U.S. Customs and Border Protection

GRANT OF "LEVER-RULE" PROTECTION

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

ACTION: Notice of grant of "Lever-Rule" protection.

SUMMARY: Pursuant to 19 CFR 133.2(f), this notice advises interested parties that CBP has granted "Lever-rule" protection to The Procter & Gamble Company's federally registered and recorded "ORAL-B" trademark with respect to electric toothbrush replacement heads manufactured in Germany. Notice of the receipt of an application for "Lever-rule" protection was published in the November 3, 2021, issue of the *Customs Bulletin*.

FOR FURTHER INFORMATION CONTACT: Jennifer Boger, Intellectual Property Rights Branch, Regulations and Rulings, Jennifer.Boger@cbp.dhs.gov.

SUPPLEMENTARY INFORMATION:

BACKGROUND

Pursuant to 19 CFR 133.2(f), this notice advises interested parties that CBP has granted "Lever-rule" protection for all electric toothbrush replacement heads manufactured in Germany that bear the recorded "ORAL-B" mark (U.S. Trademark Registration No. 2,910,847 / CBP Recordation No. TMK 08–01198) and are intended for sale outside of the United States.

In accordance with *Lever Bros. Co. v. United States*, 981 F.2d 1330 (D.C. Cir. 1993), CBP has determined that the above-referenced gray market ORAL-B electric toothbrush replacement heads differ physically and materially from the ORAL-B electric toothbrush replacement heads authorized for sale in the United States with respect to the following product characteristics: compliance with regulatory requirements regarding labelling and importer registration, and consumer assistance information.

ENFORCEMENT

Importation of the above-referenced subject gray market ORAL-B electric toothbrush replacement heads is restricted, unless the labeling requirements of 19 CFR § 133.23(b) are satisfied.

Dated: March 10, 2023

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

19 CFR PART 177

REVOCATION OF ONE RULING LETTER AND REVOCATION OF TREATMENT RELATING TO THE TARIFF CLASSIFICATION OF METAL STORAGE LOCKERS AND CABINETS FOR GARAGE USE

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

ACTION: Notice of revocation of one ruling letter and revocation of treatment relating to the tariff classification of metal storage lockers and cabinets for garage use.

SUMMARY: Pursuant to section 625(c), Tariff Act of 1930 (19 U.S.C. § 1625(c)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that U.S. Customs and Border Protection (CBP) is revoking one ruling letter concerning tariff classification of metal storage lockers and cabinets for garage use under the Harmonized Tariff Schedule of the United States (HTSUS). Similarly, CBP is revoking any treatment previously accorded by CBP to substantially identical transactions. Notice of the proposed action was published in the *Customs Bulletin*, Vol. 56, No. 40, on October 12, 2022. No comments were received in response to that notice.

EFFECTIVE DATE: This action is effective for merchandise entered or withdrawn from warehouse for consumption on or after May 28, 2023.

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

SUPPLEMENTARY INFORMATION:

BACKGROUND

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

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

Pursuant to 19 U.S.C. § 1625(c)(1), a notice was published in the *Customs Bulletin*, Vol. 56, No. 40, on October 12, 2022, proposing to revoke one ruling letter pertaining to the tariff classification of metal storage lockers and cabinets for garage use. Any party who has received an interpretive ruling or decision (*i.e.*, a ruling letter, internal advice memorandum or decision, or protest review decision) on the merchandise subject to this notice should have advised CBP during the comment period.

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

In NY N310710, CBP classified the metal storage lockers and cabinets in heading 9403, HTSUS, specifically in subheading 9403.20.0081, HTSUSA (Annotated), which provides for "Other furniture and parts thereof: Other metal furniture: Other: Counters, lockers, racks, display cases, shelves, partitions and similar fixtures: Other". CBP has reviewed NY N310710 and has determined the ruling letter to be in error. It is now CBP's position that the metal locker cabinets are properly classified, in heading 9403, HTSUS, specifically in subheading 9403.20.0050, HTSUSA, which provides for "Other furniture and parts thereof: Other metal furniture: Household: Other: Other".

Pursuant to 19 U.S.C. § 1625(c)(1), CBP is revoking one ruling letter and revoking or modifying any other ruling not specifically identified to reflect the analysis contained in HQ H313152, set forth as an attachment to this notice. Additionally, pursuant to 19 U.S.C. § 1625(c)(2), CBP is revoking any treatment previously accorded by CBP to substantially identical transactions.

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

Yuliya A. Gulis,
Director
Commercial and Trade Facilitation Division

Attachment

HQ H313152

March 9, 2023

OT:RR:CTF:CPMMA H313152 AJK

CATEGORY: Classification

TARIFF NO: 9403.20.0050

Mr. Patrick D. Gill
Sandler, Travis & Rosenberg, P.A.
675 Third Avenue, Suite 1805–06
New York, NY 10017

RE: Revocation of NY N310710; Classification of Metal Storage Lockers and Cabinets for Garage Use

Dear Mr. Gill:

This letter is in response to your submission dated May 12, 2020, on behalf of your client, NewAge Products, Inc., in which you requested reconsideration of New York Ruling Letter (NY) N310710, dated April 14, 2020, concerning the classification of metal storage lockers and cabinets for garage use under the Harmonized Tariff Schedule of the United States (HTSUS). In NY N310710, U.S. Customs and Border Protection (CBP) classified the merchandise in subheading 9403.20.0081, HTSUSA (Annotated), as other metal furniture.[1] We have reviewed the aforementioned ruling and have determined that the classification of the metal storage lockers and cabinets was incorrect.

Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. § 1625(c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), a notice of the proposed action was published in the Customs Bulletin, Vol. 56, No. 40, on October 12, 2022. No comments were received in response to this notice.

FACTS:

In your initial ruling request, dated March 16, 2020, you stated that the products under consideration are metal locker cabinets that are advertised and sold for use in household garages. The subject merchandise was described in NY N310710 as follows:

> Item 1, the "Bold Series," is a group of unequipped, locking, modular, shelved, metal storage lockers and cabinets that are available in different paint finishes. First, a floor standing, 2-door shelved locker whose dimensions are 42" in width, 18" in depth, and 72" in height. Second, a floor standing, 2-door shelved locker whose dimensions are 30" in width, 18" in depth, and 72" in height. Third, a floor standing, 2-door pair of shelved lockers whose combined dimensions are 84" in width, 18" in depth, and 77.25" in height. Fourth, a floor standing, 2-door base cabinet whose dimensions are 24" in width, 16" in depth, and 35.25" in height. Fifth, a floor standing, 5-drawer project workstation and locker component whose overall dimensions are 62" in width, 18" in depth, and 35." in height. The workstation contains four casters, two that are lockable. Sixth, a floor standing, multi-level rolling tool drawer whose dimensions are 20.75" in width, 16" in depth, and 33" in height. The tool drawer contains four

[1] Subheading 9403.20.0081, HTSUSA, was removed and replaced with subheading 9403.20.0086, HTSUSA, on July 1, 2022.

casters. Seventh, a wall mounted 2-door cabinet whose dimensions are 36" in width, 12" in depth, and 19.5" in height. Eighth, a wall mounted 2-door cabinet whose dimensions are 24" in width, 12" in depth, and 18" in height.

Item 2, the "Pro Series," is a group of unequipped, locking, modular, shelved, metal storage lockers and cabinets that are available in different paint finishes. First, a floor standing, 2-door, shelved multi-use locker whose dimensions are 36" in width, 24" in depth, and 80" in height. Second, a floor standing, 5-drawer tool cabinet whose dimensions are 28" in width, 22" in depth, and 32.25" in height. Third, a floor standing, multi-functional cabinet whose dimensions are 28" in width, 22" in depth, and 35.5" in height. Fourth, a floor standing, 2-door base cabinet whose dimensions are 28" in width, 22" in depth, and 32.25" in height. Fifth, a floor standing mobile locker on casters whose dimensions are 28" in width, 22" in depth, and 65" in height. Sixth, a floor standing sink-cabinet whose dimensions are 28" in width, 22" in depth, and 38.75" in height. The sink-cabinet is equipped with a sink and faucet. Seventh, a floor standing, single-door, adjustable-shelf locker whose dimensions are 15" in width, 24" in depth, and 80" in height. Eighth, a wall mounted single-shelf cabinet whose dimensions are 28" in width, 14" in depth, and 22" in height.

ISSUE:

Whether the metal storage lockers and cabinets are classified in subheading 9403.20.0050, HTSUSA, as metal household furniture, subheading 9403.20.0078, HTSUSA, as metal exchange lockers, or subheading 9403.20.0086, HTSUSA, as other metal furniture.

LAW AND ANALYSIS:

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

* * * * * *

The HTSUSA provisions at issue are as follows:

7324	Sanitary ware and parts thereof, of iron or steel:
7324.10.00	Sinks and wash basins, of stainless steel:
7324.10.0050	Other
9403	Other furniture and parts thereof:
9403.20.00	Other metal furniture:
	Household:
	Other:
9403.20.0050	Other
	Other:

	Counters, lockers, racks, display cases, shelves, partitions and similar fixtures:
9403.20.0078	Storage lockers, other than exchange lockers as described in statistical note 3 to this chapter
9403.20.0086	Other

Note 2 to chapter 94, HTSUS, provides, in pertinent part:

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

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

   (a) Cupboards, bookcases, other shelved furniture (including single shelves presented with supports for fixing them to the wall) and unit furniture ....

Statistical note 3 to chapter 94, HTSUS, provides, in pertinent part:

3. For the purposes of statistical reporting number 9403.20.0078, “metal exchange lockers” are lockers with individual locking doors mounted on one master locking door to access multiple units used by commercial businesses, hospitals, police departments, condominiums, apartments, hotels, automobile dealerships, etc.

* * * * * *

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

EN to chapter 94 provides, in pertinent part, as follows:

For the purposes of this Chapter, the term “furniture” means:

(A) Any “movable” articles (not included under other more specific headings of the Nomenclature), which have the essential characteristic that they are constructed for placing on the floor or ground, and which are used, mainly with a utilitarian purpose, to equip private dwellings, hotels, theatres, cinemas, offices, churches, schools, cafés, restaurants, laboratories, hospitals, dentists’ surgeries, etc., or ships, aircraft, railway coaches, motor vehicles, caravan-trailers or similar means of transport. (It should be noted that, for the purposes of this Chapter, articles are considered to be “movable” furniture even if they are designed for bolting, etc., to the floor, e.g., chairs for use on ships). Similar articles (seats, chairs, etc.) for use in gardens, squares, promenades, etc., are also included in this category.

(B) The following:

   (i) Cupboards, bookcases, other shelved furniture (including single shelves presented with supports for fixing them to the wall) and

> unit furniture, designed to be hung, to be fixed to the wall or to stand one on the other or side by side, for holding various objects or articles (books, crockery, kitchen utensils, glassware, linen, medicaments, toilet articles, radio or television receivers, ornaments, etc.) and separately presented elements of unit furniture. ...

> Headings 94.01 to 94.03 cover articles of furniture of any material (wood, osier, bamboo, cane, plastics, base metals, glass, leather, stone, ceramics, etc.). ...

EN 94.03 provides, in pertinent part, as follows:

> [This heading] includes furniture for general use (e.g., cupboards, show-cases, tables, telephone stands, writing-desks, escritoires, book-cases, and other shelved furniture (including single shelves presented with supports for fixing them to the wall), etc.), and also furniture for special uses.
>
> The heading includes furnitures for:
>
> (1) Private dwellings, hotels, etc., such as: cabinets, ...

* * * * * *

There is no dispute that the metal locker cabinets are metal furniture classified in subheading 9403.20.00, HTSUS, which is an *eo nomine* provision that provides for other metal furniture. *See* EN 94.03. The General EN to chapter 94 explains that "furniture" means any movable articles that are designed to be placed on the floor or ground and are used, mainly with a utilitarian purpose, to equip private dwellings. Furthermore, it provides that "furniture" also includes other shelved furniture that are "designed to be hung, [or] to be fixed to the wall". *See also* note 2 of chapter 94. In the instant case, the metal storage lockers and cabinets are either placed directly on the floor or mounted to a wall to furnish houses—specifically, household garages. Thus, the subject merchandise constitutes metal furniture within the scope of HTSUS. Specifically, the lockers constitute metal household furniture in subheading 9403.20.0050, HTSUSA, because they are intended to be used in household garages.[2] Although statistical note 3 to chapter 94 states that subheading 9403.20.0078, HTSUSA, specifically provides for "[s]torage lockers, other than metal exchange lockers," the subject merchandise is precluded from this subheading because the lockers are not intended, marketed or sold to be used by commercial businesses. In addition, the subject metal storage lockers and cabinets are also precluded from subheadings subsequent to subheading 9403.20.0050, HTSUSA, because such subheadings fall under the basket provision that provides for other non-household metal furniture.

[2] CBP has historically held that metal furniture that is utilized in household garages constitute metal household furniture within the scope of HTSUS. *See, e.g.*, NY N263824, dated May 7, 2015 (classifying a metal table intended to be used in a household garage in subheading 9403.20.0018, HTSUSA, as metal household furniture); NY N246865, dated Nov. 15, 2013 (classifying a floor-standing steel shelving unit intended for use from pantry to garage in subheading 9403.20.0018, HTSUSA, as metal household furniture); NY I85764, dated Aug. 28, 2002 (classifying a metal rolling storage chest that is designed to be used in the garage or workshop as furniture for storage in subheading 9403.20.0010, HTSUSA, as metal household furniture).

Pursuant to GRI 1, therefore, the metal locker cabinets are classified in subheading 9403.20.0050, HTSUSA, as metal household furniture.

The sixth product of item #2, the "Pro Series," however, is a floor standing combination sink-cabinet that is equipped with a steel sink and a faucet. Accordingly, the classification of the sink-cabinet is determined by the application of GRI 3(b), which applies to composite goods. To classify under GRI 3(b), CBP must identify the component of the subject merchandise that imparts the essential character of the merchandise. "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). Generally, the physical measures of bulk, quantity, weight or value are considered to determine the constituent material that imparts the essential character of the merchandise. *See* EN to GRI 3(b). Heading 7324, HTSUS, provides for steel sinks whereas heading 9403, HTSUS, provides for furniture, including the subject metal storage lockers and cabinets, as analyzed above. Historically, CBP has classified composite goods of consisting of a sink and cabinet in the heading that provides for cabinets by holding that the cabinet component imparts the essential character of the merchandise.combination sink-cabinet, which is a floor standing metal cabinet that is used to equip household garages, is classified in subheading 9403.20.0050, HTSUSA, as metal household furniture.[3] Accordingly, we find that the metal cabinet component imparts the essential character of the sink-cabinet and thus, the sink-cabinet constitutes furniture in heading 9403, HTSUS. The metal combination sink-cabinet, which is a floor standing metal cabinet that is used to equip household garages, is classified in subheading 9403.20.0050, HTSUSA, as metal household furniture.

HOLDING:

By application of GRI 1, the metal storage lockers and cabinets are classified in heading 9403, HTSUS, specifically subheading 9403.20.0050, HTSUSA, which provides for "Other furniture and parts thereof: Other metal furniture: Household: Other: Other". The 2022 column one, general rate of duty is free.

By application of GRI 3(b), the metal floor standing combination sink-cabinet is classified in heading 9403, HTSUS, specifically subheading 9403.20.0050, HTSUSA, which provides for "Other furniture and parts thereof: Other metal furniture: Household: Other: Other". The 2022 column one, general rate of duty is free.

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

EFFECT ON OTHER RULINGS:

NY N310710, dated April 14, 2020, is hereby revoked.

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[3] *See, e.g.*, NY N318142, dated Mar. 16, 2021 (classifying a stainless-steel laundry sink and cabinet, and an acrylic laundry sink and cabinet in subheading 9403.60.8081, HTSUSA, as wooden furniture); NY R03428, dated Mar. 20, 2006 (classifying a wood cabinet base with a marble top and ceramic sink in subheading 9403.60.8080, HTSUSA, as wooden furniture); NY L80594, dated Nov. 1, 2004 (classifying a wooden cabinet with a marble top, bronze sink and bronze faucets in subheading 9403.60.8080, HTSUSA, as wooden furniture).

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

YULIYA A. GULIS,
Director
Commercial and Trade Facilitation Division

U.S. Court of Appeals for the Federal Circuit

Borusan Mannesmann Boru Sanayi ve Ticaret A.S., Borusan Mannesmann Pipe U.S. Inc., Plaintiffs-Appellants v. United States, Wheatland Tube, Nucor Tubular Products Inc., Defendants-Appellees

Appeal No. 2021–2097

Appeal from the United States Court of International Trade in No. 1:20-cv-00015-JAR, Senior Judge Jane A. Restani.

Decided: March 15, 2023

JULIE MENDOZA, Morris, Manning & Martin, LLP, Washington, DC, argued for plaintiffs-appellants. Also represented by DONALD CAMERON, JR., MARY HODGINS, BRADY MILLS, R. WILL PLANERT, EDWARD JOHN THOMAS, III; TIMOTHY MEYER, Duke University School of Law, Durham, NC.

ALAN H. PRICE, Wiley Rein, LLP, Washington, DC, for defendant-appellee Nucor Tubular Products Inc. Also represented by THEODORE PAUL BRACKEMYRE, ROBERT E. DEFRANCESCO, III, PAUL A. DEVAMITHRAN.

ELIZABETH DRAKE, Schagrin Associates, Washington, DC, argued for defendant-appellee Wheatland Tube. Also represented by NICHOLAS J. BIRCH, CHRISTOPHER CLOUTIER, WILLIAM ALFRED FENNELL, LUKE A. MEISNER, KELSEY RULE, ROGER BRIAN SCHAGRIN.

ROBERT R. KIEPURA, Commercial Litigation Branch, Civil Division, United States Department of Justice, Washington, DC, argued for defendant-appellee United States. Also represented by BRIAN M. BOYNTON, PATRICIA M. MCCARTHY, FRANKLIN E. WHITE, JR.; RACHEL BOGDAN, Office of the Chief Counsel for Trade Enforcement and Compliance, United States Department of Commerce, Washington, DC.

Before TARANTO, STOLL, and CUNNINGHAM, *Circuit Judges*.

TARANTO, *Circuit Judge*.

From May 2017 to April 2018, Borusan Mannesmann Boru Sanayi ve Ticaret A.S. and Borusan Mannesmann Pipe U.S. Inc. (collectively, Borusan) imported circular welded carbon steel pipes and tubes (carbon steel pipe) that were subject to decades-old antidumping duties. Near the end of that period in 2018, the President issued Proclamation 9705, which separately imposed a duty on imported steel articles (including Borusan's carbon steel pipe) under § 232 of the Trade Expansion Act of 1962, 19 U.S.C. § 1862. In the annual administrative review of the antidumping duties owed on Borusan's imports for the May 2017–April 2018 period, the Department of Commerce treated the Proclamation 9705 duty as a "United States import dut[y]" under 19 U.S.C. § 1677a(c)(2)(A), a treatment that resulted in

higher antidumping duties for Borusan's imports in the review than if Commerce had not so treated the Proclamation 9705 duty.

Borusan challenged Commerce's annual-review determination in the Court of International Trade (Trade Court), urging that the phrase "United States import duties" in § 1677a(c)(2)(A) did not encompass any duties imposed under § 232. The Trade Court disagreed and affirmed Commerce's treatment of the Proclamation 9705 duty. *Borusan Mannesmann Boru Sanayi ve Ticaret A.S. v. United States*, 494 F. Supp. 3d 1365, 1371–76 (Ct. Int'l Trade 2021). That ruling is now here on Borusan's appeal. Because Commerce correctly determined that the particular § 232 duty imposed by Proclamation 9705 is a "United States import dut[y]" under 19 U.S.C. § 1677a(c)(2)(A), we affirm.

I

A

Antidumping duties are designed to remedy injury or threatened injury to domestic industry from the importation of merchandise sold in the United States at a price less than the merchandise's fair value (*i.e.*, dumping). *See* 19 U.S.C. § 1673; *Thyssenkrupp Steel North America, Inc. v. United States*, 886 F.3d 1215, 1217 (Fed. Cir. 2018). The antidumping duty is set to equal the amount by which the imported merchandise is sold below its fair value. 19 U.S.C. § 1673. Importers make appropriate deposits upon entering merchandise subject to an antidumping duty, but final determinations of the duties owed are generally made in annual administrative reviews (if requested) that cover imports during the preceding 12 months (the period of review). *Id.* § 1675(a)(1); *see Thyssenkrupp*, 886 F.3d at 1218 (describing this "retrospective" system).

Of importance to the present appeal, antidumping duties depend on the "dumping margin," 19 U.S.C. § 1677(35)(A), which is the difference between "the normal value" and the "export price (or the constructed export price) for the merchandise," *id.* § 1673. The normal value, *i.e.*, the value in the home country, is commonly the price at which the merchandise is sold in the exporting country, subject to certain adjustments. *Id.* § 1677b(a)(1)(B). On the other hand, the "export price" is

> the price at which the subject merchandise is first sold (or agreed to be sold) before the date of importation by the producer or exporter of the subject merchandise outside of the United

> States to an unaffiliated purchaser in the United States or to an unaffiliated purchaser for exportation to the United States, as adjusted under subsection (c).

Id. § 1677a(a). A "constructed export price" is similar for present purposes.[1] In either case, this price, before it is adjusted as next described, can be called the "U.S. price." *See United States Steel Corp. v. United States*, 621 F.3d 1351, 1353 & n.1 (Fed. Cir. 2010) (defining "export price" as "the price of the product in the United States").

To arrive at the final export or constructed export price, adjustments must be made. For example, the U.S. price must be "increased by . . . the amount of any countervailing duty imposed on the subject merchandise under part I of this subtitle [19 U.S.C. §§ 1671–1671h] to offset an export subsidy." 19 U.S.C. § 1677a(c)(1)(C). And, what is key here, the U.S. price also must be "reduced by[,] . . . except as provided in paragraph (1)(C)," *i.e.*, except for certain countervailing duties,

> the amount, if any, included in such price, attributable to any additional costs, charges, or expenses, and *United States import duties*, which are incident to bringing the subject merchandise from the original place of shipment in the exporting country to the place of delivery in the United States.

Id. § 1677a(c)(2)(A) (emphasis added). We have described these adjustments as designed to produce an "apples with apples" comparison between the price at which the merchandise is sold in the U.S. and the price at which it is sold in the home country. *Smith-Corona Group v. United States*, 713 F.2d 1568, 1578 (Fed. Cir. 1983); *see also APEX Exports v. United States*, 777 F.3d 1373, 1375 (Fed. Cir. 2015).

B

Borusan Mannesmann Boru Sanayi ve Ticaret A.S. produces carbon steel pipe in Turkey and exports it to the United States. Borusan Mannesmann Pipe U.S. Inc., a United States-based affiliate of Borusan A.S., imports carbon steel pipe into the United States. Borusan's

[1] A "constructed export price," also involving a foreign producer's or exporter's first sale to an unaffiliated purchaser, is used when the location of such a sale is "in the United States"—rather than (as with an "export price") "outside of the United States"—according to the definition of "construction export price" as

> the price at which the subject merchandise is first sold (or agreed to be sold) in the United States before or after the date of importation by or for the account of the producer or exporter of such merchandise or by a seller affiliated with the producer or exporter, to a purchaser not affiliated with the producer or exporter, as adjusted under subsections (c) and (d).

19 U.S.C. § 1677a(b).

carbon steel pipe has long been subject to antidumping duties, *see, e.g., Antidumping Duty Order: Welded Carbon Steel Standard Pipe and Tube Products from Turkey,* 51 Fed. Reg.17, 784 (May 15, 1986), including the Borusan pipe imported from May 2017 through April 2018.

In March 2018, the President issued a proclamation, pursuant to § 232 of the Trade Expansion Act of 1962, Pub.L. No. 87–794, 76 Stat. 872, 877, codified as amended at 19 U.S.C. § 1862, that imposed a 25 percent ad valorem tariff on imported steel articles, including carbon steel pipe, from all countries except Canada and Mexico, entered (or withdrawn from a warehouse for consumption) on or after March 23, 2018. Proclamation 9705, 83 Fed. Reg. 11,625 (Mar. 15, 2018). The proclamation directed that the duty was to be imposed "in addition to any other duties, fees, exactions, and charges applicable to such imported steel articles." *Id.* clause 2, 83 Fed. Reg. at 11,627. Although the President later modified Proclamation 9705, the 25 percent duty applied to Borusan's imports for the last five weeks or so of the period from May 1, 2017, through April 30, 2018, which was the period of review for the annual administrative review of antidumping duties initiated by Commerce in July 2018. *Initiation of Antidumping and Countervailing Duty Administrative Reviews,* 83 Fed. Reg. 32,270 (July 12, 2018).

In its final results for that administrative review, Commerce treated the Proclamation 9705 duty as a "United States import dut[y]" under 19 U.S.C. § 1677a(c)(2)(A). Because Borusan had built this duty into its U.S. price (raising, after imposition of the Proclamation 9705 duty, what the U.S. price was before the duty), Commerce subtracted the Proclamation 9705 duty from the Borusan U.S. price, thereby lowering the export (and constructed export) price for Borusan (from what it would be without subtraction) and enlarging the gap between the normal value and the export (and constructed export) price, *i.e.*, increasing the dumping margin that determines the antidumping duty owed. *Circular Welded Carbon Steel Standard Pipe and Tube Products from Turkey: Final Results of Antidumping Duty Administrative Review and Final Determination of No Shipments; 2017–2018*, 85 Fed. Reg. 3616 (Jan. 22, 2020) (*Final Results*); *see also Circular Welded Carbon Steel Standard Pipe and Tube Products from Turkey: Amended Final Results of Antidumping Duty Administrative Review; 2017–2018,* 85 Fed. Reg. 12,893 (Mar. 5, 2020); J.A. 1348.

In a memorandum issued with the *Final Results*, J.A. 2368, Commerce analyzed two factors to determine whether the Proclamation 9705 duty, imposed under § 232, is a "regular" duty, such that, ac-

cording to Commerce, it falls within the meaning of "United States import duties," or a "special duty," such that it does not. J.A. 2397–400. Commerce borrowed the distinction, and factors used to apply it, from its determination made years earlier in considering a different presidential proclamation, Proclamation 7529, 67 Fed. Reg. 10,553 (Mar. 7, 2002), that imposed so-called "safeguard" (or "§ 201") duties under different statutory authority, namely, § 201 *et. seq.* of the Trade Act of 1974, Pub. L. No. 93–618, title II, §§ 201–05, 88 Stat. 1978, 2011–18 (codified as amended at 19 U.S.C. §§ 2251–55). *See Stainless Steel Wire Rod from the Republic of Korea: Final Results of Antidumping Duty Administrative Review*, 69 Fed. Reg. 19,153 (Apr. 12, 2004) (*SWR Korea*); *Wheatland Tube Co. v. United States*, 495 F.3d 1355, 1359–66 (Fed. Cir. 2007) (affirming the *SWR Korea* analysis under *Chevron U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984)). Specifically, Commerce analyzed (1)whether the Proclamation 9705 duty is remedial and (2)whether "double counting" of the duty would result from deeming it a United States import duty and therefore subtracting it from the U.S. price. J.A. 2397–400. Commerce did not analyze a third factor identified in the earlier § 201 proceedings: whether the duty at issue is temporary.

Commerce determined that Proclamation 9705's duty is not remedial, making it unlike special duties, because duties imposed under § 232 "are not focused on remedying injury to a domestic industry" but instead on eliminating threats to national security. J.A. 2398. Commerce also concluded that "antidumping duties and section 232 duties" serve "separate and distinct" functions, so "there would be no overlap between the two in providing the remedies sought by each," and hence no double counting in deeming the duty imposed under § 232 a United States import duty to be subtracted under 19 U.S.C. § 1677a(c)(2)(A). J.A. 2399. Commerce then pointed to Proclamation 9705's statement, which it described as "critical" to its double-counting analysis, that the duty is "to be imposed in addition to other duties." J.A. 2400. Finally, Commerce concluded that the International Trade Commission's placement of the § 232 duty at issue in the "special" duties chapter of the Harmonized Tariff Schedule is not sufficient to change the above-described conclusion. *Id*. Because Commerce determined in a separate memorandum that the Proclamation 9705 duty was in fact included in the U.S. price for Borusan before adjustment, J.A. 1348, it subtracted the duty under 19 U.S.C. § 1677a(c)(2)(A).

Borusan challenged the *Final Results* in the Trade Court. It contended, among other things, that all duties imposed under § 232, categorically, must be deemed not "United States import duties."

Wheatland Tube and Nucor Tubular Products, Inc., U.S. domestic producers of carbon steel pipe and therefore interested parties, 19 U.S.C. § 1677(9)(C), intervened.

The Trade Court, in its February 17, 2021 opinion, agreed with Commerce on the point now at issue here. *Borusan*, 494 F. Supp. 3d at 1373–76. It determined that duties imposed by the President under § 232 are "remedial in a broad sense" but are unlike the presidentially imposed safeguard duties (also called "§ 201 duties") that were a tissue in *SWR Korea* and *Wheatland*. *Id.* at 1374. Safeguard duties, the Trade Court said, "require[] a finding of a particular level of injury or threat of injury," whereas duties imposed under § 232 "could be used to promote vital nascent industries, not just already established injured industries," in which case "remediation would not be a primary goal." *Id.* The Trade Court further noted that duties imposed under § 232 are not subject to statutory time limits, unlike safeguard duties, which are subject to such time limits, *see* 19 U.S.C. § 2253(e), but nevertheless determined that duties imposed under section 232 are "not . . . significantly more permanent than safeguard duties." *Borusan*, 494 F. Supp. 3d. at 1374–75. The Trade Court gave a third factor—whether inclusion in "United States import duties" results in double counting—the greatest weight. *Id.* at 1375–76. It explained that "[t]here is a clear statutory interplay between Section 201 duties and antidumping duties," which is not the case for duties imposed under § 232, so no double counting results from treating the latter as "United States import duties" under 19 U.S.C. § 1677a(c)(2)(A) to calculate the dumping margin. *Id.* at 1375. The Trade Court finally noted that the parties accepted that Borusan's relevant U.S. prices included the Proclamation 9705 duty. *Id.* at 1376 n.9.

The Trade Court remanded the matter for Commerce to consider other issues immaterial to the present appeal. *Id.* at 1377. Commerce issued final results of redetermination on April 19, 2021. The Trade Court, "[h]aving received no objections to . . . the Remand Results," entered final judgment "sustain[ing]" them and ordering "liquidat[ion] [of the Borusan entries covered by the administrative review] in accordance with the final court decision in this action, including all appeals." J.A. 1 (capitalization removed). Borusan timely appealed.[2] We have jurisdiction under 28 U.S.C. § 1295(a)(5).

[2] Wheatland and the United States each cross-appealed, but those cross-appeals have been dismissed.

II

"We review the Commerce decisions at issue de novo, using the same standard of review applied by the [Trade Court] . . . ." *Quiedan Co. v. United States*, 927 F.3d 1328, 1330 (Fed. Cir. 2019) (citations omitted). We must sustain Commerce's determinations in antidumping duty proceedings unless they are "unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B)(i). "For factual determinations, substantial evidence is 'such relevant evidence as a reasonable mind might accept to support a conclusion' considering the record as a whole." *Mid Continent Steel & Wire, Inc. v. United States*, 941 F.3d 530, 537 (Fed. Cir. 2019) (citations omitted). We evaluate questions of statutory interpretation de novo. *Transpacific Steel LLC v. United States*, 4 F.4th 1306, 1318 (Fed. Cir. 2021).

There is no properly preserved dispute before us about Commerce's determination, J.A. 1348, that the duty imposed by Proclamation 9705 was in fact included in Borusan's U.S. prices.[3] The only issue is whether it was permissible for Commerce to treat that duty as a "United States import dut[y]" under 19 U.S.C. § 1677a(c)(2)(A) to be subtracted from those U.S. prices to arrive at the export (and constructed export) price used for calculation of the dumping margin. We draw the proclamation-specific conclusion that this treatment was permissible.

A

Before addressing the situation presented here—a specific presidential proclamation imposing a duty under § 232—we recount the decisions of Commerce and of this court that addressed the application of 19 U.S.C. § 1677a(c)(2)(A) to safeguard duties imposed by a 2002 presidential proclamation under the distinct § 201 regime. Those decisions feature prominently in the Commerce decision, Trade Court ruling, and parties' briefing before us.

Section 201 authorizes the President to take actions when an "article is being imported into the United States in such *increased* quantities as to be a substantial cause of serious injury, or the threat thereof, to . . . domestic industry." 19 U.S.C. § 2251(a) (emphasis added to indicate why § 201 is commonly described as addressing surges in imports). Among the wide range of actions authorized is "an increase in, or the imposition of, any duty on the imported article." *Id.*

[3] Borusan did not challenge that determination before the Trade Court. *See Borusan*, 494 F. Supp. 3d at 1376 n.9. Nor did Borusan challenge the determination in this court until its reply brief, Reply Br. at 25–27, which was too late. *See In re Google Technology Holdings LLC*, 980 F.3d 858, 863 (Fed. Cir. 2020); *Aventis Pharma S.A. v. Hospira, Inc.*, 675 F.3d 1324, 1332 (Fed. Cir. 2012).

§ 2253(a)(3)(A). For purposes of the chapter containing § 201 *et seq.*, "[t]he term 'duty' includes the rate and form of any import duty, including but not limited to tariff-rate quotas." *Id.* § 2481(1). Congress set certain prerequisites to presidential action, including an identified determination by the International Trade Commission about injury or threatened injury. *Id.* §§ 2251–54. Presidentially proclaimed measures are time-limited, presumptively to four years. *Id.* § 2253(e).

In 2002, the President issued Proclamation 7529 to impose duties under § 201 on merchandise that was also subject to antidumping duties, *e.g.*, stainless steel wire rod from the Republic of Korea, *SWR Korea*, 69 Fed. Reg. at 19,153, and carbon steel pipe from Thailand, *Certain Welded Carbon Steel Pipes and Tubes from Thailand: Final Results of Antidumping Duty Administrative Review*, 69 Fed. Reg. 61,649 (Oct. 20, 2004). Commerce, in its annual administrative reviews addressing those antidumping duties, had to decide whether the Proclamation 7529 duties were "United States import duties." It concluded that they were not, after giving notice and receiving comments on the issue. *SWR Korea*, 69 Fed. Reg. at 19,154–61.

Commerce reasoned that there is a distinction between "special" duties and "regular" duties, that it had long excluded antidumping duties from "United States import duties," and that antidumping duties are "special duties." *Id.* at 19,159 (discussing the Antidumping Act of 1921, Pub. L. No. 67–10, title II, §§ 202, 211, 42 Stat. 9, 11–12, 15). Commerce then considered whether the duties at issue, imposed under § 201 by Proclamation 7529, were more like special duties, which include at least antidumping duties, or regular duties. *Id.* Much of Commerce's reasoning addressed § 201 generally, but some was specific to Proclamation 7529. *Id.* at 19,160.

Commerce stated that § 201 duties are both remedial and temporary, unlike normal duties. *Id.* at 19,159. Commerce also determined that treating the duties at issue as "United States import duties" presented problems of double counting similar to the circularity problems presented by treating antidumping duties as "United States import duties." *Id.* at 19,160. Commerce stated that duties imposed under § 201 and antidumping duties can be interrelated and remedy

overlapping harms. *Id.*[4] Commerce then made the proclamation-specific point that there was "absolutely no indication in [Proclamation 7529] placing 201 duties on certain imports of steel that the President believed that Commerce effectively would increase those duties by taking them into account in calculating subsequent dumping margins." *Id.* Commerce reasoned that "any adjustment for the potential overlap between 201 and [antidumping] remedies is to be made by the President in setting the level of the 201 duties," and "[o]nce the President has struck this balance, it is not Commerce's place to upset that balance." *Id.*

In *Wheatland*, we approved Commerce's *SWR Korea* conclusion, affirming its application in the annual administration review before us. 495 F.3d at 1359–66. We quickly found ambiguity at step one of the *Chevron* framework. *Id.* at 1359–60. We explained that "Congress has not defined or explained the meaning or scope of 'United States import duties,'" *id.* at 1359, and concluded that "Congress has not 'directly spoken to the precise question at issue'"—"whether § 201 safeguard duties are to be considered 'United States import duties' for purposes of determining the [export price] and calculating dumping margin," *id.* at 1359–60.

We then determined, at step two of the *Chevron* framework, that Commerce's answer to this precise question was reasonable. Among other things, we specifically highlighted the lack of express presidential intent "regarding the calculation of antidumping margin" in the particular proclamation at issue. *Id.* at 1364. We quoted and relied on Commerce's explanation that the relationship between a particular safeguard duty and antidumping remedies was for the President to decide in imposing the former and that, in Proclamation 7529, "the balance between § 201 safeguard duties and antidumping duties had been set by the President." *Id.* at 1365. We also noted certain proclamation-specific facts as supporting Commerce's conclusion. *Id.* at 1364–65 (stating that only four of the twenty exporting countries were subject to both antidumping duties and § 201 safeguard duties).

Notably, the government emphasized proclamation-specific issues in its brief before us in *Wheatland*. For example, the government suggested that Commerce was in the best position to determine

[4] For support, Commerce relied on a Senate Committee Report related to the Trade Act of 1974 (which enacted the § 201 regime), S. Rep. No. 93–1298 at 123 (1974), and also the Statement of Administrative Action (SAA) accompanying the Uruguay Round Agreements Act (URAA), the latter stating that, in considering the imposition of measures under § 201, "the President will continue the practice of taking into account relief provided under other provisions of law, such as the antidumping and countervailing duty laws," SAA, H.R. Doc. No. 103–316, Vol. 1, at 964 (1994). The SAA "shall be regarded as an authoritative expression by the United States concerning the interpretation and application of the Uruguay Round Agreements" and the URAA. 19 U.S.C. § 3512(d).

whether to deduct the § 201 duties at issue from the U.S. price because Commerce, through the Secretary of Commerce, is subject to the President's control. *Wheatland*, Nos. 2006-1524, -1525, United States Opening Br. at 41–42. The government also emphasized the lack of country-specific rates in Proclamation 7529, which it viewed as indicating that the President did not intend for the proclamation's duties to be imposed in addition to antidumping duties. *Id.* at 42–45.

B

1

The reference to "United States import duties" in § 1677a(c)(2)(A) is a reference to actually prescribed duties—not to a mere legal authorization to prescribe duties, such as the constitutional grant of power to Congress or a statutory grant of authority to the President. The provision requires "reducing" a concrete numerical price, the U.S. price, by "United States import duties," to the extent those duties are "included in such price" to arrive at a different concrete numerical price, the "export price" (or "constructed export price"). 19 U.S.C. § 1677a(c)(2)(A). There is nothing to subtract until a duty is prescribed. If a statute merely authorizes a governmental officer or body to impose a duty, as § 232 authorizes the President to do, it is the particular exercise of the authority that determines—based on the character of that exercise—whether the prescribed duty comes within § 1677a(c)(2)(A).

Nothing in § 1677a(c)(2)(A) requires the uniform treatment of all duties prescribed under a particular statutory authorization. Nor, more specifically, have we been shown anything in the § 232 framework that requires the uniform treatment of all duties imposed by the President under§ 232. Specifically, although Borusan suggests that we categorically conclude that § 232 duties are not United States import duties, *see* Oral Arg. at 43:20–44:19, it has presented no persuasive reason to conclude that the relevant question—whether a specific duty prescribed by a particular presidential action under § 232 constitutes a "United States import dut[y]" under § 1677a(c)(2)(A)—must have the same answer for all such actions under § 232.

Section 232 by its terms gives the President discretion to determine "the nature and duration of the action" needed to "adjust the imports of the article and its derivatives" to address the national-security threat. 19 U.S.C. § 1862(c)(1)(A)(ii). Even as to a choice between quotas and duties, § 232 gives the President "discretion in determining the method to be used to adjust imports." *Federal Energy Administration v. Algonquin SNG, Inc.*, 426 U.S. 548, 561 (1976). The

President's discretion is broad enough to encompass the choice of whether a duty is to be imposed on top of the amounts of antidumping duties that would be due without the duty or, instead, is to partly or wholly substitute for such duties. *See Transpacific*, 4 F.4th at 1324–26 (affirming discretion as to action to be taken).

Thus, we need not make a statute-wide categorical determination regarding all duties imposed on imports by presidential action under § 232. We will focus on the character of Proclamation 9705 specifically—the authorized governmental action that actually prescribed the duty on imports at issue. This proclamation-specific approach is consistent with our decision in the § 201 setting in *Wheatland*, where, as described above, our approval of Commerce's determination relied in part on specifics of the particular proclamation at issue there and on Commerce's own declaration that it is for the President, in the duty-creating action under the § 201 regime, to determine the duty's relationship to antidumping duties. At oral argument before this court, we note, government counsel seemingly agreed that *Wheatland* is "fair[ly] read[]" as "approving only the proclamation-specific determination by Commerce there, not a necessarily categorical treatment of all [§ 201] impositions." Oral Arg. at 29:28–30:09.

2

Proclamation 9705 makes clear that the duty newly being imposed was to add to, and not partly or wholly offset, the antidumping duties that would be due without the new duty. Proclamation 9705 provides:

> Except as otherwise provided in this proclamation, or in notices published pursuant to clause 3 of this proclamation, all steel articles imports specified in the Annex shall be subject to an additional 25 percent ad valorem rate of duty with respect to goods entered, or withdrawn from warehouse for consumption, on or after 12:01 a.m. eastern daylight time on March 23, 2018. This rate of duty, which is *in addition to any other duties*, fees, exactions, and charges applicable to such imported steel articles, shall apply to imports of steel articles from all countries except Canada and Mexico.

Proclamation 9705, clause 2, 83 Fed. Reg. at 11,627 (emphasis added). The proclamation imposes a duty on imports to the United States, which comes within the literal language, "United States import duties," of § 1677a(c)(2)(A). More particularly, the proclamation declares that the rate of duty is to be imposed "in addition to any

other duties." *Id.*; *see also id.* at 11,629, Annex ("All anti-dumping, countervailing, or other duties and charges applicable to such goods shall continue to be imposed."). The context confirms the evident meaning of this declaration—that the duty should be charged on top of otherwise-determined antidumping duties. The President determined that national security was threatened by the unsustainably low utilization of domestic steel-producing capacity, an underutilization tied to imports of steel, *id.* ¶¶ 5, 8, 11, 83 Fed. Reg. at 11,626–27, notwithstanding that antidumping duties had been in place for three decades on certain imports covered by the proclamation's duty.

We conclude that the only fair reading of Proclamation 9705 is that, when applied to an article covered by antidumping duties, the Proclamation 9705 and antidumping duties must together result in a full imposition of both duties. Producing that result requires the antidumping duty to be calculated as if the Proclamation 9705 duty did not exist—*i.e.*, by subtraction of the Proclamation 9705 duty from the U.S. price if the Proclamation 9705 duty is built into it. Otherwise, the Proclamation 9705 duty would be offset substantially or completely by a reduction in the antidumping duty itself (through an increase in the U.S. price and therefore a decrease in the dumping margin), defeating the evident "in addition to" prescription of Proclamation 9705. *See* J.A. 2400.

3

This treatment of the duty imposed in Proclamation 9705 is not inconsistent with Commerce's long-recognized categorical exclusion of antidumping duties themselves from classification as "United States import duties." Antidumping duties cannot be subtracted in the calculation of dumping margins (and hence antidumping duties), because doing so would produce a spiraling circularity. *See APEX Exports*, 777 F.3d at 1379 & n.2. It is therefore a necessary implication of the antidumping duty statute itself that such duties cannot come within § 1677a(c)(2)(A). *See United States v. Brown*, 333 U.S. 18, 27 (1948) ("No rule of construction necessitates our acceptance of an interpretation resulting in patently absurd consequences."). There is no such circularity problem with recognizing that the Proclamation 9705 duty on imports is a "United States import dut[y]."

Commerce similarly treats countervailing duties as categorically excluded from "United States import duties." *AK Steel Corp. v. United States*, 988 F. Supp. 594, 607–08 (Ct. Int'l Trade 1997). But there is no immediately evident circularity problem, and we have not addressed whether such treatment is proper. Commerce's practice in this regard thus does not undermine the conclusion here.

Commerce's determination in *SWR Korea*, involving a proclamation that imposed duties under § 201, and our decision in *Wheatland* upholding Commerce's decision, also do not preclude our view or Commerce's decision here. Commerce did use some categorical language in *SWR Korea*. 69 Fed. Reg. at 19,161 ("In conclusion, Commerce will not deduct 201 duties from U.S. prices in calculating dumping margins because 201 duties are not 'United States import duties' within the meaning of the statute."). But, importantly, its rationale for excluding the proclamation's duties from "United States import duties" depended expressly on the language and nature of the particular proclamation at issue, Proclamation 7529. *Id.* at 19,160 (noting that "any adjustment for the potential overlap between 201 and AD remedies is to be made by the President in setting the level of the 201 duties" and that Commerce cannot "upset that balance" "[o]nce the President has struck" it); *id.* (highlighting that there was "absolutely no indication in [Proclamation 7529] placing 201 duties on certain imports of steel that the President believed that Commerce effectively would increase those duties by taking them into account in calculating subsequent dumping margins"). Before this court, moreover, the government took pains to argue that Commerce's decision was perfectly consistent with Proclamation 7529. *Wheatland*, Nos. 2006-1524, -1525, United States Opening Br. at 41–42 (arguing that the "trial court made the further implausible assumption that Commerce, a Department of the Executive Branch, flouted the President's intent"). We likewise relied on Commerce's proclamation-specific reasoning, *Wheatland*, 495 F.3d at 1365, and other aspects of Proclamation 7529, *id.* at 1364 (discussing the President's "intent regarding the calculation of antidumping margin at the time [he] imposed § 201 safeguard duties"); *id.* at 1364–65 (discussing the particular "§ 201 safeguard duties" imposed in Proclamation 7529).

In these circumstances, the present matter is properly distinguished from the relied-on § 201 decisions at least because of the difference in the presidential proclamations at issue. As discussed above, Proclamation 9705 requires that its duty be treated as a "United States import dut[y]" to be subtracted under § 1677a(c)(2)(A). In contrast, there was no comparable language in Proclamation 7529, and in light of a background recognition concerning potential overlap of § 201 duties and antidumping duties, Commerce found no implication that the Proclamation 7529 duties imposed should be subtracted so that they would add to, and not be substantially or completely offset by, reductions in the antidumping duties. In the present matter, as in the earlier one, the duty's treatment under §

1677a(c)(2)(A) is effectively determined by the President in exercising the broad power to shape the particular duty imposition, as Commerce suggested it should be, in a passage in *SWR Korea* that we quoted in *Wheatland*.

C

The foregoing analysis is enough for us to uphold Commerce's decision here. We do not decide whether the same result could soundly rest on distinctions between § 232 and the § 201 regime more generally, and the distinction between "normal" and "special" duties, articulated by Commerce and approved by the Trade Court here. That approach presents challenges that we may avoid. The Commerce decision sufficiently rests on the proclamation-specific basis set forth above. *See* J.A. 2399–400.

We also do not decide whether our *Wheatland* conclusion about ambiguity at *Chevron*'s step one is subject to question based on intervening developments about, at least, the fullness of the statutory analysis required at that step. *See*, *e.g.*, *SAS Institute, Inc. v. Iancu*, 138 S. Ct. 1348, 1358 (2018) (stating that "whether *Chevron* should remain is a question we may leave for another day" and concludingthat *Chevron* did not apply because "after applying traditional tools of interpretation here," the Court was "left with no uncertainty that could warrant deference"); *Kisor v. Wilkie*, 139 S. Ct. 2400, 2414–15 (2019) (in case concerning *Auer* deference regarding interpretation of a regulation, citing *Chevron* to clarify the *Auer* standard as permitting deference to an agency interpretation only if "after exhausting all the 'traditional tools' of construction, the regulation is genuinely ambiguous" (citation omitted)). The best interpretation of the statute, as relevant in this case, supports Commerce's decision, making it unnecessary to apply the *Chevron* framework. *See Nicely v. United States*, 23 F.4th 1364, 1368 (Fed. Cir. 2022); *Chudik v. Hirshfeld*, 987 F.3d 1033, 1039 (Fed. Cir. 2021). Further consideration of *Chevron* and other issues can await other cases, such as one, if it arises, in which Commerce applies its broader language in *SWR Korea* to deny subtraction under § 1677a(c)(2)(A) to a § 201-based duty even if the proclamation imposing it insists that it is to be supplemental to antidumping duties.

III

For the foregoing reasons, we conclude that the specific duty imposed by the President in Proclamation 9705 was properly treated by the President's subordinate, the Secretary of Commerce, as a "United States import dut[y]" under§ 1677a(c)(2)(A). We therefore affirm the judgment of the Trade Court.

The parties shall bear their own costs.

AFFIRMED

U.S. Court of International Trade

Slip Op. 23–29

AA METALS, INC., Plaintiff, v. UNITED STATES, Defendant, and TEXARKANA ALUMINUM, INC., Defendant-Intervenor.

Before: Jane A. Restani, Judge
Court No. 22–00051
PUBLIC VERSION

[Sustaining Commerce's Final Scope Determination.]

Dated: March 10, 2023

Kristen S. Smith and *Sarah E. Yuskaitis*, Sandler, Travis & Rosenberg, PA, of Washington, DC, argued for plaintiff AA Metals, Inc.

Eric E. Laufgraben, Senior Trial Counsel, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC, argued for defendant. With him on the brief were *Brian M. Boynton*, Principal Deputy Assistant Attorney General, *Patricia M. McCarthy*, Director, and *Reginald T. Blades, Jr.*, Assistant Director. Of counsel on the brief was *Leslie Lewis*, Office of the Chief Counsel for Trade Enforcement and Compliance, U.S. Department of Commerce, of Washington, DC.

Peter J. Koenig, Squire Patton Boggs (US) LLP, of Washington, DC, argued for defendant-intervenor Texarkana Aluminum, Inc. With him on the brief was *Jeremy W. Dutra*.

OPINION

Restani, Judge:

This action challenges a final scope determination of the United States Department of Commerce ("Commerce") regarding common alloy aluminum sheet ("CAAS") imported by AA Metals, Inc. ("AA Metals"). The Final Scope Determination found that certain CAAS exported from China to Turkey and further worked by Turkish company PMS Metal Profil Alüminyum San. Ve Tic. A.Ş. ("PMS") before importation into the United States is within the scope of antidumping and countervailing duty orders. *See Notification of Final Scope Determination and Response to Covered Merchandise Referral*, P.R. 48 (Jan. 21, 2022) ("Final Scope Determination").

AA Metals asks for judgment on the record, arguing the Final Scope Determination is unsupported by substantial evidence and is otherwise not in accordance with law. *See* Pl. AA Metals, Inc.'s Mem. of Points and Authorities in Supp. of its R. 56.2 Mot. for J. on the Agency Record at 11–13, ECF No. 21 (July 7, 2022) ("AA Metals Br."). AA Metals asserts that Commerce improperly determined that the language of the scope was dispositive and that Commerce failed to

address 19 C.F.R. § 351.225(k)(1) factors. *Id.* 12, 21–23. AA Metals argues this resulted in an unlawful expansion of the antidumping and countervailing duty orders's scopes. *Id.* at 21–25. AA Metals also asserts several other arguments, including that Commerce should have given AA Metals the opportunity to address and correct deficiencies in the record, and that Commerce was required to do a substantial transformation analysis. *Id.* at 17–21, 32–37. The United States argues that Commerce's dispositive language determination was appropriate, that there were no deficiencies in the questionnaire responses, and that a substantial transformation analysis was unnecessary. Def.'s Resp. to Pl.'s R. 56.2 Mot. for J. Upon the Agency Record at 8–9, 12, ECF No. 26 (Nov. 3, 2022) ("Government Br."). For the following reasons, the court affirms Commerce's determination.

BACKGROUND

I. Antidumping and Countervailing Duty Orders

In November 2017 Commerce initiated antidumping and countervailing duty investigations for CAAS from China. *See Common Alloy Aluminum Sheet From the People's Republic of China: Initiation of Less-Than-Fair-Value and Countervailing Duty Investigations*, 82 Fed. Reg. 57,214 (Dep't Comm. Dec. 4, 2017); *see also* AA Metals Br. at 2. A year later Commerce published its affirmative final antidumping and countervailing duty determination. *Antidumping Duty Investigation of Common Alloy Aluminum Sheet From the People's Republic of China: Affirmative Final Determination of Sales at Less-Than-Fair Value*, 83 Fed. Reg. 57,421 (Dep't Comm. Nov. 15, 2018); *Countervailing Duty Investigation of Common Alloy Aluminum Sheet From the People's Republic of China: Final Affirmative Determination*, 83 Fed. Reg. 57,427 (Dep't Comm. Nov. 15, 2018); *see also* AA Metals Br. at 4.

In January 2019 the International Trade Commission ("ITC") published an injury determination. *Response of AA Metals, Inc. & Teknik Alüminyum San. Ve Tic. A.Ş. to the Department's October 27, 2021 Supplemental Questionnaire* at Ex. 6, C.R. 12, P.R. 43 (Nov. 5, 2021) ("SQR"). The determination covered China's various aluminum products, including clad and non-clad aluminum sheet. SQR, Ex. 6 at I-10–I-12. The ITC determination utilized the same scope as Commerce's investigations, examining CAAS defined as

> Aluminum common alloy sheet (common alloy sheet), which is a flat-rolled aluminum product having a thickness of 6.3 mm or less, but greater than 0.2 mm, in coils or cut-to-length, regardless of width. Common alloy sheet within the scope of this

> investigation includes both not clad aluminum sheet, as well as multi-alloy, clad aluminum sheet. With respect to not clad aluminum sheet, common alloy sheet is manufactured from a 1XXX-, 3XXX-, or 5XXX-series alloy as designated by the Aluminum Association. With respect to multi-alloy, clad aluminum sheet, common alloy sheet is produced from a 3XXX-series core, to which cladding layers are applied to either one or both sides of the core. Common alloy sheet may be made to ASTM specification B209–14, but can also be made to other specifications. Regardless of specification, however, all common alloy sheet meeting the scope description is included in the scope. Subject merchandise includes common alloy sheet that has been further processed in a third country, including but not limited to annealing, tempering, painting, varnishing, trimming, cutting, punching, and/or slitting, or any other processing that would not otherwise remove the merchandise from the scope of the investigations if performed in the country of manufacture of the common alloy sheet.
>
> Excluded from the scope of this investigation is aluminum can stock, which is suitable for use in the manufacture of aluminum beverage cans, lids of such cans, or tabs used to open such cans. Aluminum can stock is produced to gauges that range from 0.200 mm to 0.292 mm, and has an H–19, H–41, H–48, or H–391 temper. In addition, aluminum can stock has a lubricant applied to the flat surfaces of the can stock to facilitate its movement through machines used in the manufacture of beverage cans. Aluminum can stock is properly classified under Harmonized Tariff Schedule of the United States (HTSUS) subheadings 7606.12.3045 and 7606.12.3055.

Id. at I-10.

The injury determination further defined “aluminum sheet” as a “thin wrought aluminum product that is produced via rolling process” and noted that “wrought aluminum” consists of “aluminum products that are rolled, drawn, extruded, or otherwise mechanically formed of aluminum or aluminum alloys.” *Id.* at I-12. Thus, the scope of the subject merchandise addressed by the ITC was defined to be rolled, wrought aluminum within a certain thickness range. The determination then went into detail discussing 3XXX-series alloy and noted that common applications for CAAS Alloy [[ ]] include “heat exchangers, air condition evaporators” and other appliances. *Id.* The data collected based on this scope from U.S. producers and importers

involved eight products, four of which were identified as Alloy [[ ]]. *Id.* at V-5. Although the products varied in alloy, temper, and dimensions, the ITC requested information about only two types of tempers in this eight-product survey: H and O. *Id.* Seven of the products were H temper products, and the remaining product surveyed was O temper. *Id.*

The ITC published a notice of its affirmative finding that “an industry in the United States is materially injured by reason of imports of common alloy aluminum sheet from China,” determining several types of aluminum sheets were sold in the United States at less than fair value and were subsidized by the government of China in February 2019. *Common Alloy Aluminum Sheet from China; Determinations*, 84 Fed. Reg. 1,784 (ITC Feb. 5, 2019).

After the ITC made its affirmative injury determination and published its CAAS from China determination, Commerce issued antidumping and countervailing duty orders on CAAS from China. *See Common Alloy Aluminum Sheet From the People’s Republic of China: Antidumping Duty Order*, 84 Fed. Reg. 2813 (Dep’t Comm. Feb. 8, 2019) (“Antidumping Order”); *see also Common Alloy Aluminum Sheet From the People’s Republic of China: Countervailing Duty Order*, 84 Fed. Reg. 2157 (Dep’t Comm. Feb. 6, 2019) (“Countervailing Order”) (collectively, “the Orders”). These orders cover merchandise described as:

> aluminum common alloy sheet (common alloy sheet), which is a flat-rolled aluminum product having a thickness of 6.3 mm or less, but greater than 0.2 mm, in coils or cut-to-length, regardless of width. Common alloy sheet within the scope of this order includes both not clad aluminum sheet, as well as multi-alloy, clad aluminum sheet. With respect to not clad aluminum sheet, common alloy sheet is manufactured from a 1XXX-, 3XXX-, or 5XXX-series alloy as designated by the Aluminum Association. With respect to multi-alloy, clad aluminum sheet, common alloy sheet is produced from a 3XXX-series core, to which cladding layers are applied to either one or both sides of the core.
>
> Common alloy sheet may be made to ASTM specification B209–14, but can also be made to other specifications. Regardless of specification, however, all common alloy sheet meeting the scope description is included in the scope.

Antidumping Order, 84 Fed. Reg. at 2815; *see also Countervailing Order*, 84 Fed. Reg. 2157.

The Orders included one explicit exclusion for aluminum can stock:

> Excluded from the scope of this order is aluminum can stock, which is suitable for use in the manufacture of aluminum beverage cans, lids of such cans, or tabs used to open such cans. Aluminum can stock is produced to gauges that range from 0.200 mm to 0.292 mm, and has an H-19, H-41, H-48, or H-391 temper. In addition, aluminum can stock has a lubricant applied to the flat surfaces of the can stock to facilitate its movement through machines used in the manufacture of beverage cans. Aluminum can stock is properly classified under Harmonized Tariff Schedule of the United States (HTSUS) subheadings 7606.12.3045 and 7606.12.3055.

Id.

II. Scope Proceeding

Texarkana Aluminum, Inc. ("Texarkana") filed a Enforce and Protect Act ("EAPA") petition on March 16, 2020, and amended the petition on May 19, 2020, alleging that AA Metals entered Chinese-origin aluminum sheet into the United States that was transshipped through Turkey after minor processing and falsely declared it as originating from Turkey. *Placement of Covered Merchandise Referral Documents on the Record* at 2, P.R. 4 (Aug 18, 2021). On June 30, 2020, CPB initiated an investigation under EAPA. *Id.* at 3. The petition specified two scenarios that Texarkana contended should be investigated: Scenario 1) Chinese-origin aluminum sheet of a thickness a little greater than covered by the scope is re-rolled in Turkey to a thickness covered by the scope; and Scenario 2) Chinese-origin aluminum sheet of a thickness covered by the scope is re-rolled in Turkey to a thickness still covered by the scope. *Id.* at 4.

On May 13, 2021, Commerce received a covered merchandise referral from Customs and Border Protection ("CBP") regarding EAPA investigation No. 7469. *Id.* CBP notified Commerce that CBP was unable to determine whether the merchandise in the two scenarios Texarkana specified was covered. Final Scope Determination at 2.

Commerce issued initial and supplemental questionnaires to AA Metals about both scenarios, to which AA Metals responded. *See Initial Questionnaire Response*, C.R. 1–6 (Sept. 27, 2021) ("IQR"); *see also* SQR. Texarkana also submitted a rebuttal to AA Metals's initial response, to which AA Metals submitted a surrebuttal. Final Scope Determination at 3–4. AA Metals, for its part, requested that Commerce investigate Texarkana's counsel for misconduct and possible sanctions pursuant to 19 C.F.R. § 351.313. *Id.* at 4.

Commerce issued its Final Scope Determination on January 21,

2022. *Id.* at 1. The Determination evaluated the two scenarios identified by Texarkana as excess. *Id.* In the Final Scope Determination, Commerce found Scenario 1 merchandise to be outside the scope of the Orders, but that concluded that Scenario 2 was within the scope and subject to the Orders. *Id.* Commerce also refused to investigate AA Metals's claims against Texarkana. *Id.* at 4. AA Metals seeks no relief from the court on this particular matter.

JURISDICTION & STANDARD OF REVIEW

The court has jurisdiction pursuant to 28 U.S.C. § 1581(c) (2022) and 19 U.S.C. § 1516a(a)(2)(B)(vi) (2021). This section provides for judicial review of a determination of "whether a particular type of merchandise is within the class or kind of merchandise described in an . . . antidumping or countervailing duty order." *Id.* In conducting review, the court must set aside "any determination, finding, or conclusion found . . . to be unsupported by substantial evidence on the record, or otherwise not in accordance with law." *Id.* § 1516a(b)(1)(B)(i).

DISCUSSION

I. Legal Framework

The Department's regulation governing scope determinations, 19 C.F.R. § 351.225(k), provides that Commerce will take into account the following: (1) the descriptions of the merchandise contained in the petition, (2) the initial investigation, and (3) the determinations of the Secretary of Commerce (including prior scope determinations) and (4) the United States International Trade Commission.[1] 19 C.F.R. § 351.225(k)(1) (2021).[2] If this inquiry fails to resolve the issue, Commerce applies additional criteria found under 19 C.F.R. § 351.225(k)(2). *Id.* § 351.225(k)(2) (2021). *MCC Holdings v. United States*, 45 CIT __, __, 537 F. Supp. 3d 1350, 1355 (2021).

The Federal Circuit has held that the first step in the inquiry is consideration of the language of the Orders. *See Shenyang Yuanda Aluminum Indus. Eng'g Co., Ltd. v. United States*, 776 F.3d 1351, 1356 (Fed. Cir. 2015) ("Scope language is the 'cornerstone' of any scope determination."); *see also Walgreen Co. of Deerfield, IL v. United*

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[1] These four factors will hereinafter be referred to as "(k)(1) factors."

[2] Commerce has since revised the regulations. The revised regulations "apply to scope inquiries for which a scope ruling application is filed, as well as any scope inquiry self-initiated by Commerce, on or after November 4, 2021." *Regulations To Improve Administrative and Enforcement of Antidumping and Countervailing Duty Laws*, 86 Fed. Reg. 52,300 (Sept. 20, 2021); *see also id.* at 52,374. As Commerce received the Covered Merchandise Referral from CBP on May 13, 2021, the previous iteration of the regulation applies here, although it is not clear that the change would have affected this case.

States, 620 F.3d 1350, 1357 (Fed. Cir. 2010); *Duferco Steel, Inc. v. United States*, 296 F.3d 1087, 1097 (Fed. Cir. 2002). Specifically, "Commerce cannot 'interpret' an antidumping order so as to change the scope of that order, nor can Commerce interpret an order in a manner contrary to its terms." *Eckstrom Indus., Inc. v. United States*, 254 F.3d 1068, 1072 (Fed. Cir. 2001).

If the language of the Orders is ambiguous, (k)(1) factors must be considered.[3] *See Mid Continent Nail Corp. v. United States*, 725 F.3d 1295, 1302 (Fed. Cir. 2013) ("Commerce must first examine the language of the final order. If the language is ambiguous, Commerce must next consider the regulatory history, as contained in the so-called '(k)(1) materials.'"); *see also Star Pipe Prod. v. United States*, 981 F.3d 1067, 1073 (Fed. Cir. 2020). Even though "it is not justifiable to identify an ambiguity where none exists," *Allegheny Bradford Corp. v. United States*, 28 CIT 830, 843, 342 F. Supp. 2d 1172, 1184 (2004), relevant scope terms are only unambiguous if they have a "single clearly defined or stated meaning." *Diamond Sawblades Manufacturers' Coal. v. United States*, 51 CIT __, __, 405 F. Supp. 3d 1345, 1352 (2019) (citing *Atkore Steel Components, Inc. v. United States*, 42 CIT ___, ___, 313 F. Supp. 3d 1374, 1380 (2018)). Ambiguity is a common issue in scope cases, as "descriptions of subject merchandise contained in the Department's determinations must be written in general terms." 19 C.F.R. § 351.225(a). It is fairly easy to provide a "single clearly defined" meaning when excluding particular merchandise; it is much harder to do so when including a variety of merchandise in the statute's required "general terms."

Whether or not the language appears to be dispositive, a scope determination requires an examination of "the record as a whole, taking into account both the evidence that justifies and detracts from an agency's opinion." *Falko-Gunter Falkner v. Inglis*, 448 F.3d 1357, 1363 (Fed. Cir. 2006).

II. Commerce Did Not Rely on Plain Language Alone, But Considered (k)(1) Factors

In its Final Scope Determination analysis of Scenario 2 merchandise, Commerce stated that the language of the Orders was disposi-

[3] The Federal Circuit has been inconsistent in stating whether consideration of (k)(1) factors is necessary if the language of an order appears dispositive. *See Shenyang* 776 F.3d at 1357–58 ("In addition to the plain language of the Orders, Commerce will also consider the descriptions of the merchandise contained in the petition, the initial investigation, and the prior determinations of Commerce and the ITC."); *but see Star Pipe Prod. v. United States*, 981 F.3d 1067, 1073 (Fed. Cir. 2020) (holding that if the language is unclear Commerce must consider the (k)(1) factors). The language of the applicable regulation itself, however, has no such ambiguity: "the Secretary *will* take into account" (k)(1) criteria when considering whether a particular product is within the scope of the order. 19 C.F.R. § 351.225(k) (emphasis added).

tive and determined further analysis of the factors listed in 19 C.F.R. § 351.225(k)(1) was unnecessary. Final Scope Determination at 10. AA Metals contends that Commerce erred when it determined that the language was dispositive, and instead insists that examining the (k)(1) factors is necessary to determine the meaning of the Orders. AA Metals Br. at 25–28, 30–31. AA Metals also asserts that, had all (k)(1) sources been considered, a narrower interpretation of the Orders would have been clearly established. *Id.* AA Metals contends that an examination of all (k)(1) factors would have resulted in excluding Scenario 2 merchandise, and accordingly Commerce impermissibly expanded the scope beyond its intended merchandise. *Id.*

Despite Commerce's assertion that the language of the scope of the Orders is dispositive, Commerce did not rely on the language alone. In the Final Scope Determination, Commerce referred to various (k)(1) factors in its analysis of the Orders. Final Scope Determination at 6, 8, 9. First, Commerce described the merchandise using the exact same language as that presented by Texarkana in the original petition. Final Scope Determination at 6. Second, noting that "the scope of the *Orders* does not explicitly define wrought aluminum alloy sheet," Commerce referred to the Commission's final determination when defining CAAS as "a thin wrought aluminum product that is produced via a rolling process." Final Scope Determination at 8, *see also* SQR, Ex. 6 at I-12. Thirdly, Commerce noted that the scope is consistent with prior scope determinations, stating that the language "products that otherwise meet the definition of aluminum sheet in the first paragraph of the scope are subject to the scope" is present in both findings. Final Scope Determination at 9. In addition, the prior scope determinations Commerce referenced also addressed arguments about the ITC Investigation, similar to those raised by AA Metals. *See infra* pp. 12–13.

Had Commerce been confident that the language of the scope was dispositive, it would not have needed to reference the above factors. Or perhaps, it wisely decided consideration of plaintiff's arguments was appropriate. For whatever reason, Commerce apparently concluded that the language should be considered in context and bolstered the bare language with consideration of various (k)(1) factors. *See* Final Scope Determination at 9. In particular, it cited its own prior determinations regarding the products, which contain more detail about the scope of the Orders. *See id.* at n.58.

Significantly, plaintiff has not made it clear how further examination of the initial investigation would change the result here. Although under the applicable regulation every (k)(1) factor must be considered in some way, the amount of reliance on each factor differs

from case to case, as facts change, as analyses differ, and as different arguments are presented. If an error did occur, as is by no means clear, plaintiff has not demonstrated how remanding this matter for correction of the alleged error would alter the outcome of the antidumping or countervailing proceedings for the parties involved.

As indicated, despite stating the language of the Order was dispositive, Commerce did reference various (k)(1) factors that effectively provided an understanding of the scope that Commerce then applied to the merchandise in question. The analysis of the language and the various factors, even where brief, was more than "the mere scintilla" of evidence needed for substantial evidence review. *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 217 (1938).

III. The Merchandise in Scenario 2 Is Within the Scope of the Orders

A. The Temper of Scenario 2 Is Within the Scope of the Orders

AA Metals argues that Commerce impermissibly expanded the scope of the Orders to include the Scenario 2 product. AA Metals Br. at 11. AA Metals argues that F-temper aluminum alloy is not within the scope of the Orders. *Id.* at 26–31. AA Metals argues that, because F-temper products were not considered in the ITC injury determination, they should be excluded from the scope of the Orders. *Id.* at 28–31.

In the Final Scope Determination, Commerce concluded that because Scenario 2 merchandise did not meet the explicit exclusions of the scope determination, and the scope language of the Orders states that "products that otherwise meet the definition of aluminum sheet in the first paragraph of the scope are subject to the scope," F-temper products are within the scope of the Orders. *See* Final Scope Determination at 9. To support this, Commerce relied upon a previous scope determination that specifically stated that F-tempered products are within the scope of an order with identical scope language.[4] *Id.* at 9; *see also* IQR, Ex. 2 at 9–11 ("2021 Final Decision").

In the 2021 Final Decision, Commerce responded to comments made by foreign and domestic aluminum manufacturers regarding scope. *See generally* 2021 Final Decision. Comment 3 of the Decision

[4] AA Metals argues that as this previous scope determination did not address China directly, Commerce erred in relying on this memorandum. This is incorrect. 19 C.F.R. 351.225(k)(1) factors require that Commerce will take into account "determinations of the Secretary (including prior scope determinations)." It does not restrict such determinations to only those addressing the countries involved in the scope proceeding at issue.

discussed the inclusion of F-temper re-roll stock. *Id.* at 9–11. Plaintiff Hulamin argued that F-temper products should be outside of the scope, and that including F-tempered stock "is contrary to the domestic like product in the China aluminum sheet investigations and subsequent *China Aluminum Sheet Orders*." *Id.* at 9–10. Noting that F-tempered product includes re-roll stock, Hulamin asserted that "proprietaries [sic] of re-roll stock are not established until further processing that only occurs after downstream production," and that re-roll stock is an "intermediary product." *Id.* at 10. Domestic petitioners pushed back on these arguments, asserting that "Commerce did not include a code for 'F' temper products because neither Commerce, nor the petitioners, had any information that significant volumes of such aluminum sheet products entered the United States from China during the period of investigation."[5] *Id.* Petitioners also argued that "re-rolled stock is a flat-rolled, coiled aluminum product" that "falls squarely within the scope of these investigations" and that they intended to include such "re-roll" stock in the scope of the investigations. *Id.*

In response to these comments, Commerce stated that "the petitioners are uniquely situated to opine on the definition of merchandise that would be subject to the investigations," and squarely endorsed petitioners's definition of the scope. *Id.* at 11. Commerce also echoed petitioners's definition, stating "[r]e-roll stock is flat-rolled, coiled aluminum product." *Id.* Commerce also stated that re-roll stock was not excluded from the scope, "even where it might be identified as an 'intermediate product.'" *Id.* Although not explicitly addressing F-tempered products that might be other than re-roll stock, Commerce stated "[w]e continue to find that products that otherwise meet the definition of aluminum sheet in the first paragraph of the scope are subject to the scope." *Id.*

The 2021 Final Determination is highly persuasive, as it clearly addressed a (k)(1) scope factor and as it effectively responded to the allegation that F-tempers were not covered by the ITC injury determination. Therefore, if the F-temper re-roll stock meets the definition of aluminum sheet in the first paragraph of the scope language, it is within the scope of the Orders. Here, AA Metals identified the Scenario 2 product, on its arrival to Turkey, as [[ ]] re-roll stock with a thickness of [[ ]] mm. IQR, Ex. 6; SQR at 12. The product upon entry into Turkey is re-roll stock, with a thickness and aluminum alloy number within scope of the order. There is no dispute

[5] AA Metals disagreed with this contention at oral argument, however, it did not point to any evidence to support its position.

that upon exportation from Turkey the product, if still a product of China, was within the scope of the Orders.

B. Scenario 2 Product is Wrought, Flat-Rolled Common Alloy Aluminum Sheet

AA Metals contends that the Scenario 2 product upon entry into Turkey is unwrought, continuous cast coil. *See* AA Metals Br. at 18; SQR at 22. Plaintiff and defendant agree that continuous cast coil is unwrought and outside the scope of the Orders, despite having a coiling process as part of the continuous cast procedure.[6] Commerce, however, determined in the Final Scope Determination that the Scenario 2 product was in fact a wrought, rolled product and not an unwrought, upstream product as AA Metals contends. Final Scope Determination at 8.

The United States relies on two factual matters from AA Metals's own exhibits in its questionnaire answers. First, the Government argues that Commerce correctly concluded that the alloy designation number of Scenario 2 identified the product as wrought aluminum alloy. Government Br. at 13; *see also* Final Scope Determination at 8. According to the Aluminum Association, wrought aluminum alloy uses a four-digit whole number to identify they type of alloy, shown as XXXX. SQR, Ex. 19 at Appendix A-10A-1. In contrast, cast aluminum alloy uses a four-digit number system with a decimal point between the third and fourth digits, shown as XXX.X. SQR, Ex. 19 at Appendix A-10A-3. Scenario 2 product has a four-digit, whole-number alloy designation of [[ ]]. IQR, Ex. 6 (in which AA Metals's business records list Scenario 2 merchandise from China as [[ ]] alloy F-temper products within the dimension set forth in the scope). The Government argues that the alloy designation number of Scenario 2 indicates that the product is wrought, not cast, aluminum alloy. Government Br. at 13.

Second, the Government argues that a diagram AA Metals submitted as part of the Supplemental Questionnaire narrative indicates that the product is rolled, wrought aluminum. Government Br. at 14; *see also* Final Scope Determination at 8 n.50. According to this diagram, which is titled "Processing" and sourced from the Aluminum Association, sheet aluminum is only created after casted products, such as ingots and slabs, go through a rolling process. SQR at 23. As Scenario 2 product is sheet, the Government argues, it must have undergone a flat-rolling process, separate from any coiling that may

[6] Apparently, defendant-intervenor contends that all continuous casting results in rolled merchandise that is within the scope of the Orders. The court need not address this contention as, even under Commerce's narrower view, the product is within scope.

have occurred during the casting process. *See* Government Br. at 14; *see also* Final Scope Determination at 8 n.50; SQR, Ex. 6 at I-15–I-18.

The Government relied on the information AA Metals provided in its questionnaire responses to determine that the Scenario 2 product upon entry into Turkey was wrought, flat-rolled sheet. The Government's determination was supported by the substantial evidence.

IV. AA Metals' Answers Were Not Deficient

AA Metals argues that Commerce should have provided it an opportunity to "address and correct" deficiencies in the record. AA Metals Br. at 17–21. AA Metals argues that Commerce concluded that Scenario 2 merchandise was wrought aluminum as a result of a deficient response. *Id.* at 17. AA Metals contends that Scenario 2 merchandise was unwrought and that it did not have any notice that Commerce disagreed. *Id.* at 20. AA Metals asserts this lack of notice prevented AA Metals from responding to this inconsistency, creating an error in law. *Id.* at 17.

The law governing notice of deficiencies in the record states "[i]f the administering authority or the Commission determines that a response to a request for information under this subtitle does not comply with the request, the administering authority . . . shall promptly inform the person submitting . . . and shall . . . provide that person with an opportunity to remedy or explain the deficiency . . . ." 19 U.S.C. § 1677m(d) (2023).

AA Metals asserts that Commerce's determination that the Scenario 2 aluminum was not "continuous cast coil" constituted a deficiency. AA Metals Br. at 17, 20. This is not the case. Commerce determined from AA Metals's questionnaire responses, not that the responses AA Metals provided were deficient, but that the answers AA Metals gave demonstrated that Scenario 2 merchandise was within scope. Final Scope Determination at 9. AA Metals appears to read "deficient" to mean "in conflict with the desires of the company under investigation." Such an understanding would twist the meaning of the statute beyond recognition. In addition to the textual argument, to assume that Commerce has a duty to inform and allow for correction every time the agency makes a decision that is in conflict with the position of a party would render Commerce's duty to implement EAPA completely unadministrable. It is not Commerce's duty to notify a company that there will be a ruling adverse to its interests. AA Metals's argument fails. The court concludes that Commerce's inquiries were sufficiently clear and, indeed, were equally clearly answered.

V. Additional Substantial Transformation Analysis Was Not Necessary

Plaintiff argues that Commerce was required to perform a substantial transformation analysis to determine if the sheet product that entered the United States was a product of Turkey and not China. AA Metals's Br. at 32–37. It cites the traditional test of change in name, character, or use that is used for Customs country-of-origin determinations and that Commerce has used in unfair trade proceedings, as plaintiff has noted. Pl. AA Metals, Inc., Reply Br. at 14–17, ECF No. 30 (Dec. 1, 2022); SQR at 10; *see also Cyber Power Sys. (USA) Inc. v. United States*, 46 CIT __, __, 560 F. Supp. 3d 1347, 1350 (2022) (citing *Torrington, Co. v. United States*, 764 F.2d 1563, 1568 (Fed. Cir. 1985); *E.I. Du Pont de Nemours & Co. v. United States*, 22 CIT 370, 372, 8 F. Supp. 2d 854, 857 (1998). Commerce, however, is not required to apply this traditional test if it has administrative reasons to proceed differently. *See Canadian Solar, Inc. v. United States*, 918 F.3d 909, 918–919 (Fed. Cir. 2019).

Here, the Orders specify that:

> Subject merchandise includes common alloy sheet that has been further processed in a third country, including but not limited to annealing, tempering, painting, varnishing, trimming, cutting, punching, and/or slitting, *or any other processing that would not otherwise remove the merchandise from the scope of the order if performed in the country of manufacture of the common alloy sheet.*

Antidumping Order, 84 Fed. Reg. at 2815; *Countervailing Order*, 84 Fed. Reg. at 2158 (emphasis added).

Consistent with this language, Commerce stated that the re-rolling was a further process that did not remove the merchandise from the scope of the Orders, irrespective of the country of further processing. Final Scope Determination at 9. Plaintiff has never explained why Commerce's order language is not a reasonable way to bring all of the sheet product that originates in China that was found to cause injury into the scope of the Orders.

Here, according to Commerce's findings as to Scenario 2, the aluminum sheet exported to Turkey was within the scope of the Orders and the finished common alloy aluminum sheet further processed in Turkey and exported to the United States was also within the scope of the Orders. Final Scope Determination at 8–9 (finding that the aluminum alloy designation number clearly marks Scope 2 merchandise as wrought aluminum, and that the F-temper was properly

within scope); IQR, Ex. 6; SQR at 13, 16. Further rolling was "other processing" that did not remove the merchandise from the scope of the Orders because, under the terms of the Orders, the processing would not have removed the product from the scope if performed in China. Final Scope Determination at 9. This is not a transformation that affects the scope as set forth in the Orders. Because there is agreement that the product that entered the United States from Turkey was as described in the Orders and the court has already determined that the product that left China was a product described in the Orders, the product that entered the United States was within the scope of the Orders.

CONCLUSION

The court determines that either Commerce did not commit error in interpreting the scope of the Orders or that such error was not harmful; and it otherwise did not expand the Orders beyond their scope. Accordingly, the court sustains Commerce's Final Scope Determination.

Dated: March 10, 2023
New York, New York

/s/ Jane A. Restani
Jane A. Restani, Judge

Slip Op. 23–30

JA Solar International Limited, and JA Solar USA Inc., Plaintiffs, v. United States, Defendant.

Before: Leo M. Gordon, Judge
Court No. 21–00514

JUDGMENT

This action having been submitted for decision, and the court, after due deliberation, having rendered an opinion; now in conformity with that opinion, it is hereby

ORDERED that the Final Results of Redetermination Pursuant to Court Remand, ECF No. 52–1 (Remand Results), regarding the final results of the fifth administrative review of the antidumping duty ("AD") order covering crystalline silicon photovoltaic products (solar products) from Taiwan, *Certain Crystalline Silicon Photovoltaic Products from Taiwan*, 86 Fed. Reg. 49,509 (Dep't of Commerce Sept. 3, 2021) (final results and partial rescission of AD review, and final determ. of no shipments) and the accompanying Issues and Decision

Memorandum, A-583–853 (Aug. 27, 2021), *available at* https://access.trade.gov/Resources/frn/summary/taiwan/2021–19052–1.pdf (last visited this date), are sustained; and it is further

ORDERED that the subject entries enjoined in this action, *see* ECF No. 11 (order granting motion for preliminary injunction), must be liquidated in accordance with the final court decision, as provided in Section 516A(e) of the Tariff Act of 1930, as amended, 19 U.S.C. § 1516a(e) (2018).

Dated: March 10, 2023
New York, New York

/s/ Leo M. Gordon
JUDGE LEO M. GORDON

Slip Op. 23–31

PRINTING TEXTILES, LLC, doing business as BERGER TEXTILES, Plaintiff, v. UNITED STATES, Defendant.

Before: Timothy C. Stanceu, Judge
Court No. 23–00056

[Dismissing action for lack of subject matter jurisdiction]

Dated: March 10, 2023

Kyl J. Kirby, Attorney and Counselor of Law, P.C., of Fort Worth, Texas, for plaintiff.
Mikki Cottet, Senior Trial Counsel, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, D.C., for defendant. Also appearing were *Brian M. Boynton*, Principal Deputy Assistant Attorney General, *Patricia M. McCarthy*, Director, and *Franklin E. White, Jr*., Assistant Director.

OPINION

Stanceu, Judge:

Plaintiff commenced this action on March 8, 2023, contesting various decisions of U.S. Customs and Border Protection (“Customs” or “CBP”) following CBP’s denial of two administrative protests filed by plaintiff. Concluding that the Court of International Trade lacks subject matter jurisdiction, the court dismisses this action.

I. BACKGROUND

Plaintiff Printing Textiles, LLC dba Berger Textiles (“Berger”), a company based in Garden Grove, California, states in its complaint that it was the importer on entries of what it describes as “Canvas Banner Matisse coated fabric” that it imported from the People’s Republic of China (“China” or the “PRC”). Compl. 1 (Mar. 8, 2023), ECF No. 2.

A. The Protests and Protest Denials by Customs

Plaintiff states, further, that it filed two administrative protests with Customs pertaining to various of these entries, one on June 16, 2020 (Protest No. 520120101583) and another on March 16, 2022 (Protest No. 270422159803). *Id.* ¶¶ 16, 18. Berger filed Protest No. 520120101583 with an application for further review. *Id.* ¶ 16. Customs denied both protests on September 16, 2022. *Id.* ¶ 19. In denying Protest No. 520120101583, Customs also denied the application for further review. *Id.* ¶ 20.

Plaintiff filed with Customs a request to set aside the denial of the application for further review of Protest No. 520120101583 on November 15, 2022, *id.* ¶ 21, which Customs denied on January 14, 2023, *id.* ¶ 24. On December 15, 2022, Berger requested that Customs void the denials of the protests on the ground that it submitted to the U.S. Department of Commerce ("Commerce"), on that same date, a request for a scope ruling on the issue of whether the Canvas Banner Matisse coated fabric is within the scope of an antidumping duty order, *Notice of Antidumping Duty Order: Certain Artist Canvas from the People's Republic of China*, 71 Fed. Reg. 31,154 (Int'l Trade Admin. June 1, 2016) (the "Antidumping Duty Order"). Compl. ¶ 22, 23. Plaintiff asserts that Commerce deemed the scope inquiry initiated on January 23, 2023. *Id.* ¶ 25.

On February 10 and March 3, 2023, plaintiff made further requests to Customs for the voiding of one or both protest denials, and the denial of the request for further review. *Id.* ¶¶ 26, 27.

B. Plaintiff's Submissions in the Court of International Trade

Plaintiff commenced this action on March 8, 2023 by the filing of a Summons, ECF No. 1, and the Complaint, ECF No. 2. On the same day, plaintiff moved for injunctive relief. Pl.'s Mot. for TRO and Prelim. Inj., ECF No. 6 ("Pl.'s Mot.").

II. DISCUSSION

Berger attempts to invoke the jurisdiction of the Court of International Trade according to the Court's residual jurisdictional provision, 28 U.S.C. § 1581(i).[1] Compl. ¶¶ 3–10. This is unavailing, as the court may not exercise jurisdiction under that provision if jurisdiction is, or could have been, available under a provision in paragraphs (a) through (h) of § 1581, unless the relief available under such provision would be "manifestly inadequate." *Wanxiang America Corp. v. United States*, 12 F.4th 1369, 1373 (Fed. Cir. 2021) ("§ 1581(i) is a statute of

[1] Citations herein to the United States Code are to the 2018 edition.

residual jurisdiction that may not be invoked where jurisdiction is or could have been available under any other subsection of § 1581, unless such other relief would be manifestly inadequate.") (citing *Miller & Co. v. United States*, 824 F.2d 961, 963 (Fed. Cir. 1987)).

The court interprets plaintiff's claim to be, in essence, that Customs unlawfully refused to void the denial of its two protests. *See* Compl. ¶ 30. As a remedy, Berger seeks an order that would require Customs "to reverse its protest denial decisions and return of [*sic*] the entries to unliquidated status or suspend the protest during the pendency of the litigation." Compl. 8. It also seeks immediate injunctive relief to this effect. Pl.'s Mot. 22.

A plaintiff has the burden of demonstrating facts under which the court may exercise subject matter jurisdiction over its claim. *Norsk Hydro Canada, Inc. v. United States*, 472 F.3d 1347, 1355 (Fed. Cir. 2006) ("It is true that the Court of International Trade, like all federal courts, is a court of limited jurisdiction, and that the party invoking that jurisdiction bears the burden of establishing it.") (citing *Kokkonen v. Guardian Life Ins. Co. of Am.,* 511 U.S. 375, 377 (1994)). Berger has failed to do so.

According to Berger, Customs denied the two protests on the ground, *inter alia*, that it has made a final determination that the imported merchandise is subject to the Antidumping Duty Order. Compl. ¶ 19. Plaintiff has not demonstrated that any remedy it might obtain according to an action brought to contest CBP's denial of its protests under section 515 of the Tariff Act of 1930, *as amended*, 19 U.S.C. § 1515, over which action the court may exercise jurisdiction according to 28 U.S.C. § 1581(a), would be manifestly inadequate.

One of the justifications plaintiff offers to show manifest inadequacy is that an action brought according to 28 U.S.C. § 1581(a) would not "ensure adequate relief for successful scope decisions where entries have been *finally liquidated*." Compl. ¶ 8. In making this assertion, plaintiff fails to explain how the relief is inadequate even though the commencing of an action to contest a protest denial under 19 U.S.C. § 1515 may prevent finality of liquidation from attaching. *See* 19 U.S.C. § 1514(a). Berger adds that:

> CBP does not have scope ruling/inquiry statutes to follow for implementing regulations to provide adequate relief. The existing statute (19 U.S.C. § 1515(d)) does not go far enough in providing a remedy by forcing CBP to stand by while Commerce makes a decision as held by the aforementioned case law.

Compl. ¶ 9.[2] This argument is puzzling in light of plaintiff's factual assertion that Customs already has made a "final and conclusive" decision on the scope issue. *See id.*¶ 19.

Plaintiff's final argument is that "[i]t is necessary that CBP receive gap filling directives to save the rights of plaintiff if either CBP or the CIT [Court of International Trade] is unwilling to reliquidate if the Plaintiff is eventually successful" and that "[i]f CBP does not have adequate law to law [*sic*], 28 U.S.C. § 1581(a) would accomplish nothing other than forcing Plaintiff to file a redundant case with the CIT." *Id*. ¶ 10. Because the action plaintiff has commenced according to 28 U.S.C. § 1581(i) must be dismissed for lack of jurisdiction, such a case would not be "redundant." Moreover, plaintiff indicates that it has a scope ruling request pending before Commerce. Compl. ¶ 25. Commencing an action to contest the protest denials would not by itself preclude plaintiff from also contesting a future scope ruling by Commerce by bringing an action under section 516A of the Tariff Act, 19 U.S.C. § 1516a, which potentially could be heard in this Court according to the jurisdictional provision in 28 U.S.C. § 1581(c).

The only remaining issue for the court to decide is whether the action plaintiff has commenced could be construed by the court as an action to contest the protest denials. In some circumstances, a court may be able to exercise jurisdiction of an action even though plaintiff invokes the incorrect jurisdictional provision. The question presented is whether the action Berger has commenced under 28 U.S.C. § 1581(i) could suffice as an action brought according to 28 U.S.C. § 1581(a) to contest the denial of protests under section 515 of the Tariff Act, 19 U.S.C. § 1515. No such circumstance is presented here. An action to contest a protest denial by Customs is lawfully commenced only "in accordance with the rules of the Court of International Trade." 28 U.S.C. § 2636(a). The action plaintiff has commenced does not conform to this Court's rules for commencing an action to contest a denial of a protest. *See* USCIT Rs. 3(a)(1), 87; Form 1.

III. CONCLUSION

For the reasons discussed in the foregoing, the court must dismiss this action for lack of subject matter jurisdiction. Judgment will enter accordingly.

[2] This is an unclear reference. The Complaint does not contain citations to court cases in the portion appearing prior to ¶ 9. Compl. (Mar. 8, 2023), ECF No. 2.

Dated: March 10, 2023
New York, New York

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

Slip Op. 23–32

SHAMROCK BUILDING MATERIALS, INC., Plaintiff, v. UNITED STATES, Defendant.

Before: Timothy C. Stanceu, Judge
Court No. 20–00074

[Granting defendant's cross-motion for summary judgment on the tariff classifications of certain steel electrical conduit tubing]

Dated: March 13, 2023

Patrick D. Gill, Sandler Travis & Rosenberg, P.A., of New York, N.Y., argued for plaintiff. With him on the briefs was *Michael S. O'Rourke*.

R. Will Planert, Morris Manning & Martin, LLP, of Washington, D.C., for plaintiff. With him on the briefs were *Nicholas C. Duffey, Donald B. Cameron*, *Julie C. Mendoza*, *Brady W. Mills*, *Mary S. Hodgins*, *Eugene Degnan*, *Edward J. Thomas III*, and *Jordan L. Fleischer*.

Marcella Powell, Senior Trial Counsel, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of New York, N.Y., argued for defendant. With her on the briefs were *Brian M. Boynton*, Principal Deputy Assistant Attorney General, *Patricia M. McCarthy*, Director, and *Justin R. Miller*, Attorney-In-Charge. Of counsel on the briefs was *Mathias Rabinovitch*, Office of the Assistant Chief Counsel for International Trade Litigation, U.S. Customs and Border Protection.

OPINION

Stanceu, Judge:

Plaintiff Shamrock Building Materials, Inc. ("Shamrock") brought this action to contest the denial of its administrative protests by U.S. Customs and Border Protection ("Customs" or "CBP"). Compl. ¶ 1 (May 20, 2020), ECF No. 10 ("Compl."). Shamrock claims that Customs incorrectly determined the tariff classifications of certain imported steel electrical conduit tubing. *Id.* ¶ 8. Before the court are the parties' cross-motions for summary judgment. The court awards summary judgment in favor of defendant United States.

I. BACKGROUND

This case arose over the tariff classification of steel conduit tubing ("conduit") that plaintiff imported from Mexico. *Id*. Shamrock was the importer of record for 201 entries of conduit at the Port of Laredo,

Texas between June and October of 2018, which Customs liquidated between April and July of 2019. Summons 3–6 (Apr. 6, 2020), ECF No. 1 ("Summons"); Compl. ¶ 47. Following liquidation, Shamrock timely filed protests of CBP's determinations of classification between June and August of 2019, which CBP denied on November 7 and December 9, 2019. Summons 3–6; Compl. ¶¶ 1, 6. Shamrock initiated the instant action to contest the denial of its protests with a timely filing of its summons on April 6, 2020 and filed its complaint on May 20, 2020.

Before the court are plaintiff's and defendant's motions for summary judgment. Pl.'s Mot. for Summary J. (June 3, 2022), ECF No. 43; Mem. in Supp. of Pl.'s Mot. for Summary J. (June 3, 2022), ECF No. 43 ("Pl.'s Br."); Def.'s Cross-Mot. for Summary J. (Aug. 11, 2022), ECF No. 48; Mem. of Law in Resp. to Pl.'s Mot. for Summary J. and in Supp. of the Government's Cross-Mot. for Summary J. (Aug. 11, 2022), ECF Nos. 48 (original), 64 (corrected) ("Def.'s Br.");[1] Pl.'s Resp. to Def.'s Cross-Mot. for Summary J. (Sept. 29, 2022), ECF No. 55; Mem. of Law in Reply to Pl.'s Resp. to the Government's Cross-Mot. for Summary J. (Nov. 10, 2022), ECF No. 61.

Also before the court is a motion in limine plaintiff filed on April 11, 2022, prior to the filing of the summary judgment motions, seeking a ruling that portions of the report of defendant's designated expert witness would be inadmissible at trial. Mot. in Limine, ECF No. 41 ("Mot. in Limine").

Following briefing on the motion and cross-motion for summary judgment, plaintiff and defendant jointly moved for oral argument. Joint Mot. for Oral Argument (Nov. 17, 2022), ECF No. 65. The court held oral argument on Thursday, February 23, 2023.

II. DISCUSSION

A. Jurisdiction and Standard of Review

The court exercises jurisdiction over this action pursuant to Section 201 of the Customs Courts Act of 1980, 28 U.S.C. § 1581(a), which grants the court "exclusive jurisdiction of any civil action commenced to contest the denial of a protest, in whole or in part, under section 515" of the Tariff Act of 1930 ("Tariff Act"), *as amended* 19 U.S.C § 1515.[2] Actions to contest the denial of a protest are adjudicated by the

[1] References to the Defendant's Brief are to the original version (ECF No. 48), as the corrected version (ECF No. 64) addressed only a single error concerning a quoted figure from an identified expert witness.

[2] References to the United States Code and to the Harmonized Tariff Schedule of the United States ("HTSUS") herein are to the 2018 editions.

court *de novo*. 28 U.S.C. § 2640(a)(1) ("The Court of International Trade shall make its determinations upon the basis of the record made before the court.").

The court shall grant summary judgment "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." USCIT R. 56(a). In a tariff classification dispute, summary judgment is appropriate where "there is no genuine dispute as to the nature of the merchandise and the classification determination turns on the proper meaning and scope of the relevant tariff provisions." *Deckers Outdoor Corp. v. United States*, 714 F.3d 1363, 1371 (Fed. Cir. 2013) (citations omitted).

B. Description of the Merchandise

The facts stated in this Opinion to describe the conduit are taken from the submissions of the parties and, unless stated otherwise herein, are not in dispute.[3]

The imported conduit was produced in Mexico by Conduit S.A. de C.V., dba RYMCO. The parties describe the conduit as being of two types, "electrical metal tubing" ("EMT") and "intermediate metal conduit" ("IMC"). Both are made of carbon steel with welded seams, are of circular cross section, are galvanized with a layer of zinc on the outer surface, are produced in ten-foot lengths, in various diameters, and are threaded at the ends. EMT and IMC are highly similar, differing with respect to wall thickness in that IMC is produced to relatively larger wall thicknesses than is EMT.

The conduit is used to form a "raceway" for the routing of electrical wiring from one location to another while protecting the wires within from external forces. It is suitable for use in routing and protecting wiring circuits (e.g., 110-volt circuits) in household and commercial applications. Individual lengths of conduit can be connected by threaded steel couplings.

Significant to the classification issue presented by this case, which involves the insulating characteristics of the imported merchandise, is a layer of organic epoxy coating (also referred to as "enamel") on the

[3] *See* Pl.'s Statement of Undisputed Material Facts (June 3, 2022), ECF No. 43; Def.'s Resp. to Pl.'s Statement of Undisputed Material Facts (Aug. 11, 2022), ECF No. 48–1; Def.'s Statement of Undisputed Material Facts (Aug. 11, 2022), ECF Nos. 48–2 (original), 64–1 (corrected); Pl.'s Resp. to Def.'s Statement of Undisputed Material Facts (Sept. 29, 2022), ECF No. 55–1; Mem. of Law in Resp. to Pl.'s Mot. for Summary J. and in Supp. of the Government's Cross-Mot. for Summary J. Exs. 6, 14 (Aug. 11, 2022), ECF Nos. 48 (original), 64 (corrected); Oral Argument at 0:06:07 (discussing the difference between EMT and IMC); *id*. at 2:10:00, 2:14:30, & 2:16:26 (confirming with the parties a set of undisputed facts); *id*. at 2:12:36 & 2:18:59 (discussing the measured thickness of the coating on the inside of the conduit).

interior surface of the conduit. The interior coating is comprised of epoxy resin, melamine resin, and silicone additives, among other materials, the precise composition of which is proprietary to the supplier of the epoxy coating, Pinturas Diamex S.A. The coating is transparent, allowing the steel surface of the inside of the conduit to be visible. The coating varies in thickness and was measured to be between 10 and 60 microns, inclusive.[4]

The interior coating protects wires from abrasion as they are pulled through the conduit. Epoxy, melamine, and silicone have electrically-insulating properties. The parties are unaware of any customers who purchased the conduit from Shamrock specifically "because the interior coating provides electrical insulation."

C. Tariff Classification under the HTSUS

Tariff classification under the Harmonized Tariff Schedule of the United States ("HTSUS") is governed by the General Rules of Interpretation ("GRIs") and, if applicable, the Additional U.S. Rules of Interpretation ("ARIs"), both of which are contained in the statutory text of the HTSUS. *Dependable Packaging Solutions, Inc. v. United States,* 757 F.3d 1374, 1377 (Fed. Cir. 2014) (citation omitted) ("Along with the headings and subheadings . . . the HTSUS statute also contains the 'General Notes,' the 'General Rules of Interpretation' ('GRI'), the 'Additional United States Rules of Interpretation' ('ARI'), and various appendices for particular categories of goods.").

The GRIs are applied in numerical order, with GRI 1 providing that "classification shall be determined according to the terms of the headings and any relative Section or Chapter Notes." GRI 1, HTSUS. GRIs 2 through 6 apply "provided such headings or notes do not otherwise require." *Id.*

After determining the correct four-digit heading, the court determines the correct subheading by applying GRI 6, HTSUS (directing determination of the subheading "according to the terms of those subheadings and any related subheading notes and, mutatis mutandis, to the above rules" [GRIs 1 through 6]).

D. Judicial Review in Tariff Classification Disputes

In adjudicating a tariff classification dispute, the court first considers whether "the government's classification is correct, both independently and in comparison with the importer's alternative." *Jarvis Clark Co. v. United States*, 733 F.2d 873, 878 (Fed. Cir. 1984) ("*Jarvis Clark*"). The plaintiff has the burden of showing that the govern-

[4] One micron is equal to one one-thousandth of a millimeter.

ment's classification of the subject merchandise was incorrect. *Id.* at 876. Subject to the plaintiff's rebuttal, factual determinations by Customs are presumed correct, *see* 28 U.S.C. § 2639(a)(1), but the presumption of correctness applies to issues of fact and not questions of law, *Goodman Mfg. L.P. v. United States,* 69 F.3d 505, 508 (Fed. Cir. 1995). If the plaintiff satisfies its burden of demonstrating that the government's classification was incorrect, the court must ascertain "the *correct* result, by whatever procedure is best suited to the case at hand." *Jarvis Clark*, 733 F.2d at 878 (footnote omitted).

In determining the correct classification, the court undertakes a two-step analysis. *Faus Grp., Inc. v. United States,* 581 F.3d 1369, 1371 (Fed. Cir. 2009). "The first step addresses the proper meaning of the relevant tariff provisions, which is a question of law." *Id.* (citation omitted). "The second step involves determining whether the merchandise at issue falls within a particular tariff provision as construed, which, when disputed, is a question of fact." *Id.* at 1371–72 (citation omitted).

"Absent contrary legislative intent, HTSUS terms are to be construed according to their common and commercial meanings." *La Crosse Tech., Ltd. v. United States*, 723 F.3d 1353, 1358 (Fed. Cir. 2013) (quoting *Carl Zeiss, Inc. v. United States*, 195 F.3d 1375, 1379 (Fed. Cir. 1999)). When interpreting tariff terms in the HTSUS, the court "may consult lexicographic and scientific authorities, dictionaries, and other reliable information sources." *Carl Zeiss*, 195 F.3d at 1379 (citing *Baxter Healthcare Corp. of P.R. v. United States*, 182 F.3d 1333, 1337 (Fed. Cir. 1999)).

The court also consults the Explanatory Notes ("ENs") for the Harmonized Commodity Description and Coding System ("Harmonized System" or "HS") maintained by the World Customs Organization. Although not legally binding, the Explanatory Notes "are generally indicative of the proper interpretation of a tariff provision." *Degussa Corp. v. United States*, 508 F.3d 1044, 1047 (Fed. Cir. 2007) (citing *Motorola, Inc. v. United States*, 436 F.3d 1357, 1361 (Fed. Cir. 2006)). The HTSUS is organized according to Harmonized System rules and nomenclature (pursuant to the "Harmonized System Convention"). The Explanatory Notes are informative as to the intent of the drafters of the Harmonized System where, as in this case, the dispute involves a legal determination of the scope of the competing headings as determined under the GRIs and the section and chapter notes.

E. Claims of the Parties

Upon liquidation of the entries, Customs classified the imported merchandise under heading 7306, HTSUS, in subheadings according to the wall thickness of the conduit, as follows:

> Subheading 7306.30.1000, HTSUS ("Other tubes, pipes, and hollow profiles (for example, open seamed or welded, riveted or similarly closed), of iron or steel: Other, welded, of circular cross section, of iron or nonalloy steel: Having a wall thickness of less than 1.65 mm")
>
> Subheading 7306.30.5028, HTSUS ("Other tubes, pipes, and hollow profiles (for example, open seamed or welded, riveted or similarly closed), of iron or steel: Other, welded, of circular cross section, of iron or nonalloy steel: . . . Having a wall thickness of 1.65 mm or more: . . . Other: . . . Other: With an outside diameter not exceeding 114.3 mm: Galvanized: . . . Internally coated or lined with a non-electrically insulating material, suitable for use as electrical conduit").

Goods entered in 2018 that were classified in subheadings 7306.30.10 and 7306.30.50, HTSUS were free of general (Column 1) duty, but the entries at issue were subject to a duty of 25% *ad valorem* under U.S. note 16 to subchapter III of chapter 99 and subheading 9903.80.01, HTSUS. These provisions implemented Presidential Proclamation 9705, *Adjusting Imports of Steel Into the United States*, 83 Fed. Reg. 11,625 (Exec. Off. of the President Mar. 15, 2018), issued under Section 232 of the Trade Expansion Act of 1962, *as amended*, 19 U.S.C. § 1862. Proclamation 9705 was in effect and applied to products of Mexico during the dates of the entries in this action. *Adjusting Imports of Steel Into the United States*, 83 Fed. Reg. 11,625; Presidential Proclamation 9740, *Adjusting Imports of Steel Into the United States*, 83 Fed. Reg. 20,683 (Exec. Off. of the President May 7, 2018); Presidential Proclamation 9894, *Adjusting Imports of Steel Into the United States*, 84 Fed. Reg. 23,987 (Exec. Off. of the President May 23, 2019).

Plaintiff claims classification in subheading 8547.90.0020, HTSUS (". . . electrical conduit tubing and joints therefor, of base metal lined with insulating material: . . . Other: . . . Electrical conduit tubing and joints therefor, of base metal lined with insulating material: Conduit tubing"). Summons 2; Compl. ¶ 33. Goods so classified were subject to general (Column 1) duty of 4.6% *ad valorem*, with duty-free treatment applying to goods qualifying for preferential duty treatment under the North American Free Trade Agreement Implementation

Act. *See* Gen. Note 12, HTSUS.

Defendant claims that the tariff classifications determined by Customs upon liquidation are correct. Def.'s Br. 1.

F. Application of GRI 1, HTSUS, to Determine the Appropriate Heading

As required by GRI 1, HTSUS, the court first considers the terms of the headings and any relative section and chapter notes in ascertaining the correct four-digit heading for the classification of the imported conduit.

The candidate headings of the HTSUS identified by the parties, with the espective article descriptions (in pertinent part), are as follows:

Heading 7306, HTSUS:	"Other tubes, pipes, and hollow profiles (for example, open seamed or welded, riveted or similarly closed), of iron or steel"
Heading 8547, HTSUS:	". . . electrical conduit tubing and joints therefor, of base metal lined with insulating material"

The parties have not provided, and the court has not identified, any other candidate headings.

Heading 7306 is within section XV of the HTSUS while heading 8547 is within section XVI. According to note 1(f) to section XV, HTSUS section XV "does not cover: . . . Articles of section XVI (machinery, mechanical appliances and *electrical goods*)" (emphasis added). Therefore, the court first considers whether the conduit is within the scope of heading 8547, and if it is, heading 7306, although including welded carbon steel tubing of circular cross section, must be eliminated from consideration by operation of GRI 1.

The term within the article description for heading 8547, HTSUS pertinent to this dispute is "electrical conduit tubing . . . of base metal lined with insulating material." The undisputed facts are that the imported conduit at issue is "electrical conduit tubing" and that it is made of base metal (steel). The issue, then, is whether the conduit is "electrical conduit tubing . . . of base metal *lined with insulating material*," heading 8547, HTSUS (emphasis added), within the meaning of that term as it appears in the article description for the heading.

The parties disagree on the meaning of "insulating." Plaintiff reads the heading term broadly, arguing that "[t]he term 'insulate' refers to the connotation of providing a protective layer between an underlying

article and something harmful." Pl.'s Br. 19 (citing various dictionary definitions). This would include, in plaintiff's view, the protection of wire from damage as it is pulled through the conduit during the installation process. In that regard, an advertising brochure describing the EMT refers to the inside surface of the conduit in stating: "Smooth interior coating insulates wall to provide easy installation of wire." Def.'s Br. Ex. 6. The brochure makes no other reference to insulation and does not advertise the interior coating as providing insulation from electrical current.

Defendant argues that the term "insulating," when read in context, must be interpreted "within the context of electrical equipment." Def.'s Br. 14. Under defendant's view, "insulating" should be read to mean "[t]o cut off or isolate from conducting bodies by the interposition of non-conductors, so as to prevent the passage of electricity or heat." *Id.* (quoting the Oxford English Dictionary).

The parties also disagree on the interpretation of the heading term, "electrical conduit tubing . . . of base metal lined with insulating material," considered on the whole. Taking a "plain meaning" approach, and arguing that the heading term is unambiguous, plaintiff interprets the term to be satisfied so long as the conduit is coated on the interior surface with a substance that has general application as an insulator, regardless of the thickness, or degree of insulating performance, of the coating on the particular conduit at issue. Plaintiff argues that heading 8547, HTSUS is appropriate because "[t]he subject conduit is lined with epoxy resin, melamine and silicone. Those materials are universally recognized in scientific, technical, and lexicographic authorities as insulating materials, and, in particular, electrically insulating materials." Pl.'s Br. 9.

Defendant's interpretation, in contrast, is that the mere presence of a material that is regarded as an insulator in some applications does not suffice for classification under heading 8547, HTSUS unless the interior coating imparts, in the context of electrical equipment and the intended use, an insulating characteristic to the conduit to which it is applied. For the reasons discussed below, the court agrees.

Contrary to plaintiff's argument, the court does not view the phrase "electrical conduit tubing . . . of base metal lined with insulating material" as free of ambiguity. The merchandise at issue here presents the very question that makes the heading term ambiguous. That question involves the function of the lining material in relation to the intended purpose and use of the conduit to which it is applied: must the lining effectively "insulate" the wire (or wires), once installed, from the inner surface of the steel conduit, or is it sufficient that it perform some other function?

The Explanatory Notes to Harmonized System headings 73.06 and 85.47 provide an answer to this question. They draw a distinction between electrical conduit tubing that is "insulated" and electrical conduit tubing that is "uninsulated." EN 73.06 instructs that excluded from HS heading 73.06 is "[i]nsulated electrical conduit tubing (heading 85.47)." In a parallel reference, EN 85.47 states that uninsulated electrical conduit tubing is excluded from HS heading 85.47 and instead is to be classified within section XV of the HS nomenclature. EN 85.47(B) ("This group covers the metal tubing used in permanent electrical installations (e.g. house wiring) as insulation and protection for the wires, **provided it has an interior lining of insulating material**. Uninsulated metal tubing, often used for the same purpose, is excluded (Section XV)."). In this way, the two Explanatory Notes draw a distinction between two classes of goods, i.e., insulated and uninsulated electrical conduit tubing.

The materials the parties have provided in support of their respective summary judgment motions do not describe the subject conduit, when offered for sale in commerce, as "insulated electrical conduit" or "insulated electrical conduit tubing." Moreover, the uncontested facts are inconsistent with a finding that the coating "insulates" the interior wire so as to impede the transfer of electrical current or heat when the conduit is used for its intended purpose. The parties agree that the coating inside the subject conduit provides some measurable resistance (or "resistivity") to the flow of electric current when compared to the same pipe when uncoated, and the evidence they would introduce demonstrates that fact. Nevertheless, the uncontested facts also demonstrate that the degree of resistivity is not significant in relation to the intended use of the conduit. They agree, based on the statements of prospective witnesses, that while the coating provides some electrical resistivity, it does not do so in a way that would qualify the conduit as an insulator. *See* Oral Argument at 2:14:30.

Plaintiff's witness measured the resistivity of the coating inside the conduit to be between 120 milliohms and 1.2 ohms, depending on the testing method, and defendant's witness measured the resistivity as much less than that.[5] Even if the results obtained by plaintiff's witness, rather than defendant's, are taken as definitive, they would not

[5] Using a two-point test, plaintiff's witness measured 0.2 ohms of resistivity on uncoated pipe and between 0.7 and 1.2 ohms of resistivity on the coated pipe. Mem. in Supp. of Pl.'s Mot. for Summary J. Ex. IV, at 128 (June 3, 2022) (Deposition of Dr. Joshua E. Jackson), ECF No. 43. Using a four-point test, plaintiff's witness measured the resistivity of the uncoated pipe to be 2.5 milliohms and the coated pipe to be 120 milliohms. *Id.* at 129. Defendant's witness measured the resistivity of the lining to be between 3.419 and 14.043 milliohms. Mem. of Law in Resp. to Pl.'s Mot. for Summary J. and in Supp. of the Government's Cross-Mot. for Summary J. 27 (Aug. 11, 2022), ECF No. 48 ("Def.'s Br.") (citing Expert Witness Report of Dr. Sakis [Athanasios] Meliopoulos (Oct. 20, 2021), Def.'s Br. Ex. 5, at 21).

demonstrate that the conduit significantly would impede the flow of electrical current in the type of wiring circuits that would be found in or around residential or commercial buildings. Nor could it plausibly be contended that the coating, which is extremely thin (10 to 60 microns), provides meaningful protection from overheated wiring in such circuits.

Notably, plaintiff does not contend that the coating provides significant protection from current flow or heat, and the brochure described above, Def.'s Br. Ex. 6, does not make any such claims. According to plaintiff's theory of this case, however, that does not matter: all that is needed is a coating with a substance that has general applications as an insulator.

The court interprets heading 8547, HTSUS in a common and commercial context to describe electrical conduit that performs an insulating function necessary or desirable for electrical wiring in applications for which the conduit is designed and for which it is marketed in commerce. "Absent contrary legislative intent, HTSUS terms are to be construed according to their common and commercial meanings." *La Crosse Tech.*, 723 F.3d at 1358 (quoting *Carl Zeiss, Inc.*, 195 F.3d at 1379). A reading of the word "insulating" in conjunction with the term "*electrical* conduit," in a common and commercial sense, indicates that the insulating layer must function in a way that relates to the "electrical conduit" function, i.e., it must impede electrical current or isolate the heat from the wire from the inside surface of the steel conduit. The court is not convinced that the term "electrical conduit . . . of base metal lined with an insulating material" describes electrical conduit that cannot insulate the base metal, to any significant degree, from the current or heat in the wire it surrounds.

The Explanatory Note for HS heading 85.47 provides additional insight, stating as follows:

> The tubing of this group consists either of spiralled metal strip wound on to an interior tube of insulating material, or of rigid metal tubing (usually iron or steel) coated or lined on the inside with insulating material. *The insulating material may be special electrically insulating varnish, paper or paperboard, rubber, plastics, etc. Metal tubing simply coated with varnish to prevent corrosion is excluded* (Section XV).

EN 85.47(B) (emphasis added). The EN describes examples of various materials that are electrically insulating and may be used to line the conduit. While the term "may be" is somewhat imprecise, the connotation is of a non-exhaustive list of electrically-insulating materials that may be used as lining for the conduit. Moreover, plaintiff's

broader reading of the term "insulate" as having a "connotation of providing a protective layer between an underlying article and something harmful," Pl.'s Br. 19, is at odds with the example of a coating of varnish that is applied merely to protect the metal from corrosion by insulating it from exposure to oxygen in the air. The distinction drawn by EN 85.47 indicates that electrical conduit that is not identified in commerce as insulated conduit, even though advertised as having a coating that smooths the interior surface to facilitate the pulling of wire through the conduit, is not properly classified under the heading.

In summary, the uncontested facts show that the conduit is not of a type that could insulate the base metal, to any significant degree, from the electrical current or heat in the wire it surrounds. Therefore, these facts demonstrate that the subject merchandise is not "electrical conduit . . . of base metal lined with an insulating material" within the meaning of that term as used in the article description for heading 8547, HTSUS. The subject merchandise is instead described by the terms of heading 8547, HTSUS. The subject merchandise is instead described by the terms of heading 7306 ("Other tubes, pipes, and hollow profiles . . . of iron or steel").[6]

G. Application of GRI 6, HTSUS to Determine the Correct Subheading

Within heading 7306, HTSUS, six-digit subheading 7306.30, HTSUS includes welded steel pipe and tube of circular cross section other than goods suitable for use in oil or gas pipelines or for use in drilling for oil and gas. This subheading describes the imported conduit.

Within the six-digit subheading, eight-digit subheading 7306.30.10, HTSUS includes welded steel pipe and tube of circular cross section "[h]aving a wall thickness of less than 1.65 mm" while subheading 7306.30.50 ("Other . . .") includes welded steel pipe and tube of circular cross section "[h]aving a wall thickness of 1.65 mm or more." The subject merchandise falls within these two eight-digit subheadings, depending on the wall thickness of the individual product.[7]

[6] The term "Other . . ." refers to steel pipe and tube not described in the immediately preceding headings of chapter 73, HTSUS. Heading 7304, HTSUS applies to seamless steel tubes and pipes, and heading 7305, HTSUS applies to steel tubes and pipes of circular cross section, other than seamless tubes and pipes, that are of an external diameter exceeding 406.4 millimeters.

[7] Both eight-digit subheadings are free of general (column 1) duty but at the time of importation were subject to the duty of 25% *ad valorem* under U.S. note 16 to subchapter III of chapter 99 and subheading 9903.80.01, HTSUS. The ten-digit statistical subheadings are of no significance to the tariff treatment.

H. Plaintiff's Motion in Limine

Plaintiff argues that defendant's designated expert witness, Dr. Athanasios Meliopoulos, an electrical engineer, does not have the necessary professional qualifications to testify in the field of chemistry as an expert on what constitutes an "insulating material." Mot. in. Limine 3 ("We submit that Dr. Meliopoulos is woefully incompetent to render an opinion on the chemical composition of the lining and whether it is insulating material."). The expert witness report of Dr. Meliopoulos opines that the material used to coat the inside of the subject conduit would be classified as a "semiconductor" rather than as an insulator. Def.'s Br. Ex. 5, at 8 ("[T]he coating material is a semiconductor."). Plaintiff moves that the court order "that the opinion testimony of Dr. Athanasios Meliopoulos on what constitutes 'insulating materials' is inadmissible under Rule 702 of the Federal Rules of Evidence and is hereby excluded." Mot. in. Limine Proposed Order.

The court agrees that Dr. Meliopoulos has not presented credentials as a chemist or chemical engineer. Had this case gone to trial, the court accordingly would have excluded his testimony to the effect that the material applied as a coating to the conduit is classified as a "semiconductor" rather than an insulator or insulating material. Nevertheless, the court rules that this case presents no genuine dispute as to any material fact and considers the issue of whether the coating material may be described generally as an "insulator" or "insulating material" not to be an issue of material fact in this case. Therefore, the court sees no need to resolve, as a disputed fact in this litigation, whether the coating material would be classified for chemical purposes as an "insulator" or instead classified as a "semiconductor."

The uncontested fact is that the coating material, *in the form in which it exists on the inside of the subject conduit*, has a measurable electrically-insulating property, as discussed previously in this Opinion. The parties also agree, as discussed previously in this Opinion, that while the coating provides some electrical resistivity, it does not do so in a way that would qualify the *conduit* as an insulator. While the court must make its decision on defendant's motion for summary judgment on the basis of evidence that would be admissible, Dr. Meliopoulos's opinion that the material is a "semiconductor" is irrelevant to the court's summary judgment analysis and is not used to reach the decision in this case.

For these reasons, plaintiff's motion in limine will be denied as moot.

III. CONCLUSION

For the reasons stated above, the court concludes that there is no genuine dispute as to any material fact and rules that plaintiff has not demonstrated that "the government's classification is incorrect." *Jarvis Clark*, 733 F.2d at 876. Therefore, the defendant is entitled to judgment as a matter of law. Accordingly, the court will deny plaintiff's motion for summary judgment, grant defendant's cross-motion, and enter summary judgment in favor of defendant.

Dated: March 13, 2023
New York, New York

/s/ Timothy C. Stanceu
Timothy C. Stanceu
Judge

Slip Op. 23–33

Teknik Aluminyum Sanayi A.S., Plaintiff, v. United States, Defendant, and Aluminum Association Common Alloy Aluminum Sheet Trade Enforcement Working Group and its Individual Members, Defendant-Intervenors.

Before: M. Miller Baker, Judge
Court No. 21–00251

[The court denies Plaintiff's motion for judgment on the agency record and instead grants judgment on the agency record to Defendant and Defendant-Intervenors.]

Dated: March 16, 2023

Kristen Smith, Sandler, Travis & Rosenberg, PA, of Washington, DC, argued for Plaintiff. With her on the briefs was *Sarah E. Yuskaitis*.

Kyle S. Beckrich, Trial Attorney, Civil Division/National Courts, U.S. Department of Justice of Washington, DC, argued for Defendant. With him on the brief were *Brian M. Boynton*, Principal Deputy Assistant Attorney General; *Patricia M. McCarthy*, Director; and *Reginald T. Blades, Jr.*, Assistant Director. Of counsel on the briefs was *Brendan Saslow*, Senior Attorney, Office of the Chief Counsel for Trade Enforcement and Compliance, U.S. Department of Commerce of Washington, DC.

Elizabeth C. Johnson, Kelley Drye & Warren LLP of Washington, DC, argued for Defendant-Intervenors. With her on the brief were *John M. Herrmann* and *Kathleen W. Cannon*.

OPINION

Baker, Judge:

Plaintiff Teknik Aluminyum Sanayi A.S. challenges the Department of Commerce's final determination in a countervailing duty investigation of aluminum sheet from Turkey. For the reasons below, the court sustains that determination.

I

The Tariff Act of 1930, as amended, provides that when Commerce determines that a foreign government provides "countervailable subsid[ies]" of goods imported into the United States, and the International Trade Commission also determines that such imports injure domestic industry, the Department will impose a "countervailing duty" on the relevant merchandise "equal to the amount of the net countervailable subsidy." 19 U.S.C. § 1671(a).[1]

In countervailing duty investigations, Commerce first obtains relevant information from interested parties and other sources through questionnaires. *See* 19 C.F.R. § 351.301(c)(1) ("During a proceeding, the Secretary may issue to any person questionnaires, which includes both initial and supplemental questionnaires."). Based on that information, the Department issues a preliminary determination. *Id.* § 351.205. Commerce then verifies information gathered in its investigation before issuing a final determination. *See* 19 U.S.C. § 1677m(i)(1) (requiring the Department to "verify all information relied upon in making . . . a final determination").

"Verification is like an audit, the purpose of which is to test information provided by a party for accuracy and completeness." *Hung Vuong Corp. v. United States*, 483 F. Supp. 3d 1321, 1336 (CIT 2020) (quoting *Bomont Indus. v. United States*, 733 F. Supp. 1507, 1508 (CIT 1990)). The Department "has latitude in how it conducts verification . . . ." *Id.* at 1336 n.10.

Commerce's regulations provide that ordinarily it will conduct on-site verification where the respondent maintains its records. *See* 19 C.F.R. § 351.307(d). During the COVID-19 pandemic, however, the Department "issued an agency-wide memo prohibiting all travel not 'mission-critical and pre-approved by senior bureau leadership.' " *Ellwood City Forge Co. v. United States*, 582 F. Supp. 3d 1259, 1266 (CIT 2022) (quoting Dep't of Commerce, *All Hands: Coronavirus Update* (Mar. 16, 2020), https://bit.ly/commercecoronavirus). Commerce therefore used "verification questionnaires" instead of on-site verification. *See Coal. of Am. Millwork Producers v. United States*, 581 F. Supp. 3d 1295, 1302 (CIT 2022); *Ellwood City*, 582 F. Supp. 3d at 1267–69 (discussing use of verification questionnaires "in lieu of performing an on-site verification").

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[1] "Generally, countervailing duty investigations are undertaken by Commerce to determine whether a foreign government has conferred to its producers benefits that are deemed to be countervailable subsidies. A countervailable subsidy is defined to include certain types of financial assistance provided by a foreign government or entity that confers a 'benefit' to the recipient relating to its production, manufacture, or export of the subject goods." *Habaş Sinai ve Tibbi Gazlar Istihsal Endüstrisi A.Ş. v United States*, 992 F.3d 1348, 1352 (Fed. Cir. 2021) (citing 19 U.S.C. §§ 1671, 1677).

II

In March 2020, American aluminum sheet producers petitioned Commerce to investigate alleged subsidization of Turkish aluminum sheet producers by that country's government, contending that such subsidies harmed U.S. domestic industry. *See Common Alloy Aluminum Sheet from Bahrain, Brazil, India, and the Republic of Turkey: Initiation of Countervailing Duty Investigations*, 85 Fed. Reg. 19,449, 19,550 (Dep't Commerce Apr. 7, 2020) (referring to receipt of petitions in March 2020). Commerce opened an investigation in response. *Id.* at 19,452.

In its investigation, the Department selected Teknik as one of two mandatory respondents. Appx1006–1012. Based on the results of its investigation, the Department preliminarily determined that Teknik received *de minimis* subsidies from the Turkish government. Appx1044–1046; *see also* 19 C.F.R. § 351.106(c)(1) (providing that Commerce treats any countervailable subsidy rate of less than 0.50 percent as *de minimis*). The *de minimis* finding meant that Teknik would escape imposition of countervailing duties absent any further changes in Commerce's final determination. *See* 19 U.S.C. § 1671b(b)(4)(A) (directing Commerce to "disregard any *de minimis* countervailable subsidy" in making a preliminary determination); *id.* § 1671d(a)(3) (same as to the Department's a final determination); As relevant here, Commerce then propounded a verification questionnaire, Appx2361–2364, to which Teknik responded. Appx2371–3288.

In its final determination, Commerce assigned Teknik a countervailing duty rate of 4.34 percent based on application of partial facts otherwise available with an adverse inference.[2] ECF 21–4, at 46. The Department explained that it asked Teknik to submit sales reconciliations tied to "source documentation such as audited financial statements and/or financial accounting system screenshots" and that it also requested "screenshots of ledgers and trial balance information from the actual financial accounting systems that support the sales reconciliations and reports of non-use." *Id.* at 21. Commerce found the screenshots important because they "would allow us to confirm whether the reconciliations corroborated entries in Teknik's financial systems or financial statements." *Id.* at 22. Teknik failed to submit screenshots, however, and the Department concluded that "many of the values in the submitted reconciliations do not tie directly to source documentation." *Id.*

As a result, Commerce determined under § 1677e(a)(2)(D) that Teknik had provided information that could not be verified and fur-

[2] For a detailed explanation of facts otherwise availablewith an adverse inference, *see Hung Vuong*, 483 F. Supp. 3d at 1336–39.

ther found under § 1677e(a)(2)(A) and (B) that Teknik had "withheld information that Commerce requested and failed to provide information in the form and manner requested by Commerce." *Id.* The Department then explained that "because Teknik specifically acknowledged that it could have provided screenshots from its accounting system and did not," the company had failed to cooperate to the best of its ability under § 1677e(b). *Id.* at 22–23.

III

Teknik timely challenged Commerce's final determination under 19 U.S.C. § 1516a(a)(2)(B)(i). ECF 1. Members of the domestic industry intervened as of right to defend the Department's decision. ECF 18. Teknik then filed the pending Rule 56.2 motion for judgment on the agency record (ECF 37, confidential; ECF 38, public). The government (ECF 35, confidential; ECF 36, public) and the domestic industry (ECF 33, confidential; ECF 34, public) opposed the motion and Teknik replied (ECF 39, confidential; ECF 40, public); the court then heard oral argument.

IV

The court has subject-matter jurisdiction under 28 U.S.C. § 1581(c).

In § 1516a(a)(2) actions such as this, "[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." 19 U.S.C. § 1516a(b)(1)(B)(i). That is, the question is not whether the court would have reached the same decision on the same record—rather, it is whether the administrative record, taken as a whole, permits Commerce's conclusion.

> Substantial evidence has been defined as more than a mere scintilla, as such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. To determine if substantial evidence exists, we review the record as a whole, including evidence that supports as well as evidence that fairly detracts from the substantiality of the evidence.

Nippon Steel Corp. v. United States, 337 F.3d 1373, 1379 (Fed. Cir. 2003) (cleaned up).

In addition, Commerce's exercise of discretion in § 1516a(a)(2) cases is subject to the default standard of the Administrative Procedure Act, which authorizes a reviewing court to "set aside agency action, findings, and conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C.

§ 706(2)(A); *see Solar World Americas, Inc. v. United States*, 962 F.3d 1351, 1359 n.2 (Fed. Cir. 2020) (explaining that in cases reviewed under 28 U.S.C. § 2640(b), "section 706 review applies since no law provides otherwise").

V

Teknik challenges the 4.34 percent countervailing duty rate assigned by Commerce based on two over-arching theories. First, for various reasons, Teknik objects to *how* Commerce conducted verification. Second, even if the Department otherwise properly performed verification, the company contends that Commerce unlawfully applied partial facts otherwise available with an adverse inference.

A

1

Teknik argues that it was "unreasonable" or "arbitrary and capricious" for Commerce to use a questionnaire instead of on-site verification because "[v]erification in [countervailing duty] investigations is, by its nature, an interactive exercise. During the verification process, respondent companies provide supporting documentation to Commerce and can supplement said documentation should Commerce feel that the information provided is not sufficient." ECF 38–1, at 21. Teknik contends that because no such "interactive exercise" happened here, the Department erred: "Failure to allow respondent companies to provide clarifying information or further information where Commerce deems supporting information is deficient is contrary to Commerce's mandate to ensure fair and accurate CVD determinations." *Id.* at 22.

Teknik, however, cites no authority requiring Commerce to employ any verification procedure under the circumstances of a global pandemic, much less any authority for the proposition that verification must be an "interactive exercise" in which respondents can supplement their information upon request. As the government notes, the Federal Circuit has held that Commerce has the authority "to derive verification procedures ad hoc," ECF 36, at 17 (quoting *Goodluck India Ltd. v. United States*, 11 F.4th 1335, 1343 (Fed. Cir. 2021)), and that the statute gives the Department "wide latitude in its verification procedures," *id.* at 18 (quoting *Stupp Corp. v. United States*, 5 F.4th 1341, 1350 (Fed. Cir. 2021)). The court easily rejects Teknik's challenge to Commerce's decision to conduct verification by questionnaire rather than on site.

2

Teknik contends that "Commerce's failure to issue a verification report was contrary to law . . . ." ECF 38–1, at 28. In support of this theory, the company cites the following Commerce regulation:

> (c) *Verification report.* The Secretary will report the methods, procedures, and results of a verification under this section prior to making a final determination in an investigation or issuing final results in a review.

19 C.F.R. § 351.307(c). Teknik asserts that the Department's violation of the regulation prevented the company "from commenting on [Commerce's] incorrect understanding of" the lack of requested screenshots in the company's verification response—had Teknik "known about Commerce's misunderstanding," it could have "pointed to the record documents provided in" its verification response, ECF 38–1, at 29.

Even accepting Teknik's reading of the regulation, it had every opportunity to defend its failure to submit screenshots to the Department. Defendant-Intervenors raised that issue in their case brief shortly after the company submitted its verification questionnaire. Appx4832–4840. Teknik duly responded when it filed its rebuttal brief. Appx4915. In its final determination, Commerce considered, and rejected, the company's explanation.

Because Teknik has not shown that it suffered substantial prejudice, any procedural error by Commerce in not issuing a verification report was harmless. *See United States v. Great Am. Ins. Co. of N.Y.*, 738 F.3d 1320, 1330 (Fed. Cir. 2013) (an agency's "procedural error" is not actionable under the APA unless it causes "substantial prejudice"); *cf. Ellwood City*, 582 F. Supp. 3d at 1280 n.3 (same, citing *Great American* and other authorities).[3]

3

Teknik further argues that it had a right to cure any deficiency created by its failure to supply the requested screenshots at verification. The company invokes 19 U.S.C. § 1677m(d), which provides that when Commerce "determines that a response to a request for information" does not comply with the request, the agency is to give notice and, "*to the extent practicable*," an opportunity to cure the deficiency "in light of the time limits" applicable for completing the investigation. *See* ECF 38–1, at 26–27 (emphasis added) (quoting 19 U.S.C. § 1677m(d)).

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[3] As Teknik has not shown substantial prejudice, the court need not address the government's argument that the company failed to exhaust its administrative remedies nor Teknik's rejoinder that exhaustion does not apply to purely legal questions.

In its opening brief, Teknik makes no argument that it would have been practicable for the Department to provide the company an opportunity to cure the deficiency in view of the applicable time limits, which is reason alone to reject its § 1677m(d) argument. For its part, the government contends that it was not practicable to provide Teknik with such an opportunity here, ECF 36, at 31–32, and the court agrees.

Teknik submitted its verification questionnaire on January 22, 2021. Appx2371. Case briefs were due on February 2, 2021, *see* Appx4821, rebuttal briefs were due on February 9, 2021, *see* ECF 40, at 16, and Commerce's statutory deadline to issue a final determination was March 1, 2021, *id*. at 15. Under this tight timetable, the Department simply did not have time to allow Teknik an opportunity to correct the deficiency. Indeed, Teknik explains at length that this schedule made it pointless for the company to object in its rebuttal brief to the Department's failure to issue a verification report. *See* ECF 40, at 16–17. For the same reasons why it was impracticable for Teknik to object to Commerce's failure to issue such a report, it was impracticable for the Department to allow the company to remedy the verification deficiency.

B

Teknik also challenges Commerce's application of facts otherwise available with an adverse inference. The Department applied facts otherwise available because Teknik "withheld information, failed to provide requested necessary information in the form and manner requested by Commerce, or failed to provide verifiable information" under 19 U.S.C. § 1677e(a)(2)(A), (B), and (D). ECF 21–4, at 6. Because the statute is structured disjunctively, if the court sustains Commerce's decision as to any one of these grounds, the court need not address the other provisions. *See Hung Vuong*, 483 F. Supp. 3d at 1337 ("[I]f any one (or more) of the conditions listed in paragraph (2) applies, Commerce must use facts otherwise available.").

The Department explained that its verification questionnaire asked Teknik "to provide a reconciliation to its total and export sales as reported in its June 15, 2020[,] questionnaire response and its 2019 accounting records and year-end financial statement" and further asked the company "to provide screen-shots to support all reported amounts used in the reconciliation." ECF 21–4, at 6. Commerce also explained that other parts of the verification questionnaire likewise sought screenshots from Teknik's accounting system. *Id.* at 7. The Department explained that "screenshots from [the company's] ac-

counting systems . . . would allow us to confirm whether the reconciliations corroborated entries in Teknik's financial systems or financial statements," *id.* at 22, and would have allowed Commerce "to see the actual information as portrayed in Teknik's financial accounts and ledgers," *id*. In other words, Commerce wanted the company to provide source documentation to substantiate the amounts reported in the questionnaire responses.

The Department found, however, that Teknik's response to the verification questionnaire did not include the screenshots Commerce had requested and that the company had instead produced data in an alternative format that did not comply with instructions. *Id.* at 6. Teknik does not dispute this point—rather, it repeatedly argues that it decided that screenshots would not be helpful and instead gave Commerce its complete accounting ledgers in a different format. ECF 38–1, at 45 ("Providing multiple screenshots of a big ledger would not have presented the information in any meaningful sense. In other words, Teknik provided more verifiable information than that which Commerce requested to support the lack of payment for deduction of taxable income."), 46 ("Teknik also submitted the complete POI account ledger in excel [sic] format *instead of screenshot* [sic] from the accounting system. . . . As Teknik explained to Commerce, Teknik submitted the complete ledger in excel [sic] format over screenshot because Teknik wanted to submit the complete ledger showing all the transactions for the POI as opposed to a screenshot which would have only provided Commerce with the POI total.") (emphasis added), 50 ("Teknik emphasized the content of the information over the format . . . ."). Teknik complains that Commerce could have asked for screenshots if it was not satisfied with what the company submitted, *id.* at 47, but that argument ignores that it was *Teknik's* obligation to submit what the Department requested, especially at verification.[4]

Teknik argues, however, that "[t]he screenshots are not needed to determine usage as Commerce was provided the entire actual account ledger to show the lack of payment for this program. Commerce failed to provide any information or analysis as to whether in fact the lack of screenshots created a gap in the record that required the application of AFA." ECF 38–1, at 52. But Commerce did not have to do that.

[4] *See also* 19 U.S.C. § 1677m(c)(1) (permitting a party to ask Commerce to modify its reporting requirements if the party notifies the Department in advance, explains the problem, and suggests an alternative); *Hung Vuong*, 483 F. Supp. 3d at 1361 (noting that Hung Vuong failed to seek advance approval from Commerce for its alternative data format and finding that "Hung Vuong should have made that request of Commerce before unilaterally proceeding with its own alternative methodology"). The same is true here. Teknik sought, and received, a one-week extension of time to respond to the verification questionnaire, *see* Appx 2370, so there is no reason to believe that Commerce would not at least have considered Teknik's request for permission to use a different format.

The statute requires use of facts otherwise available when a party fails to provide information "in the form and manner requested," 19 U.S.C. § 1677e(a)(2)(B), and it permits an adverse inference when a party fails to cooperate to the best of its ability, *id.* § 1677e(b)(1). Teknik did not provide information in the form and manner requested, and its ready admission that it did not do so demonstrates failure to cooperate. That is enough to sustain Commerce's findings.[5]

* * *

For all these reasons, the court denies Teknik's motion for judgment on the agency record and instead grants judgment on the agency record to the government and to Defendant-Intervenors. *See* USCIT R. 56.2(b). A separate judgment will issue. *See* USCIT R. 58(a).

Dated: March 16, 2023
New York, New York

/s/ M. Miller Baker
Judge

[5] Alternatively, the court would sustain Commerce's use of facts otherwise available based on the other grounds cited by the Department. *See* 19 U.S.C. § 1677e(a)(2)(A) ("withholds information that has been requested by the administering authority"); *id*. § 1677e(a)(2)(D) ("provides such information but the information cannot be verified"). As to the former, Teknik admits that it withheld information requested by Commerce. As to the latter, Teknik's "account ledger" is an Excel spreadsheet. Counsel for the intervenors noted at oral argument that a spreadsheet in an Excel file can be modified, so Commerce rightly does not accept that format instead of "screenshots of the relevant accounts." Appx2363 (verification questionnaire).

Index

Customs Bulletin and Decisions
Vol. 57, No. 12, March 29, 2023

U.S. Customs and Border Protection

General Notices

	Page
Grant or “Lever-Rule” Protection	1
Revocation of One Ruling Letter and Revocation of Treatment Relating to the Tariff Classification of Metal Storage Lockers and Cabinets for Garage Use	3

U.S. Court of Appeals for the Federal Circuit

	Appeal No.	*Page*
Borusan Mannesmann Boru Sanayi ve Ticaret A.S., Borusan Mannesmann Pipe U.S. Inc., Plaintiffs-Appellants v. United States, Wheatland Tube, Nucor Tubular Products Inc., Defendants-Appellees	2021–2097	11

U.S. Court of International Trade
Slip Opinions

	Slip Op. No.	Page
AA Metals, Inc., Plaintiff, v. United States, Defendant, and Texarkana Aluminum, Inc., Defendant-Intervenor.	23–29	29
JA Solar International Limited, and JA Solar USA Inc., Plaintiffs, v. United States, Defendant.	23–30	42
Printing Textiles, LLC, doing business as Berger Textiles, Plaintiff, v. United States, Defendant.	23–31	43
Shamrock Building Materials, Inc., Plaintiff, v. United States, Defendant.	23–32	47
Teknik Aluminyum Sanayi A.S., Plaintiff, v. United States, Defendant, and Aluminum Association Common Alloy Aluminum Sheet Trade Enforcement Working Group and its Individual Members, Defendant-Intervenors.	23–33	59

GPO U.S. G.P.O.: 2023—423-106/30017