination Pursuant to Court Remand* at 58 (Dep't Com. Jan. 30, 2023), *remanded on other grounds*, *Nucor Corp. v. United States* ("*Nucor II*"), 47 CIT __, __, Slip Op. 23–119 (Aug. 21, 2023). What Domestics' examples show, at most, is that Commerce has in the past reached positive primary dedication conclusions on different facts. *See Nucor I*, 600 F. Supp. 3d at 1238 ("[D]ecisions regarding [subsidy] attribution are fact specific and Commerce may reach different conclusions in different cases in relation to the same input.").

Even if past agency practice did saddle Commerce with the burden of explaining its departure from that practice, Domestics' challenges to Commerce's explanation of its reasoning are unpersuasive.[7] These challenges, to the extent they are not conclusory, address only periph-

[7] Domestics summarize their challenges as follows:

> In sum, Commerce failed to adequately explain or support its conclusion that the physical nature of Nur's scrap and the circumstances of its generation were such that the scrap did not form a "link in the overall production chain" for Kaptan's downstream rebar. While Commerce determined that unprocessed, byproduct steel scrap is a "common input among a variety of products and industries and used in a variety of production processes," Remand Results at 17–18, 28, it provided no support for this assertion. It did not identify products/industries using such scrap beyond downstream steel products. It did not adequately explain its reasons for finding the relationship between such scrap and rebar more like the relationship that plastics have with automobiles and appliances than the relationship that timber has with lumber or that semolina has with pasta. It cited no record evidence demonstrating that Kaptan used or could only use scrap that had been pre-processed or purposely generated with its downstream operations in mind. It failed to identify any qualitative distinctions between the scrap that Nur provided to Kaptan and the scrap provided by other scrap-supplying Kaptan affiliates that the agency treated as cross-owned input suppliers for subsidy attribution purposes. Commerce failed to acknowledge or confront the multiple past cases in which it found steel scrap primarily dedicated to downstream steel production without any finding as to whether that scrap was processed or not, as well as its own prior rejection of the argument that the byproduct nature of scrap is relevant to the cross-attribution analysis.

Domestics' Br. at 17–18.

eral aspects of Commerce's detailed explanation of the considerations underlying its characterization of the relationship of Nur's steel scrap to Kaptan's rebar. *See Remand Results* at 8–18.

First is Domestics' contention that Commerce "did not identify products/industries using [steel] scrap beyond downstream steel products" and thus "did not adequately explain its reasons for finding the relationship between such scrap and rebar more like the relationship that plastics have with automobiles and appliances than the relationship that timber has with lumber or that semolina has with pasta." Domestics' Br. at 18.[8] This argument merely fulfills a self-fulfilling prophecy: after first constructing a category of "downstream steel products" that by its terms sweeps in all conceivable downstream applications of steel scrap, Domestics then insist that Commerce failed in its *Remand Results* to enumerate examples of downstream applications of steel scrap that fall outside this maximally broad definition.

By this reasoning, it would appear that even in the archetypical case of plastics, automobiles, and appliances, Commerce would be required to offer examples of downstream uses for plastics other than "downstream plastic products" in order to show that plastics production is not primarily dedicated to automobile production. And because every product that incorporates plastics as an input is arguably a "downstream plastics product," as Domestics suggest is the case with "downstream steel products," Domestics' Br. at 18, Domestics' proposed standard would seemingly compel a primary dedication finding in the very hypothetical case that Commerce invoked to demonstrate a lack of primary dedication—and, indeed, in every case. This standard wants for a limiting principle, and the court declines to adopt it.

Contrary to Domestics' suggestion, Commerce's task in establishing steel scrap's closer similarity to plastics than to semolina was not to "identify products/industries using [steel] scrap beyond downstream steel products."[9] Domestics' Br. at 18. Commerce's task was instead to assess the range of downstream steel products that steel scrap can be used to produce. *Kaptan I*, 633 F. Supp. 3d at 1284 ("Commerce needs to explain further why the input product in question . . . is in fact primarily dedicated to the production of downstream products in this

[8] Earlier in their brief, Domestics argue along similar lines that Commerce erroneously classified steel scrap as a "common input" because "there is no obvious use for steel scrap, regardless of its processing level, except in the production of more steel through remelting." Domestics' Br. at 14.

[9] As the court noted in *Gujarat Fluorochemicals*, "the reference in [§ 351.525(b)(6)(iv)] to 'the downstream product' is not only singular, it is also a reference to a *specific* product." 617 F. Supp. 3d at 1340. Thus, even if Domestics' suggested category of "downstream steel products" were not so broad as to be meaningless, it would at the very least extend impermissibly beyond the singular "downstream product" at issue in this case: rebar.

case. This is especially true considering record evidence that the scrap may have been used for the production of products other than the subject merchandise.").

That is precisely what Commerce did on remand. Explaining that "unprocessed scrap is a common input among a wide variety of products and industries," *Remand Results* at 18, Commerce (elsewhere in its redetermination) listed "non-subject rebar, other types of bars, and angle profiles" as examples of products besides the subject rebar that Kaptan uses steel scrap to produce. *Id.* at 26–27. The remand record on which Commerce based these assertions contains Kaptan's representations that "Kaptan Demir manufactures steel billets, reinforcing bars, angles, square bars, flat bars, and round bars in its meltshop and two rolling mills" and that at one of these mills, "hot billets are . . . rolled into various products, including deformed reinforcing bars ranging from 8 mm to 40 mm and other products." Letter from Kaptan to W. Ross, Sec'y of Com., re: Kaptan Initial Questionnaire Response at 8–9 (July 6, 2020), P.R.R. 88 ("Kaptan Questionnaire Response"). As the Government notes, Commerce cited cases in its Remand Results that involved additional downstream products for which steel scrap can be an input.[10] Even Domestics acknowledge that "[t]he record here indicates that Kaptan used Nur's scrap to produce downstream steel products, including rebar." Domestics' Br. at 15.

This variety of downstream outputs constitutes substantial evidence in support of Commerce's determination that rebar is one of many products that can be manufactured from steel scrap, and that the relationship of Nur's steel scrap to Kaptan's rebar is thus unlike the more direct input-to-output relationship of semolina to pasta. Commerce, furthermore, has adequately explained the link between this evidence and its findings in the *Remand Results*.

Domestics next challenge Commerce's statements that "it is significant that there is no evidence that the scrap provided by Nur was processed in any way prior to selling it to Kaptan Demir" and that "[w]hether or not scrap is generated or otherwise prepared for downstream products in the production line is a factor to consider when determining whether an input is primarily dedicated to the production of a downstream product," *Remand Results* at 17, as inadequately explained and unsupported by substantial evidence, *see* Domestics' Br. at 12, 16. This argument also fails to identify a legally relevant flaw in Commerce's reasoning.

[10] Besides rebar, these products are "cut-to-length plate, cold-rolled steel, oil country tubular goods, and fluid end blocks." Gov't. Br. at 11 (citing *Remand Results* at 16).

Commerce made these statements in conjunction with its analysis (discussed in greater detail above) of whether an input is "not merely a link in the overall production chain." *Remand Results* at 17. Commerce's point was simply that any processing of steel scrap by the input supplier focuses the range of likely downstream applications of that scrap, analogizing the relationship of input scrap to downstream rebar to the relationships of semolina to pasta and of stumpage to lumber.[11] *Id.* According to Commerce, the presence on the record of any evidence of such processing would support a finding that the input scrap's relationship to Kaptan's rebar was marginally closer. *Id.* Commerce did not invoke scrap processing as a determining factor[12] in its "primarily dedicated" analysis; it merely raised the possibility that processing could limit an input's downstream uses and noted that that was not the case here. *Id.*

Domestics contest the relevance of Commerce's distinction between processed and unprocessed steel. Domestics' Br. at 18. They fail, however, to explain how this purported irrelevance—which Commerce cites as one factor among many—would affect the completeness of Commerce's explanation for its negative primary dedication finding, or the question of whether that finding is supported by substantial evidence. Domestics also fail to meaningfully contest Commerce's premise that an input supplier's processing of steel scrap might lend support to a finding that that scrap is "merely a link" in downstream production. *Remand Results* at 31; *see also* Gov't Br. at 5. The court will not remand for Commerce to provide additional explanation where the party seeking remand has failed to engage with the explanation already on the record.

II. Commerce's Analysis of Nur's Business Activity Is Lawful

Domestics' second main challenge is to Commerce's consideration of the nature of Nur's business activities as a factor in its "primarily dedicated" inquiry. Domestics' Br. at 18–19. Domestics argue that

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[11] For example, if Nur had processed its steel scrap prior to sale by pressing it in a particular way, and Kaptan's production of rebar required that kind of pressed steel scrap as an input, Commerce might consider that processing as a factor militating in favor of a primary dedication finding. Analogously, the milling of wheat to create semolina might cut toward a finding of primary dedication to downstream pasta production.

[12] The court has previously questioned Commerce's reliance on a distinction between processed and unprocessed steel scrap as the sole basis for a primary dedication determination. *See Nucor II*, Slip Op. 23–119, at 25–26. The distinction that Commerce referenced here, however, is only one of several bases for Commerce's determination that Nur's steel scrap is not primarily dedicated to Kaptan's rebar.

Commerce erred[13] in even considering this factor, and also challenge specific aspects of Commerce's analysis thereunder. *Id.* The court finds neither of these arguments persuasive.

A. Commerce's Consideration of Nur's Business Activity as a Factor Is Lawful

Domestics first propose an interpretation of 19 C.F.R. § 351.525(b)(6)(iv) and the *Preamble* that would preclude Commerce's analysis of any factor besides the question of "whether the input is, by its nature, usable only in producing a narrow subset of goods and/or is a primary input into such goods." Domestics' Br. at 19–20. They then argue that Commerce supported its conflicting interpretation of the regulation, outlined in the *Remand Results* at 8–13, with citations to past determinations that are "distinguishable." Domestics' Br. at 20.

The Government and Kaptan urge this court to uphold Commerce's consideration of Nur's business activity in its "primarily dedicated" analysis on the basis that Commerce's reading of § 351.525(b)(6)(iv) and the *Preamble* as allowing for such a multifactor analysis is owed judicial deference. Gov't Br. at 7; Pl.'s Br. at 8 (citing *Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 843 (1984)); *see also Kisor v. Wilkie*, 139 S. Ct. 2400, 2414–18 (2019) (discussing the applicability of judicial deference to agency interpretations of agency regulations). The court need not weigh in on the applicability of *Chevron* or *Kisor* to Commerce's interpretation of § 351.525(b)(6)(iv) and the *Preamble*,[14] however, as Domestics' proposed alternative interpretation fails to pass muster in its own right.

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[13] Domestics do not clearly identify a legal basis for their request for remand on the issue of whether it was proper under § 351.525(b)(6)(iv) for Commerce to consider Nur's business activity as a factor. Domestics state only that "the agency has inappropriately focused on the nature of Nur's 'business activity' over the record evidence regarding Nur's production of scrap," and that "Commerce has not adequately explained or supported its analysis of Nur's business activity." Domestics' Br. at 12, 23. This second statement presumably refers to the substantial evidence standard under 19 U.S.C. § 1516a(b)(l)(B)(i) and to Commerce's duty to explain its actions under 19 U.S.C. § 1677f(i)(3)(A). *See NMB Sing.*, 557 F.3d at 1319. However, Domestics do not clarify whether these statutory requirements pertain to Commerce's threshold decision to analyze Nur's business activity or to the substance of the analysis that Commerce conducted. The court thus construes Domestics' regulatory interpretation argument as a request for remand on the basis that Commerce's multifactor analysis was "not in accordance with law" under 19 U.S.C. § 1516a(b)(l)(B)(i).

[14] Commerce explained the regulatory underpinning of its business activity analysis as follows:

> Examining a company's business activities helps us assess whether an input supplier's production is "dedicated almost exclusively to the production of a higher value-added product" in the manner suggested by the *Preamble* such that the purpose of any subsidy provided to the company would be "to benefit the production of both the input and downstream products."

Remand Results at 19 (citing *Preamble*, 63 Fed. Reg. at 65401).

Domestics offer no support for their suggestion that § 351.525(b)(6)(iv) and the *Preamble* preclude Commerce's analysis of an input supplier's business activity. They flatly assert, for example, that "the *Preamble* does not state that the input supplier's main business activity is a relevant factor" and that the *Preamble* instead "indicates that the salient issue is whether the input is, by its nature, usable only in producing a narrow subset of goods and/or is a primary input into such goods." Domestics' Br. at 19. But Domestics fail to explain why the *Preamble* should be treated as an exhaustive compendium of all relevant factors, or how the text of the *Preamble* "indicates" what the "salient issue" is.

Domestics go on to assert that "the *Preamble* does not use the term 'business activity,' but . . . 'production,' with the focus of that term being the 'production' of the "input' at issue." *Id.* at 19. "[T]he *Preamble* and regulations," they claim, "are focused on production of the 'input,' and whether the input feeds a higher value-added product, not on the supplier's production of other goods." *Id.* at 20.

These statements, too, lack support. Domestics again do not explain why the considerations that Commerce outlined in the *Preamble* cannot be applied using terms that Commerce did not employ verbatim in the *Preamble*. Nor do Domestics explain their position on the issue of where the focus of the word "production" in § 351.525(b)(6)(iv) and the *Preamble* lies. It is further unclear why an analysis of Nur's shipbuilding activities is irrelevant to "production of the 'input,' and whether the input feeds a higher value-added product." *Id.* at 20. Nur produces steel scrap, after all, by building ships. *Remand Results* at 5.

Instead of challenging Commerce's position that "[e]xamining a company's business activities helps us assess whether an input supplier's production is "dedicated almost exclusively to the production of a higher value-added product" in the manner suggested by the *Preamble*," *id.* at 19, Domestics rest their contrary position on a series of bare, conclusory assertions. Insufficiently briefed arguments may not form the basis for disturbing Commerce's interpretation, whether or not the court affords deference to that interpretation. *See United States v. Great Am. Ins. Co. of N.Y.*, 738 F.3d 1320, 1328 (Fed. Cir. 2013) ("It is well established that arguments that are not appropriately developed in a party's briefing may be deemed waived."); *see also SmithKline Beecham Corp. v. Apotex Corp.*, 439 F.3d 1312, 1320 (Fed. Cir. 2006) (concluding that "mere statements of disagreement" do not "amount to a developed argument").

More developed, but similarly unavailing, is Domestics' argument that Commerce's references to prior determinations that considered

upstream business activity as a factor are "distinguishable, or otherwise underscore the problems with the agency's analysis here." Domestics' Br. at 20. Domestics take issue with the applicability of three such determinations: *Forged Steel Fluid End Blocks from the Federal Republic of Germany: Preliminary Affirmative Countervailing Duty Determination, and Alignment of Final Determination with Final Antidumping Duty Determination*, 85 Fed. Reg. 31454 (Dep't Com. May 26, 2020) ("*Fluid End Blocks*"), *Certain Glass Containers from the People's Republic of China: Final Affirmative Countervailing Duty Determination*, 85 Fed. Reg. 31141 (Dep't Com. May 22, 2020) ("*Glass Containers*"), and *Certain Carbon and Alloy Steel Cut-to-Length Plate from the Republic of Korea: Final Results and Partial Rescission of Countervailing Duty Administrative Review, 2018*, 86 Fed. Reg. 15184 (Dep't Com. Mar. 22, 2021) ("*CTL Plate*").

With respect to *Fluid End Blocks*, Domestics argue that "while the agency stated that it considered the suppliers' 'business activities,' its analysis ultimately came down to the 'quantities and types of materials' that the input suppliers provided." Domestics' Br. at 20 (quoting Mem. from J. Maeder to J. Kessler, re: Decision Memorandum for the Preliminary Affirmative Determination of the Countervailing Duty Investigation of Forged Steel Fluid End Blocks from the Federal Republic of Germany § VI(B) (Dep't Com. May 26, 2020)). In that determination, however, Commerce did not indicate any one factor that its analysis "ultimately came down to." Instead, like the *Remand Results* at issue here, Commerce analyzed the supplier's business activities as one among several factors. *Id.*

Domestics next argue that *Glass Containers* is distinguishable because in that case, unlike here, Commerce "considered the supplier's business activities solely in the context of determining whether to employ adverse inferences." Domestics' Br. at 20. That is true, *see* Mem. from J. Maeder to J. Kessler, re: Issues and Decision Memorandum for the Final Determination in the Countervailing Duty Investigation of Certain Glass Containers from the People's Republic of China cmt. 12 (Dep't Com. May 11, 2020), but the relevance of the different framing that Domestics identify is unclear. In *Glass Containers*, Commerce considered whether to apply an adverse inference against a respondent that failed to submit a questionnaire response for an entity that a petitioner claimed was a cross-owned input supplier. *Id.* The entire inquiry into whether an adverse inference was appropriate hinged on Commerce's determination of whether that entity's production of the input in question was "primarily dedicated" to the respondent's downstream production, and Commerce engaged in substantially the same type of analysis as it did here in the

Remand Results. Id.

On *CTL Plate*, Domestics first note that Commerce's analysis of the supplier's business activities can be discounted because the court initially remanded Commerce's determination for further explanation, and the subsequent remand results were again remanded. Domestics' Br. at 21 (citing *Nucor I*, 600 F. Supp. 3d at 1234–38; *Nucor II*, Slip Op. 23–119). Domestics suggest that these back-to-back remands lessen the support that *CTL Plate* lends to the *Remand Results* in this case on the issue of Commerce's consideration of business activity. This insinuation is unfounded: in the court's second remand order in *Nucor*, the court ordered Commerce to reconsider other issues but upheld Commerce's "reasoned analysis" in its remand results as to its "consideration of primary business activities." *Nucor II*, Slip Op. 23–119, at 25.

Domestics also note that in the *CTL Plate* determination, "Commerce also relied on certain other factors [other than business activity] that are not present here." Domestics' Br. at 21. As with *Fluid End Blocks*, however, Commerce merely invoked *CTL Plate* in the *Remand Results* as an example of a determination where Commerce considered a respondent's business activities as one factor—not, as Domestics appear to suggest, as the only factor. Commerce stated in the *Remand Results* that:

> In [*CTL Plate*], we considered a range of case-specific factors, including an analysis of the by-product nature of the steel scrap as it relates to an input supplier's overall production process, the fact it was sold through an intermediary, the scope of business of the steel scrap input supplier, and the nature of other services provided by the input supplier in determining whether the materials and inputs provided were primarily dedicated to downstream production.

Remand Results at 31. *CTL Plate* and *Fluid End Blocks* are thus indistinguishable from these *Remand Results* in that they exemplify Commerce's consideration of an input supplier's business activity alongside other factors in its "primarily dedicated" analysis. Together with *Glass Containers*, they constitute analogous precedents that do not identifiably "underscore the problems" with Commerce's analytical approach in this case. Domestics' Br. at 20.

B. Commerce's Evaluation of Nur's Business Activities Is Supported by Substantial Evidence and Otherwise in Accordance with Law

Turning to the substance of Commerce's analysis of Nur's business activities in the *Remand Results*, Domestics argue that Commerce failed to adequately explain its finding that "the production processes involved in [Nur's] shipbuilding are far removed from Kaptan Demir's downstream production processes, especially given the extremely limited transactions between the two companies." *Remand Results* at 19, 25; *see also* Domestics' Br. at 22.[15] Domestics argue as follows:

> Rather than detail the basis upon which the agency concluded that the transactions were "extremely limited," [Commerce] cited generally to Kaptan's comments on the draft remand results, while simultaneously explaining that it was not the volume of scrap supplied by Nur that it found relevant. Commerce's generalized citation does not elucidate the agency's thinking, given that Kaptan's argument[] [was] that . . . Nur sold only a "miniscule" amount of scrap to Kaptan. In other words, the only argument that Kaptan made about the "limited" nature of Nur's transactions with Kaptan was grounded in the volume of steel scrap that Nur sold to Kaptan— the very thing that Commerce says is irrelevant.

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[15] Commerce's explanation is set forth below at greater length:

> Finally, we find that Kaptan Demir's arguments regarding Nur's primary business activity lead us to reconsider our evaluation of Nur's primary business activity as a shipbuilder. Examining a company's business activities helps us assess whether an input supplier's production is "dedicated almost exclusively to the production of a higher value-added product" in the manner suggested by the *Preamble* such that the purpose of any subsidy provided to the company would be "to benefit the production of both the input and downstream products." As discussed in the Draft Remand, Nur's primary business is shipbuilding, which involves the production of a product that is much further downstream than the downstream products produced by Kaptan Demir, most notably rebar. Upon a review of Nur's business activities, which consist largely of shipbuilding, we find that the production processes involved in shipbuilding are far removed from Kaptan Demir's downstream production processes, especially given the extremely limited transactions between the two companies. Therefore, we find that Nur's business activity is not "dedicated almost exclusively to the production of a higher value-added product" in the manner suggested by the *Preamble*. Simply put, the facts on the record do not support the premise that subsidies given to a shipbuilder would be given to "benefit the production of both the input and downstream products."

Remand Results at 19 (footnotes omitted). Commerce also noted that "the significance of the limited nature of these transactions is not based upon volume, as Kaptan Demir argues, but instead, an analysis of the totality of the facts contained within the transactions between Nur and Kaptan Demir." *Id.* at 25.

Id. at 22–23 (citations omitted). Domestics, in other words, argue that Commerce failed to explain the apparent contradiction between Commerce's reliance on Kaptan's representation that its purchases of steel scrap from Nur were "miniscule" in volume, *see* Kaptan's Cmts. on *Draft Remand Results* at 3, and Commerce's disavowal of a volume-based standard for assessing an input supplier's business activity as a factor in determining whether to cross-attribute subsidies, *see Remand Results* at 25.

The Government and Kaptan both respond that Domestics' argument on this point elides context which clarifies Commerce's meaning in the *Remand Results*. Gov't Br. at 15; Kaptan's Br. at 9–11. The Government points out that Commerce did in fact cite to record evidence supporting a conclusion that Nur's transactions with its corporate affiliates were "limited" in a non-volume-related sense. Gov't Br. at 15. Commerce, the Government argues, cited this evidence in its summary of Kaptan's comments on the *Draft Remand Results*: "Nur's tax returns show most of its affiliated transactions are service and financial related, with no purchase of goods . . . ." Gov't Br. at 15 (quoting *Remand Results* at 21). Kaptan argues that its comments on the *Draft Remand Results*—to which Commerce's statement in the *Remand Results* that the "significance of the limited nature of these transactions is not based upon volume" was a response—clarify that Commerce's statement "is not based upon volume," *Remand Results* at 25, is properly interpreted as "is not *entirely* based on volume," *see* Kaptan's Br. at 10–11.[16] This, Kaptan argues, resolves any apparent contradiction with Commerce's consideration of Nur's "miniscule" sales of steel scrap. Kaptan's Br. at 11.

The question here is whether Commerce sufficiently "elucidate[d] [its] thinking," Domestics' Br. at 23, such that "the agency's path may reasonably be discerned." *Bowman Transp., Inc. v. Ark.-Best Freight Sys., Inc.*, 419 U.S. 281, 286 (1974); *see also Wheatland Tube Co. v. United States*, 161 F.3d 1365, 1369–70 (Fed. Cir. 1998) ("An explicit explanation is not necessary . . . where the agency's decisional path is reasonably discernible.").

Commerce has met this standard through its explanations in the *Remand Results*, although not exactly by the means that Kaptan and the Government suggest. By stating that "the production processes

[16] These comments included a statement that one of Nur's financial statements "shows an extremely limited amount of commercial good transactions between the affiliates, all of which are accounted for by this minuscule amount of scrap sold to Kaptan." Kaptan's Cmts. on *Draft Remand Results* at 10. Commerce, Kaptan argues, meant only to correct Kaptan's notion that sales volume was the sole relevant limitation on the nature of an input supplier's transactions. Kaptan's Br. at 10–11.

involved in [Nur's] shipbuilding are far removed from Kaptan Demir's downstream production processes, especially given the extremely limited transactions between the two companies," *Remand Results* at 19, Commerce clearly indicated that the limited nature of transactions between Nur and Kaptan supported a finding that Nur's shipbuilding was its own self-contained enterprise with little connection to Kaptan's production of steel—except, that is, to Kaptan's purchase of Nur's byproduct scrap as an input. Commerce's subsequent statement that "the significance of the limited nature of these transactions is not based upon volume . . . but instead, an analysis of the totality of the facts contained within the transactions between Nur and Kaptan Demir," *Remand Results* at 25, thus does not unexplainedly contradict Kaptan's representation that its scrap purchases from Nur were "miniscule." Kaptan's Cmts. on *Draft Remand Results* at 3. Commerce did not merely state that "the limited nature of these transactions is not based on volume," which would imply (as Domestics suggest) that the scrap sales were somehow limited in a manner other than their volume. Commerce stated, rather, that "*the significance* of the limited nature of these transactions is not based upon volume . . . ." Remand Results at 25 (emphasis added). In other words, Commerce did not conclude that Nur's shipbuilding activities cut against a finding of primary dedication simply because the amount of steel scrap that Nur sold to Kaptan was small. As Commerce instead explained, Commerce drew this conclusion because the amount of steel scrap that Nur sold to Kaptan was insignificant as an element within the totality of Nur's complex shipbuilding operations:

> Upon a review of Nur's business activities, *which consist largely of shipbuilding*, we find that the production processes involved in shipbuilding are far removed from Kaptan Demir's downstream production processes, *especially given* the extremely limited transactions between the two companies.

Remand Results at 19 (emphasis added). While Commerce could have dwelt longer on this point, the court's role is not to enforce a standard of "ideal clarity" where Commerce's position is reasonably discernible. *Wheatland Tube*, 161 F.3d at 1369–70.

Lastly, Domestics take issue with Commerce's determination that two "similarly-situated affiliates that supplied Kaptan with scrap" are cross-owned input suppliers for the purpose of subsidy attribution.[17] Domestics' Br. at 16; 19 C.F.R. § 351.525(b)(6)(iv). Domestics argue that "an examination of the affiliated transactions of non-Nur

[17] These affiliates are Martas Marmara Ereglisi Liman Tesisleri A.S. ("Martas") and Aset Madencilik A.S. ("Aset"). Domestics' Br. at 16.

affiliates underscores the arbitrary nature of Commerce's treatment of Nur" and that "Commerce's failure to acknowledge, much less explain, this disparate treatment . . . supports a remand here." Domestics' Br. at 23.

As the Government and Kaptan point out, however, this differential treatment can be explained by the fact that Kaptan did not challenge Martas and Aset's treatment as cross-owned input suppliers in the initial agency proceeding or in subsequent litigation. Gov't Br. at 16; Kaptan's Br. at 7. Kaptan clarifies that this is because neither Matras nor Aset received subsidies that were attributable to Kaptan. Kaptan's Br. at 7.

Thus, while "inconsistent treatment [by an agency] is inherently significant," *DAK Ams. LLC v. United States*, 44 CIT __, __, 456 F. Supp. 3d 1340, 1355 (2020), the type of consistency that Domestics insist upon would be practically impossible for any agency to achieve. Commerce initially determined to treat Nur, Martas, and Aset alike as cross-owned input suppliers. *AR Results*, 86 Fed. Reg. at 53280 n.10. Commerce broke this alignment in the *Remand Results* only because of Kaptan's necessarily selective challenge to Nur's status. During the remand proceeding, Commerce was unable to modify any portion of its *AR Results* that was not subject to challenge by a party—including Commerce's treatment of Martas and Aset. *See Zhaoqing Tifo New Fibre Co. v. United States*, 41 CIT __, __, 256 F. Supp. 3d 1314, 1334 (2017) ("What Commerce was not permitted to do on remand was to reopen and re-review the settled issue of the agency's decision in its Final Determination . . . ."). This means that Commerce, upon determining not to treat Nur as a cross-owned input supplier, could not have avoided inconsistency by modifying its treatment of Martas and Aset unless authorized by law. Here, Commerce was authorized only to review its treatment of Nur. *Kaptan I*, 633 F. Supp. 3d at 1285.

By Domestics' reasoning, Commerce could not possibly have determined on remand that Nur was not Kaptan's cross-owned input supplier without acting arbitrarily. Such a restriction would set a virtually unattainable standard for redeterminations in cases like this one, where the original *AR Results* contain unchallenged determinations regarding several affiliated suppliers. It would also inhibit compliance with the court's order that Commerce "further expl[ain] and review . . . Commerce's finding that Nur was a cross-owned input supplier of input products primarily dedicated to the production of downstream products," *Kaptan I*, 633 F. Supp. 3d at 1285.

As to Domestics' argument that Commerce should at least be required to explain the inconsistency on further remand, the court finds

that no explanation Commerce could give on this point would "enable the court to evaluate the agency's rationale at the time of decision" beyond what Commerce has already given in the *Remand Results*. *Pension Benefit Guar. Corp. v. LTV Corp.*, 496 U.S. 633, 654 (1990). As discussed above, Commerce has met its burden of explanation with respect to its treatment of Nur. Commerce has faced no challenge to whether it has met this burden with respect to its treatment of Martas and Aset. And as for Commerce's duty to explain any disparate treatment of the different affiliates (assuming that one exists), a sufficient reason for the disparity is already plain—Commerce could not retroactively revise its treatment of Martas and Aset.

Accordingly, the court sustains Commerce's analysis of Nur's business activity.

CONCLUSION

In light of the above, the court sustains Commerce's *Remand Results*. Judgment will enter accordingly.

SO ORDERED.

Dated: November 27, 2023
New York, New York

/s/ Gary S. Katzmann
JUDGE

Slip Op. 23–168

RISEN ENERGY CO., LTD., Plaintiff, v. UNITED STATES, Defendant, and AMERICAN ALLIANCE FOR SOLAR MANUFACTURING, Defendant-Intervenor.

Before: Jane A. Restani, Judge
Court No. 23–00153

[Plaintiff's motion to amend complaint is denied.]

Dated: November 30, 2023

Gregory S. Menegaz, deKieffer & Horgan, PLLC, of Washington, DC, for Plaintiff.

Joshua E. Kurland, Commercial Litigation Branch, U.S. Department of Justice, of Washington, DC, for Defendant. With him on the brief were *Brian M. Boynton*, *Patricia M. McCarthy*, and *Reginald T. Blades, Jr.* Of counsel on the brief was *Spencer Neff*, Office of Chief Counsel for Trade Enforcement & Compliance, U.S. Department of Commerce, of Washington, DC.

Timothy C. Brightbill, Wiley Rein, LLP, of Washington, DC, for Defendant-Intervenor.

MEMORANDUM AND ORDER

Restani, Judge:

Before the court is Risen Energy Company's ("Risen") motion to file an amended complaint. Risen Mot. to Amend Compl., ECF No. 21 (Oct. 19, 2023) ("Risen Mot. to Amend"). On September 11, 2023, Risen filed its initial complaint to contest the United States Department of Commerce's ("Commerce") final results of administrative review as published in *Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled Into Modules, From the People's Republic of China: Final Results and Partial Recission of Countervailing Duty Administrative Review; 2020*, 88 Fed. Reg. 44,108 (Dep't Commerce July 11, 2023). *See* Compl., ECF No. 8 (Sep. 11, 2023). A month later, the court issued a decision in *Risen Energy Co. v. United States*, Slip. Op. 23–148, 2023 WL 6620508 (CIT Oct. 11, 2023) ("*Risen*"). In *Risen*, the court concluded that the Article 26(2) program is not a *de jure* specific countervailable subsidy. *Id.* at *4–5. Risen then filed this motion, requesting to amend the complaint that is currently before this court to include a claim that the Article 26(2) program is not specific and thus not countervailable. Risen Mot. to Amend at 6.

It is uncontested that Risen did not raise this claim at any point before the agency. *See* Risen Mot. to Amend at 2; *see also* Commerce Resp. to Mot. to Amend Compl. at 3, ECF No. 25 (Nov. 9, 2023) ("Commerce Resp."). Commerce, opposing the motion, argues that because the claim was not exhausted at the agency level, the court should deny this request as futile as Risen will lose on exhaustion

grounds. Commerce Resp. at 1–3. Risen contends that the exception to exhaustion for intervening case law ought to govern, allowing Risen to amend its complaint despite its failure to exhaust administrative remedies on this issue. Risen Mot. to Amend at 3. Risen further argues that the strong interest in accurately calculating countervailing duties weighs in favor of waiving the exhaustion requirements in this case. *Id.* at 5.

The court will ordinarily liberally allow amendment of a complaint "where justice requires it," but need not allow amendment where amendment would be "futile." USCIT Rule 15(a)(2); *see Kemin Foods, L.C. v. Pigmentos Vegetales Del Centro S.A. de C.V.*, 464 F.3d 1339, 1353 (Fed. Cir. 2006) ("[L]eave to amend may be denied if the court finds that there has been undue delay that would prejudice the nonmoving party, that the moving party has acted in bad faith, or that the amendment would be futile."). Here, this type of exhaustion is not jurisdictional, and the court applies it when "appropriate." *Ceramica Regiomontana, S.A. v. United States*, 16 CIT 358, 359 (1992). The intervening case law exception applies to issues that present a "pure question of law." *Agro Dutch Industries Ltd. v. United States*, 508 F.3d 1024, 1029 (Fed. Cir. 2007). An issue raises a pure legal question where plaintiffs "raise a new argument that is of a purely legal nature, [and] the inquiry [does] not require further agency involvement, additional fact finding, or opening up of the record . . . ." *Gerber Food (Yunnan) Co. v. United States*, 33 CIT 186, 195–96, 601 F. Supp. 2d 1370, 1380 (2009). When required, exhaustion serves two main purposes: "to allow an administrative agency to perform functions within its special competence—to make a factual record, to apply its expertise, and to correct its own errors," and to "promot[e] judicial efficiency by enabling an agency to correct its own errors so as to moot judicial controversies." *Sandvik Steel Co. v. United States*, 164 F.3d 596, 600 (Fed. Cir. 1998).

Here, waiver of the exhaustion requirement is inappropriate because Risen does not raise a "pure question of law." Risen misunderstands the claim it is trying to raise; the claim it seeks to bring to the court is not whether the Article 26(2) program is *de jure* specific, but whether the Article 26(2) program is a countervailable subsidy. *See Risen* *4–5. Examination of this claim would require further development of the record, which means that it does not present a purely legal issue, and thus the intervening case law exception to exhaustion requirements does not apply. *See Gerber*, 33 CIT at 195–96, 601 F. Supp. 2d at 1380. In *Risen*, Commerce was given the opportunity to refine its explanation and still failed to articulate a reasonable ex-

planation of why the Article 26(2) program was countervailable. *See Risen* at *4–5. It is far from certain that this would have been the case here. The claim Risen neglected to raise here had already been raised by Risen's co-plaintiff, JingAo Solar Co., Ltd. ("JA Solar"), in the litigation that then was ongoing in *Risen*. *See id.* It is possible, as the Government points out, that, had this program been objected to here, Commerce might have chosen to shore up its specificity analysis with an alternative argument that the program was *de facto* specific. *See* Commerce Resp. at 3, 8. The court has not ruled on whether a *de facto* specific analysis might support a finding that this program is countervailable, and certainly cannot do so without a fully developed record—a fact that was noted in *Risen* itself. *Risen*, at *5 n.3. Given the undeveloped record in this case, the interest in accuracy that Risen argues would support waiving exhaustion actually favors requiring exhaustion here; the court cannot accurately make an assessment of this program without a record in front of it. Because Risen did not object to this program at the agency level, a full record, addressing all of these issues, does not exist. Waiver of the exhaustion requirement is therefore inappropriate in this case. *See Gerber*, 33 CIT at 195–96, 601 F. Supp. 2d at 1380 (noting that waiver of exhaustion is appropriate where no further development of the record is required of the Agency).

Further, this is not a case where the court's decision not to waive exhaustion requirements causes a grave injustice. Risen was a party to the litigation regarding the prior administrative review period in which its co-plaintiff, JA Solar, raised this argument. *See Decision Memorandum for the Preliminary Results of the Countervailing Duty Order on Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled Into Modules, from the People's Republic of China*, C-570–980, POR 01/01/2019–12/31/2019 (Dep't Commerce Dec. 30, 2021) ("*2019 PDM*"); *see also Issues and Decision Memorandum for Final Results of the Administrative Review of the Countervailing Duty Order on Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled Into Modules, from the People's Republic of China*, C-570–980, POR 01/01/2019–12/31/2019 (Dep't Commerce June 29, 2022) ("*2019 IDM*"); *see also Risen* at *1, *4–5. Accordingly, Risen was on notice that the specificity issue existed; it might have argued it before the agency. The intervening case law exception exists to remedy cases where parties are "surprised" by a twist of the law that is impossible to predict. *See Ceramica*, 16 CIT at 361. Here, Risen cannot possibly argue that it was surprised by the existence of this issue; it was the lead plaintiff in the case to which it cites. *Risen* at *1. It was a mandatory respondent in the 2019 administrative review in

which the specificity of the Article 26(2) program was first raised. *See 2019 PDM*; *see also 2019 IDM*. The Preliminary Decision Memorandum for this case was not issued until 2023. *See Decision Memorandum for the Preliminary Results of the Countervailing Duty Administrative Review, Rescission in Part, and Preliminary Intent to Rescind in Part: Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled into Modules, from the People's Republic of China* at 52, C-570–980, POR 01/01/2020–12/31/2020 (Dep't Commerce Jan. 3, 2023). The specificity issue is not now a surprise. At best, Risen may argue that it did not expect the court to decide in JA Solar's favor and, having seen the ruling, it now wishes to benefit from a newly formed expectation that the court would decide for it on this previously unraised matter. Risen's decision not to raise this claim earlier, however, has deprived Commerce of both the ability to make a record, and the opportunity to "correct its own errors." *See Sandvik Steel*, 164 F.3d at 600.

Parties are free to make strategic decisions about what they wish to contest at the agency level. The court cannot comment on why Risen did not raise this matter, as it is not explained by Risen, but justice does not favor ignoring exhaustion principles here. When a party declines to contest a matter at the agency level while its co-plaintiff in an ongoing separate case does so, exhaustion will not give way to an exception designed to give shelter to plaintiffs surprised by the law. The only intervening factor in this case is JA Solar's victory. That alone is not enough reason to allow Risen to amend this complaint to an add a claim that it previously has made the decision not to make before the agency.

As Risen would fail on exhaustion grounds if this complaint were amended, interests in efficiency support denying this motion, rather than granting it and allowing further briefing to no end.

For the forgoing reasons, the court DENIES the motion to amend.

Dated: November 30, 2023
New York, New York

/s/ Jane A. Restani
JANE A. RESTANI, JUDGE

Slip Op. 23–169

NINESTAR CORPORATION, ZHUHAI NINESTAR INFORMATION TECHNOLOGY CO., LTD., ZHUHAI PANTUM ELECTRONICS CO., LTD., ZHUHAI APEX MICROELECTRONICS CO., LTD., GEEHY SEMICONDUCTOR CO., LTD., ZHUHAI G&G DIGITAL TECHNOLOGY CO., LTD., ZHUHAI SEINE PRINTING TECHNOLOGY CO., LTD., and ZHUHAI NINESTAR MANAGEMENT CO., LTD., Plaintiffs, v. UNITED STATES OF AMERICA; DEPARTMENT OF HOMELAND SECURITY; UNITED STATES CUSTOMS AND BORDER PROTECTION; FORCED LABOR ENFORCEMENT TASK FORCE; ALEJANDRO MAYORKAS, in his official capacity as the Secretary of the Department of Homeland Security; TROY A. MILLER, in his official capacity as the Senior Official Performing the Duties of the Commissioner for U.S. Customs and Border Protection; and ROBERT SILVERS, in his official capacity as Under Secretary for Office of Strategy, Policy, and Plans and Chair of the Forced Labor Enforcement Task Force, Defendants.

Before: Gary S. Katzmann, Judge
Court No. 23–00182

[Plaintiffs are likely to establish that the court has subject matter jurisdiction over this action.]

Dated: November 30, 2023

Gordon D. Todd, *Michael E. Murphy*, *Michael E. Borden*, *Cody M. Akins*, Sidley Austin LLP, of Washington, D.C., for Plaintiffs Ninestar Corporation, Zhuhai Ninestar Information Technology Co., Ltd., Zhuhai Pantum Electronics Co., Ltd., Zhuhai Apex Microelectronics Co., Ltd., Geehy Semiconductor Co., Ltd., Zhuhai G&G Digital Technology Co., Ltd., Zhuhai Seine Printing Technology Co., Ltd., and Zhuhai Ninestar Management Co., Ltd.

Monica P. Triana, Senior Trial Counsel, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of New York, N.Y., for Defendant United States. With her on the brief were *Brian M. Boynton*, Principal Deputy Assistant Attorney General, *Patricia M. McCarthy*, Director, *Claudia Burke*, Deputy Director, *Justin R. Miller*, Attorney-In-Charge International Trade Field Office, and *Guy Eddon*, Trial Attorney.

OPINION

Katzmann, Judge:

Plaintiffs Ninestar Corporation and its corporate affiliates are Chinese companies—specifically, manufacturers and sellers of laser printers and printer-related products—who initiated this suit against Defendants the United States and various federal agencies and officials before the U.S. Court of International Trade ("CIT"). Plaintiffs challenge a decision by the interagency Forced Labor Enforcement Task Force ("FLETF") to add Plaintiffs to the Entity List of the Uyghur Forced Labor Prevention Act ("UFLPA"). *See* Pub. L. No.

117–78, 135 Stat. 1525 (2021); *see also Notice Regarding the Uyghur Forced Labor Prevention Act Entity List*, 88 Fed. Reg. 38080, 38082 (Dep't Homeland Sec. June 12, 2023) ("*Listing Notice*"). In particular, Plaintiffs allege that the FLETF's decision to add Plaintiffs to the Entity List was arbitrary and capricious under the Administrative Procedure Act, 5 U.S.C. § 706(2)(A), because the FLETF failed to adequately explain its decision. *See* Compl. ¶¶ 57–62, Aug. 22, 2023, ECF No. 8.

Following reports of forced labor and ongoing genocide in the Xinjiang Uyghur Autonomous Region of the People's Republic of China ("China"), Congress passed the UFLPA. Per the text of the statute, the UFLPA is designed to "strengthen the prohibition against the importation of goods made with forced labor, including by ensuring that the Government of the People's Republic of China does not undermine the effective enforcement of section 307 of the Tariff Act of 1930." Pub. L. 177–78, § 1(1), 135 Stat. at 1525. Section 307 of the Tariff Act, moreover, prohibits the importation of merchandise created wholly or in part by forced labor. *See* 19 U.S.C. § 1307. The FLETF's decision to add Plaintiffs to the Entity List of the UFLPA presumptively prohibits, under section 307, the importation of any goods produced by Plaintiffs. *See* Pub. L. 177–78, § 3(a), 135 Stat. at 1529.

That prohibition is now in effect. Plaintiffs have filed the instant Motion for Preliminary Injunction, which asks the court to (1) stay the FLETF's decision to add Plaintiffs to the Entity List and (2) prevent Defendants from taking any action predicated on the Listing Decision against the importation of Plaintiffs' goods. *See* Mot. for Prelim. Inj. at 17, Aug. 22, 2023, ECF No. 9 ("PI Mot."). Among other defenses to Plaintiffs' Motion for Preliminary Injunction, Defendants argue that the CIT lacks subject matter jurisdiction over Plaintiffs' challenge to the FLETF's listing decision. *See* Defs.' Mot. to Dismiss & Resp. to Mot. for Prelim. Inj. at 15–18, Oct. 3, 2023, ECF No. 24 ("Defs.' Br.").

Focusing only on the threshold issue of jurisdiction, the court concludes that Plaintiffs are likely to establish subject matter jurisdiction. Because the UFLPA is a law providing for embargoes within the meaning of 28 U.S.C. § 1581(i), challenges to agency action implementing the UFLPA fall within the CIT's exclusive jurisdiction. All other contentions are left to further proceedings regarding Plaintiffs' Motion for Preliminary Injunction.

BACKGROUND

I. Legal Background

Federal law has long prohibited the importation of foreign goods made by forced labor. Section 307 of the Tariff Act of 1930 states in relevant part:

> All goods, wares, articles, and merchandise mined, produced, or manufactured wholly or in part in any foreign country by . . . forced labor . . . shall not be entitled to entry at any of the ports of the United States, and the importation thereof is hereby prohibited . . . .

19 U.S.C. § 1307; *see also infra* note 11 (tracing the prohibition on importing goods made with involuntary labor to 1890). Section 307 further defines forced labor as "all work or service which is exacted from any person under the menace of any penalty for its nonperformance and for which the worker does not offer himself voluntarily" and includes forced child labor. 19 U.S.C. § 1307.

In the United States–Mexico–Canada Agreement Implementation Act of 2020, Congress directed the President to establish a Forced Labor Enforcement Task Force (the "FLETF") "to monitor United States enforcement of the prohibition under section 307 of the Tariff Act of 1930." Pub L. No. 116–113, § 741(a), 134 Stat. 11, 88 (2020) (codified at 19 U.S.C. § 4681). Per the statute and the President's subsequent Executive Order, the FLETF is chaired by the Secretary of the Department of Homeland Security ("DHS") and comprises seven member agencies: DHS, the U.S. Trade Representative, and the Departments of Justice, Labor, State, Treasury, and Commerce. *See* 19 U.S.C. § 4681(b)(1); Executive Order No. 13923 § 2, 85 Fed. Reg. 30587, 30587 (May 20, 2020).[1] The FLETF also includes six observer agencies: the Departments of Energy and Agriculture, the U.S. Agency for International Development, the National Security Council, Customs, and U.S. Immigration and Customs Enforcement Homeland Security Investigations. *Listing Notice*, 88 Fed. Reg. at 38081.

In December 2021, Congress passed and the President signed into law the UFLPA, Pub. L. No. 117–78, 135 Stat. 1525. Congress declared that it was the policy of the United States to "strengthen the prohibition against the importation of goods made with forced labor, including by ensuring that the Government of the People's Republic

[1] DHS, as the FLETF Chair, may invite representatives from other agencies to participate as either members or observers. *See* Executive Order No. 13923 § 2. DHS invited the Department of Commerce to join the FLETF as a member. *See Listing Notice*, 88 Fed. Reg. at 38081 n.1.

of China does not undermine the effective enforcement of section 307 of the Tariff Act of 1930 (19 U.S.C. § 1307)." UFLPA, Pub. L. 17778, § 1(1), 135 Stat. 1525, 1525 (2021). Other aims that Congress identified included "to lead the international community in ending forced labor practices . . . by stopping the importation of any goods made with forced labor"; "to actively work to prevent, publicly denounce, and end human trafficking including with respect to forced labor"; "to regard the prevention of atrocities as it is in the national interest of the United States, including efforts to prevent torture, enforced disappearances, severe deprivation of liberty, including mass internment, arbitrary detention, and widespread and systematic use of forced labor, and persecution targeting any identifiable ethnic or religious group"; and "to address gross violations of human rights in the Xinjiang Uyghur Autonomous Region." *Id.* § 1(2), (4)–(6), 135 Stat. at 1525.

The UFLPA implements those policies mainly in two parts. First, the UFLPA requires that the FLETF "develop a strategy for supporting enforcement of Section 307 of the Tariff Act of 1930 (19 U.S.C. 1307) to prevent the importation into the United States of goods mined, produced, or manufactured wholly or in part with forced labor in the People's Republic of China." *Id.* § 2(c), 135 Stat. at 1526. The FLETF published this strategy in June 2022. *See* DHS, *Strategy to Prevent the Importation of Goods Mined, Produced, or Manufactured with Forced Labor in the People's Republic of China* (2022) ("*FLETF Strategy*").[2] As part of that strategy, the FLETF must create and update four statutory sub-lists:

> (i) a list of entities in the Xinjiang Uyghur Autonomous Region that mine, produce, or manufacture wholly or in part any goods, wares, articles and merchandise with forced labor;
>
> (ii) a list of entities working with the government of the Xinjiang Uyghur Autonomous Region to recruit, transport, transfer, harbor or receive forced labor or Uyghurs, Kazakhs, Kyrgyz, or members of other persecuted groups out of the Xinjiang Uyghur Autonomous Region;
>
> . . .
>
> (iv) a list of entities that exported products described in clause (iii) from the People's Republic of China into the United States; [and]

[2] The court may take note of matters of public record, including public agency reports. *See, e.g.*, *Sebastian v. United States*, 185 F.3d 1368, 1374 (Fed. Cir. 1999).

> (v) a list of facilities and entities, including the Xinjiang Production and Construction Corps, that source material from the Xinjiang Uyghur Autonomous Region or from persons working with the government of the Xinjiang Uyghur Autonomous Region or the Xinjiang Production and Construction Corps for purposes of the "poverty alleviation" program or the "pairing-assistance" program or any other government labor scheme that uses forced labor . . . .

UFLPA, Pub. L. 177–78, § 3(d)(2)(B), 135 Stat. at 1527; *see also FLETF Strategy*, *supra*, at 22–25. The UFLPA Entity List refers to "a consolidated register of the above four lists." *Listing Notice*, 88 Fed. Reg. at 38081. The statute requires that the FLETF update the strategy annually. *See* UFLPA, Pub. L. 177–78, § 3(e)(2), 135 Stat. at 1527; *see also FLETF Strategy*, *supra*, at 58 ("The FLETF also intends to update the UFLPA Entity List multiple times per year.").[3] An entity added to the Entity List may petition the FLETF for its removal. *See, e.g.*, *Listing Notice*, 88 Fed. Reg. at 38082.

Second, the UFLPA requires Customs to presumptively prohibit, under section 307 of the Tariff Act, the imports of entities on the Entity List. The statute reads in relevant part:

> (a) In General.—[Customs] shall, except as provided by subsection (b), apply a presumption that, with respect to any goods, wares, articles, and merchandise mined, produced, or manufactured wholly or in part in the Xinjiang Uyghur Autonomous Region of the People's Republic of China or produced by an entity on a list required by clause (i), (ii), (iv) or (v) of section 2(d)(2)(B)—
>
> (1) the importation of such goods, wares, articles, and merchandise is prohibited under section 307 of the Tariff Act of 1930 (19 U.S.C. 1307); and
>
> (2) such goods, wares, articles, and merchandise are not entitled to entry at any of the ports of the United States.

Pub. L. No. 177–78, § 3(a), 135 Stat. at 1529. Customs applies the rebuttable presumption requirement of the UFLPA through its general authority to examine and decide whether to detain, release, exclude, or seize merchandise under 19 U.S.C. § 1499 and associated

[3] Moreover, "[a]ny FLETF member agency may submit a recommendation to the FLETF Chair to add an entity to the UFLPA Entity List. Following review of the recommendation by the FLETF member agencies, the decision to add an entity to the UFLPA Entity List will be made by majority vote of the FLETF member agencies." *Listing Notice*, 88 Fed. Reg. at 38082.

regulations. *See* Customs, *Uyghur Forced Labor Prevention Act: U.S. Customs and Border Protection Operational Guidance for Importers* 7 (2022), https://www.cbp.gov/sites/default/files/assets/documents/2022Jun/CBP_Guidance_for_Importers_for_UFLPA_13_June_2022.pdf ("*Operational Guidance*"). Customs "will provide importers with notice, in accordance with the customs laws, when enforcement actions are taken on their shipments." *Id.*

An affected importer may rebut the UFLPA's presumption and demonstrate the admissibility of the merchandise. The UFLPA requires Customs to enforce the presumption unless it determines:

> (1) that the importer of record has—
>
> (A) fully complied with [guidance in the *FLETF Strategy*] and any regulations issued to implement that guidance; and
>
> (B) completely and substantively responded to all inquiries for information submitted by the Commissioner to ascertain whether the goods were mined, produced, or manufactured wholly or in part with forced labor; and
>
> (2) by clear and convincing evidence, that the good, ware, article, or merchandise was not mined, produced, or manufactured wholly or in part by forced labor.

Id. § 3(b), 135 Stat. at 1529. Customs has a process for requesting an exception to the rebuttable presumption and for furnishing information that would meet the UFLPA's admissibility requirements. *See Operational Guidance*, *supra*, at 9–10. The *FLETF Strategy* contains detailed guidance on how importers may demonstrate the admissibility of their merchandise. *Supra*, at 40–51. If Customs decides to exclude the merchandise, the importer may challenge that decision by filing a protest under 19 U.S.C. § 1514(a)(4) and 19 C.F.R. part 174. *See Operational Guidance*, *supra*, at 7–8.

II. Factual Background and Procedural History

The court recounts only those assertions pleaded in the Complaint that are relevant to assessing subject matter jurisdiction. As has been noted, Plaintiff Ninestar Corporation is a Chinese company that manufactures and sells laser printers, integrated circuit chips, and printer consumables such as toner and inkjet cartridges. Compl. ¶¶ 7, 33. All of the other plaintiffs are corporate affiliates of Ninestar. *Id.* ¶¶ 8–14. Together, Plaintiffs manufacture and sell, or support the manufacture and sale of, products directly and indirectly to numerous U.S.-based customers. *Id.* ¶ 34. According to the Complaint, prior to June 2023, Customs did not communicate to Plaintiffs that any of

Plaintiffs' products violate section 307 of the Tariff Act. *See id.* ¶ 37.

On June 9, 2023, the FLETF announced that Plaintiffs would be added to the UFLPA's Entity List.[4] Three days later, DHS, on behalf of the FLETF, published an updated Entity List in the *Federal Register* (the "Listing Decision"). *See Listing Notice*, 88 Fed. Reg. at 38082. Specifically, Plaintiffs were added to the second sub-list pursuant to section 2(d)(2)(B)(ii) of the UFLPA, which contains the entities determined to be working with the Government of the Xinjiang Uyghur Autonomous Region to "recruit, transport, transfer, harbor or receive forced labor or Uyghurs, Kazakhs, Kyrgyz, or members of other persecuted groups out of the Xinjiang Uyghur Autonomous Region." *See id.* Plaintiffs allege that the listing was accompanied by no further explanation. Plaintiffs received public notice of a process to request the FLETF for removal from the Entity List, *see id.*, but Plaintiffs did not submit such a removal request, *see* Compl. ¶ 45.

On August 22, 2023, Plaintiffs filed the Complaint initiating this action before the CIT. *See id.* Plaintiffs allege that they are "unaware of any facts relating to their respective businesses or otherwise supporting such an allegation," and that "[w]ithout learning the bases upon which Defendants added Plaintiffs to the UFLPA Entity List, Plaintiffs are unable meaningfully to seek removal from the list or otherwise challenge this final agency action." *See id.* ¶ 45. The Complaint pleads one cause of action for arbitrary and capricious agency action violating the Administrative Procedure Act, 5 U.S.C. § 706(2)(A), for failure to provide "*any* explanation[] for adding Plaintiffs to the UFLPA Entity List." Compl. ¶ 62. Plaintiffs further assert that they are not "able to seek relief under the APA challenging the action as contrary to the evidence in the administrative record, as Plaintiffs know neither the bases for the charge, nor the contents of the record. After filing, Plaintiffs will seek the record and, when appropriate, seek additional relief." *Id.* ¶ 46.

On the same day, Plaintiffs also filed a motion for preliminary injunction requesting that the court (1) stay the Listing Decision and (2) prevent Defendants from taking any action against the importation of Plaintiffs' goods predicated on the Listing Decision. *See* PI Mot. at 17. Defendants moved to dismiss the case and responded in opposition to Plaintiffs' Motion for Preliminary Injunction. *See* Defs.' Br. Plaintiffs filed a reply in support of their Motion. *See* Pls.' Reply, Oct. 13, 2023, ECF No. 30. A hearing on the Motion for Preliminary

[4] *See* Press Release, Dep't of Homeland Sec., DHS to Ban Imports from Two Additional PRC-Based Companies as Part of Its Enforcement of the Uyghur Forced Labor Prevention Act (UFLPA) (June 9, 2023), https://www.dhs.gov/news/2023/06/09/dhs-ban-imports-two-additional-prc-based-companies-part-its-enforcement-uyghur.

Injunction is scheduled for Thursday, December 7, 2023, and the briefing on Defendants' Motion to Dismiss is still underway and is not yet complete. *See* Order, Nov. 15, 2023, ECF No. 56.[5]

Defendants have also filed a confidential administrative record that Plaintiffs may review under the terms of a judicial protective order, along with a privilege log documenting Defendants' reasons for redaction. *See* Conf. Admin. R., Oct. 24, 2023, ECF No. 41; Am. Protective Order, Oct. 24, 2023, ECF No. 40; Privilege Redaction Log, Oct. 26, 2023, ECF No. 43. Pursuant to 28 U.S.C. § 2635(d)(2)[6] and USCIT Administrative Order No. 21–01, the court further ordered that Defendants file paper copies of the fully unredacted administrative record and move to treat such submissions as highly sensitive documents,[7] *see* Order, Oct. 27, 2023, ECF No. 44, and the court granted that motion, *see* Order, Oct. 30, 2023, ECF No. 49. The paper copies of the fully unredacted administrative record are not available to Plaintiffs. Because this opinion addresses only the issue of jurisdiction, no review of the record is necessary.

STANDARD OF REVIEW

A preliminary injunction is an extraordinary remedy that is "never awarded as of right." *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 24 (2008) (citing *Munaf v. Geren*, 553 U.S. 674, 689–90 (2008)); *see also Invenergy Renewables LLC v. United States*, 44 CIT __, __, 422 F. Supp. 3d 1255, 1280 (2019). The court weighs four factors in ruling on a motion for preliminary injunction: (1) whether the plaintiff is likely to succeed on the merits; (2) whether the plaintiff would suffer irrepa-

[5] The hearing on Plaintiffs' Motion for Preliminary Injunction and the briefing on Defendants' Motion to Dismiss have been postponed twice because the parties have been exploring the possibility of negotiating a process for the FLETF's consideration of a request of removal from the Entity List. *See* Joint Status Report & Mot. to Modify the Schedule at 2, Nov. 13, 2023, ECF No. 55; Order, Nov. 15, 2023, ECF No. 56. Plaintiffs state that they have provided Defendants with a proposed settlement process that would include disclosing additional information from the administrative record to Ninestar and establishing procedures for consideration of Ninestar's request for removal. Joint Status Report at 2. Defendants are considering that proposal in coordination with all FLETF members. *Id.*

[6] "The agency shall identify and transmit under seal to the clerk of the court any document, comment, or other information that was obtained on a confidential basis and that is required to be transmitted to the clerk under paragraph (1) of this subsection. . . . The confidential or *privileged* status of such material shall be preserved in the civil action, but the court may examine such material in camera and may make such material available under such terms and conditions as the court may order." *Id.* § 2635(d)(2) (emphasis added).

[7] Per USCIT Administrative Order 21–01, highly sensitive documents "are limited to documents containing information that has such a high level of sensitivity as to present a clear and compelling need to avoid filing on the existing CM/ECF system, such as certain privileged information or information the release of which could pose a danger of physical harm to any person." Admin. Order 21–01, at 1. Due to their sensitive nature, such documents "must be filed in paper format" and "may not be uploaded to CM/ECF." *Id.* at 2.

rable harm without the preliminary injunction; (3) whether the balance of hardships favors the plaintiff; and (4) whether the preliminary injunction would serve the public interest. *See, e.g.*, *Winter*, 555 U.S. at 20; *Silfab Solar, Inc. v. United States*, 892 F.3d 1340, 1345 (Fed. Cir. 2018); *Invenergy*, 422 F. Supp. 3d at 1280. "[T]he movant, by a clear showing, carries the burden of persuasion" on a motion for preliminary injunction. *Mazurek v. Armstrong*, 520 U.S. 968, 972 (1997) (internal quotation marks, emphasis, and citation omitted).

Naturally, questions of jurisdiction "closely affect[]" the first prong: a plaintiff's likelihood of success on the merits of a case. *U.S. Ass'n of Imps. of Textiles & Apparel v. U.S. Dep't of Com.*, 413 F.3d 1344, 1348 (Fed. Cir. 2005). Where there is no jurisdiction, a plaintiff is unable to succeed on the merits, and a preliminary injunction cannot issue. *Cf. Amsted Rail Co. v. U.S. Int'l Trade Comm'n*, 46 CIT __, __, 600 F. Supp. 3d 1308, 1319 (2022), *appeal dismissed*, No. 2023–1355, 2023 WL 4346710 (Fed. Cir. July 5, 2023). Moreover, where a court resolves a motion for preliminary injunction before a motion to dismiss is fully briefed, the court must evaluate subject matter jurisdiction in ruling on the preliminary injunction motion. *See U.S. Ass'n*, 413 F.3d at 1348; *see also, e.g.*, *Comm. Overseeing Action for Lumber Int'l Trade Investigations or Negots. v. United States*, 43 CIT __, __, 393 F. Supp. 3d 1271, 1273 n.3 (2019); *Int'l Custom Prods., Inc. v. United States*, 30 CIT 21, 21 n.1, 31 (2006).

Important issues of first impression and concerns of judicial economy counsel the court's review of subject matter jurisdiction now rather than later. Neither the CIT nor any other federal court has yet issued a decision involving the UFLPA. Defendants—the federal agencies and officials implementing Congress's directives combatting the trade of merchandise produced with forced labor—have taken the position that this case's challenge to agency action administering the UFLPA is not within the CIT's exclusive jurisdiction. *See* Defs.' Br. at 15. The matter has been fully briefed in the context of Plaintiffs' Motion for Preliminary Injunction. In any event, because the "court may and should raise the question of its jurisdiction sua sponte at any time it appears in doubt," *Arctic Corner, Inc. v. United States*, 845 F.2d 999, 1000 (Fed. Cir. 1988); *see also Amsted Rail*, 600 F. Supp. 3d at 1319, and because the question presented implicates weighty principles of CIT jurisdiction, the court exercises its discretion to review the issue of jurisdiction before the preliminary injunction hearing. Moreover, addressing subject matter jurisdiction now is consistent with treating jurisdiction as a threshold matter before the merits, *see Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94–95 (1998), and

will promote judicial economy in narrowing the issues for any further proceedings regarding Plaintiffs' Motion for Preliminary Injunction.

DISCUSSION

Plaintiffs request a preliminary injunction to stay the Listing Decision and to prevent Defendants from taking any action predicated on the Listing Decision against the importation of Plaintiffs' goods. *See* PI Mot. at 17. Defendants oppose, alleging among other arguments that the court lacks subject matter jurisdiction to hear Plaintiffs' challenge to the UFLPA Listing Decision. *See* Defs.' Br. at 15–18. Reviewing that argument as part of the Motion for Preliminary Injunction, the court concludes that Plaintiffs are likely to establish subject matter jurisdiction because the UFLPA is a law providing for embargoes within the meaning of 28 U.S.C. § 1581(i).

Plaintiffs plead 28 U.S.C. § 1581(i) as the basis for jurisdiction over this action and further specify subsection § 1581(i)(1)(C) in their Motion for Preliminary Injunction. *See* Compl. ¶ 23; PI Mot. at 12 n.3. That subsection establishes the CIT's "exclusive jurisdiction of any civil action commenced against the United States . . . that arises out of any law of the United States providing for . . . *embargoes* or *other quantitative restrictions* on the importation of merchandise for reasons other than the protection of the public health or safety." 28 U.S.C. § 1581(i)(1)(C) (emphasis added). Defendants, however, dispute that basis for subject matter jurisdiction and request dismissal. They argue that Plaintiffs' "addition to the UFLPA Entity List does not create an 'embargo,' nor does it constitute a 'quantitative restriction' on the amount of [P]laintiffs' goods that may enter the United States." Defs.' Br. at 16. Distinguishing between the Listing Decision itself and any later actions by Customs on the basis of the Listing Decision, Defendants contend that "[p]lacement on the list may, at some later date, result in a decision by [Customs] to exclude merchandise, but [P]laintiffs insist they are not challenging any such decision." *Id.* If Plaintiffs are unable to establish the CIT's exclusive jurisdiction over an action, the action must be brought in federal district court, so long as jurisdiction there is otherwise proper. *See Trayco, Inc. v. United States*, 994 F.2d 832, 836 (Fed. Cir. 1993).

As an initial matter, the text of the UFLPA clearly imposes an embargo within the meaning of § 1581(i). The Supreme Court has defined an embargo under § 1581(i) to be a "governmentally imposed quantitative restriction—of zero—on the importation of merchandise." *K Mart Corp. v. Cartier, Inc.*, 485 U.S. 176, 185 (1988). The UFLPA establishes a presumption that "prohibit[s]" the "importa-

tion" of merchandise. Pub. L. No. 177–78, § 3(a)(1), 135 Stat. at 1529. Moreover, the presumption was imposed by Congress and is enforced by Customs without the involvement of a third party. *See id.*; *see also K Mart*, 485 U.S. at 185 (stressing that an embargo is "a *governmental* restriction on the quantity of a particular product that will enter," not "a mechanism by which a private party might, at its own option, enlist the Government's aid in restricting the quantity of imports in order to enforce a private right"). Finally, the word "prohibit" and phrase "not entitled to entry at any . . . ports" make clear that the presumption sets a quantitative restriction of zero. Pub. L. No. 177–78, § 3(a), 135 Stat. at 1529.

Defendants argue that Plaintiffs' addition to the Entity List does not establish an embargo because the UFLPA's prohibition of imports is a presumption that may be rebutted. *See* Defs.' Br. at 15–18. Specifically, the rebuttable presumption makes the UFLPA "strictly *qualitative*," rather than quantitative. Defs.' Br. at 18. But the CIT has exercised its § 1581(i)(1)(C) jurisdiction over challenges arising under embargoes that, like the UFLPA's embargo, provide for the granting of exemptions or reconsideration. *See, e.g.*, *Humane Soc'y of U.S. v. Brown*, 19 CIT 1104, 1112, 901 F. Supp. 338, 346 (1995) (affirming § 1581(i)(1)(C) jurisdiction in a case arising under the High Seas Driftnet Fisheries Enforcement Act, 16 U.S.C. § 1826a); *Nat. Res. Def. Council, Inc. v. Ross*, 42 CIT __, __, 331 F. Supp. 3d 1338, 1353 (2018) (concluding that the CIT had § 1581(i)(1)(C) jurisdiction in a case arising under the Marine Mammal Protection Act, 16 U.S.C. § 1371, involving the endangered vaquita porpoise)[8] ; *Sea Shepherd N.Z. v. United States*, 47 CIT __, __, 639 F. Supp. 3d 1367, 1376 n.14 (2023) (same, involving the endangered Māui dolphin); *see also Earth Island Inst. v. Brown*, 28 F.3d 76, 79 (9th Cir. 1994) (holding that a case arising under the Marine Mammal Protection Act was within the CIT's exclusive jurisdiction over embargoes). Within that category of embargo provisions is section 307 itself, which allows importers to submit proof to Customs that detained merchandise was not produced with forced labor. *See* 19 C.F.R. § 12.43(a); *see also infra* p. 16 (discussing the CIT's well-established jurisdiction over section 307). Surely all of these other embargoes cannot be characterized as "qualitative" merely because they require fact-specific determinations as to which entities and goods are embargoed. Ultimately, Defendants' reliance on the rebuttable nature of the UFLPA's import prohibition is not persuasive. Whether (1) Plaintiffs attempt to provide corrective

[8] *See also Nat. Res. Def. Council, Inc. v. Ross*, 42 CIT __, 331 F. Supp. 3d 1381 (2018); *Nat. Res. Def. Council, Inc. v. Ross*, 42 CIT __, 348 F. Supp. 3d 1306 (2018); *Nat. Res. Def. Council, Inc. v. Ross*, 774 F. App'x 646 (Fed. Cir. 2019); *Nat. Res. Def. Council, Inc. v. Ross*, 44 CIT __, 456 F. Supp. 3d 1292 (2020).

information to Customs and Customs then determines that the presumption will not be lifted, or (2) Plaintiffs do not attempt to provide corrective information to Customs at all and the presumption continues to apply, "the importation of [Plaintiffs'] goods . . . is prohibited" by operation of section 307. *Id.* § 3(a)(1), 135 Stat. at 1529. Under *K Mart*, that is an embargo.[9]

The broader issue with Defendants' reading is that it creates a jurisdictional barrier between the UFLPA and section 307 when Congress was clear that the two statutes do not operate independently from one another. *See* Pls.' Reply at 2–3. To the contrary, as noted above, the UFLPA was passed "to strengthen the prohibition against the importation of goods made with forced labor, including by ensuring that the Government of the People's Republic of China does not undermine the *effective enforcement of section 307*." Pub. L. 177–78, § 1(1), 135 Stat. at 1525 (emphasis added). Moreover, the UFLPA presumption that results from addition to the Entity List is a prohibition on "importation of such goods . . . *under section 307*." *Id.* § 3(a)(1), 135 Stat. at 1529 (emphasis added).[10] The CIT has indeed adjudicated forced labor cases under section 307 as part of its § 1581(i) jurisdiction over embargoes. *See Int'l Lab. Rts. Fund*, 29 CIT at 1053, 391 F. Supp. 2d at 1373 (exercising jurisdiction under § 1581(i)(1)(C)–(D) over a challenge to Customs's failure to investigate and enforce forced labor prohibition against cocoa imports from Côte d'Ivoire); *McKinney*, 9 CIT at 319, 614 F. Supp. at 1232 (exercising jurisdiction

[9] The CIT's exclusive jurisdiction also extends to civil actions concerning the "administration and enforcement with respect to the matters referred to in" subparagraph (C). 28 U.S.C. § 1581(i)(1)(D). Plaintiffs have not alleged that basis for jurisdiction, specifying only subparagraph (C). PI Mot. at 12 n.3. But in prior cases involving section 307, the CIT has found jurisdiction under both subparagraphs (C) and (D). *See Int'l Lab. Rts. Fund v. United States*, 29 CIT 1050, 1053, 391 F. Supp. 2d 1370, 1373 (2005); *McKinney v. U.S. Dep't of Treasury*, 9 CIT 315, 319, 614 F. Supp. 1226, 1232 (1985).
The court does so here as well. The broader sweep of subparagraph (D) captures the "administration and enforcement" of embargoes. Assuming arguendo Defendants' point that a presumption is not an embargo, *see* Def.'s Br. at 16–18, subparagraph (D) nonetheless covers this case. The UFLPA makes clear that its presumption scheme is intended for the "effective *enforcement* of section 307." Pub. L. 177–78, § 1(1), 135 Stat. at 1525 (emphasis added). And Defendants do not appear to dispute that section 307 establishes embargoes. *See* Def.'s Br. at 18 n.9. That would, by the text of the UFLPA, make the UFLPA a "law of the United States providing for . . . enforcement" of embargoes. 28 U.S.C. § 1581(i)(1)(D).

[10] Further references to section 307 in the UFLPA abound. The UFLPA requires the FLETF, in consultation with the Secretary of Commerce and Director of National Intelligence, to develop a strategy for supporting enforcement of section 307, *see id.* § 2(c), 135 Stat. at 1526; to describe how Customs plans to enhance its use of legal authorities to ensure that no goods are entered at any ports in violation of section 307, *see id.* § 2(d)(4), 135 Stat. at 1528; to describe additional tools necessary for Customs to enforce section 307, *see id.* § 2(d)(5), 135 Stat. at 1528; and to formulate guidance to importers on the type, nature, and extent of evidence demonstrating that goods from China do not violate section 307, *see id.* § 2(d)(6)(C), 135 Stat. at 1528. Finally, the statute borrows the meaning of forced labor from section 307. *See id.* § 7(2)(A), 135 Stat. at 1528.

under § 1581(i)(1)(C)–(D) over, but ultimately determining to be non-justiciable, a challenge to a Treasury Department decision not to implement Customs's determination that certain products from the Soviet Union may have been produced by forced labor), *aff'd*, 799 F.2d 1544 (Fed. Cir. 1986); *see also Int'l Lab. Rts. Fund v. Bush*, 357 F. Supp. 2d 204, 208 (D.D.C. 2004) (concluding that section 307 provides for an embargo under § 1581(i)(1)(C) because it "sets forth a policy that may be invoked to prevent goods from entering the country").

In short, if challenges to agency action implementing section 307 sit comfortably within § 1581(i), so, too, must challenges to agency action implementing the UFLPA. To have jurisdiction over section 307 but not over the UFLPA would otherwise lie in tension with Congress's intention to create a coherent statutory scheme prohibiting the importation of goods produced with forced labor. Moreover, the prohibition on importing goods produced with nonvoluntary labor is a long-standing principle of U.S. trade and customs law that falls within the CIT's expertise.[11] The relationship between the two statutes, therefore, further supports the holding that the UFLPA is a law providing for embargoes within the meaning of § 1581(i).

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[11] Jurisdiction over the UFLPA is consistent with Congress's aims in passing the Customs Courts Act of 1980, Pub. L. No. 96–417, 94 Stat. 1727, which enacted the CIT's jurisdictional provisions. Like all federal courts, the CIT is a court "of limited jurisdiction." *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994). But the CIT is unique in the federal system as an Article III court with subject matter expertise in international trade and customs law. Indeed, "[i]t is . . . apparent from the legislative history of § 1581 and from the broad grant of exclusive jurisdiction given to the [CIT] that Congress had in mind consolidating this area of administrative law in one place," which would promote "a degree of uniformity and consistency" in international trade and customs law. *Conoco, Inc. v. U.S. Foreign-Trade Zones Bd.*, 18 F.3d 1581, 1589 (Fed. Cir. 1994). The U.S. Court of Appeals for the Federal Circuit in *Conoco* affirmed the CIT's jurisdiction under § 1581(i) in part because the case "deal[t] with issues of governmental law and policy regarding customs and tariffs, the type of issues with which the [CIT] is acknowledged to have expertise." *Id.* Matters outside of the CIT's expertise, by contrast, may suggest a lack of subject matter jurisdiction. For instance, the Supreme Court in *K Mart* rejected the petitioner's arguments for jurisdiction in part because the statute at issue involved trademark law, which is not an area of expertise of either the CIT or its predecessor court, the Customs Court. *See* 485 U.S. at 189. Discussing the Customs Court Act, the Court concluded that there is no "indication . . . that Congress wished the new institutions [of the CIT and the Federal Circuit] to acquire expertise in the area in which its predecessors had none." *Id.*

Here, the subject matter of the underlying statute—a prohibition on goods produced with forced labor—falls comfortably within the CIT's expertise. Such prohibitions have a long history in U.S. trade and customs law. The first such prohibition in federal law, limited to imports made with convict labor, dates to the McKinley Tariff Act of 1890. *See* Pub. L. No. 51–1244, § 51, 26 Stat. 567, 624 (1890). The McKinley Tariff Act stated in relevant part:

> That all goods, wares, articles, and merchandise manufactured wholly or in part in any foreign country by convict labor, shall not be entitled to entry at any of the ports of the United States, and the importation thereof is hereby prohibited, and the Secretary of the Treasury is authorized to prescribe such regulations as may be necessary for the enforcement of this provision.

Id.

CONCLUSION

Because the UFLPA is a "law . . . providing for . . . embargoes," 28 U.S.C. § 1581(i)(1), the CIT has exclusive jurisdiction over challenges to agency action implementing the UFLPA under 28 U.S.C. § 1581(i)(1)(C)–(D). In the interest of resolving important questions of first impression and promoting judicial economy before any further proceedings, the court therefore concludes that Plaintiffs are likely to establish subject matter jurisdiction in this case under § 1581(i)(1)(C)–(D). In so doing, the court makes no other disposition and no finding of fact. The court expresses no view on the other contentions regarding Plaintiffs' Motion for Preliminary Injunction, which are left to any further proceedings.[12]

Dated: November 30, 2023
New York, New York

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

Section 307 of the Tariff Act of 1930 expanded that prohibition to any products of convict, forced, and indentured labor. *See* 19 U.S.C. § 1307; *see also* Christopher A. Casey, Cathleen D. Cimino-Isaacs & Michael A. Weber, Cong. Rsch. Serv., IF11360, *Section 307 and Imports Produced by Forced Labor* 1 (2023). While Congress was initially concerned with protecting domestic industry from goods made with low-cost labor, *see* Casey et al., *supra*, at 1, more recent legislation has also grounded this prohibition in humanitarian and human rights concerns, *see* Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106–386, §§ 102(b), 112, 114 Stat. 1464, 1466– 67, 1486–88 (concluding that human trafficking includes forced labor and "involves significant violations of labor, public health, and human rights standards worldwide," and creating federal crimes related to the use or trafficking of forced labor); Trade Facilitation and Trade Enforcement Act of 2015, Pub. L. No. 114–125, § 910, 130 Stat. 122, 239 (removing an exemption from section 307 that allowed for goods made with forced labor, but with no comparable equivalent for the "consumptive demands of the United States," to be imported). It is against this backdrop that Congress passed the UFLPA. *See* Pub. L. 177–78, § 1(4)–(6), 135 Stat. at 1525 (expressing Congress's intent to prevent forced labor, human trafficking, torture, and deprivations of liberty and to address gross human rights violations in Xinjiang). Grounded in that long history, jurisdiction in today's case is consistent with Congress's intent to establish uniformity in trade law and make use of the CIT's subject matter expertise. *See K Mart*, 485 U.S. at 189; *Conoco*, 18 F.3d at 1589.

[12] Defendants also argue that Plaintiffs are not likely to succeed on the merits of their claim for failure to exhaust administrative remedies, for mootness due to Defendants' filing of the Confidential Administrative Record in this case, and for failure to show that the UFLPA and APA require an explanation beyond the *Federal Register* notice. *See* Defs.' Br. at 15–31. Defendants further contend that Plaintiffs have not been irreparably harmed and that the public interest and balance of hardships compel a denial of injunctive relief. *See id.* at 31–40. Plaintiffs oppose all of those arguments. *See* Pls.' Reply. The court expresses no view at this time as to any of those arguments.

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