U.S. Customs and Border Protection

NOTICE OF ISSUANCE OF FINAL DETERMINATION CONCERNING UPANELS LED DISPLAY PANELS

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

ACTION: Notice of final determination.

SUMMARY: This document provides notice that U.S. Customs and Border Protection (CBP) has issued a final determination concerning the country of origin of various models of LED display panels sold under the UPanelS brand. Based upon the facts presented, CBP has concluded in the final determination that the components of the subject UPanelS devices undergo substantial transformation in Taiwan upon the manufacture of their printed circuit board assembly (PCBA) and light-emitting diode (LED) lamp assembly.

DATES: The final determination was issued on June 10, 2024. A copy of the final determination is attached. Any party-at-interest, as defined in 19 CFR 177.22(d), may seek judicial review of this final determination within July 15, 2024.

FOR FURTHER INFORMATION CONTACT: Austen Walsh, Valuation and Special Programs Branch, Regulations and Rulings, Office of Trade, at *austen.m.walsh@cbp.dhs.gov.*

SUPPLEMENTARY INFORMATION: Notice is hereby given that on June 10, 2024, CBP issued a final determination concerning the country of origin of various models of LED display panels sold under the UPanelS brand for purposes of title III of the Trade Agreements Act of 1979. This final determination, HQ H332752, was issued at the request Unilumin USA LLC (Unilumin), under procedures set forth at 19 CFR part 177, subpart B, which implements Title III of the Trade Agreements Act of 1979, as amended (19 U.S.C. 2511–18). In the final determination, CBP has concluded that, based upon the facts presented, the components, which are largely sourced from China and Taiwan, are substantially transformed in Taiwan when made into the subject UPanelS devices.

Section 177.29, CBP Regulations (19 CFR 177.29), provides that notice of final determinations shall be published in the **Federal Register** within 60 days of the date the final determination is issued. Section 177.30, CBP Regulations (19 CFR 177.30), provides that any party-at-interest, as defined in 19 CFR 177.22(d), may seek judicial review of a final determination within 30 days of publication of such determination in the **Federal Register**.

ALICE A. KIPEL,
Executive Director, Regulations and Rulings,
Office of Trade.

HQ H332752
June 10, 2024
OT:RR:CTF:VS H332752 AMW
CATEGORY: Origin

MS. ANGELICA TSAKIRIDIS
MANAGING DIRECTOR—GLOBAL TRADE ADVISORY DELOITTE LLP
555 MISSION STREET, SUITE 1400
SAN FRANCISCO, CA 94105

RE: U.S. Government Procurement; Title III, Trade Agreements Act of 1979 (19 U.S.C. 2511); Subpart B, Part 177, CBP Regulations; Country of Origin of UPanelS Products

DEAR MS. TSAKIRIDIS:

This is in response to your request, dated September 8, 2021, on behalf of your client, Unilumin USA LLC ("Unilumin"), for a final determination concerning the country of origin of the "UPanelS" product line of light-emitting diode ("LED") display panels, pursuant to Title III of the Trade Agreements Act of 1979 ("TAA"), as amended (19 U.S.C. 2511 *et seq.*), and subpart B of Part 177, U.S. Customs and Border Protection ("CBP") Regulations (19 CFR 177.21, *et seq.*). Your request, submitted as an electronic ruling request, was forwarded to this office from the National Commodity Specialist Division. Unilumin is a party-at-interest within the meaning of 19 CFR 177.22(d)(1) and 177.23(a) and is therefore entitled to request this final determination.

FACTS

Unilumin imports various models of "high-performance [LED] display[s]" sold under the UPanelS product line. The UPanelS product line consists of a series of display units capable of producing high-definition video or photographic images differentiated primarily by pixel pitch. The UPanelS devices are used in commercial and educational settings as signage or digital displays, including in large format settings such as concert backdrops or film sets.[1] UPanelS devices are capable of being affixed directly into a wall mount, displayed free standing, or hung with hanging beams.[2]

Each UPanelS consists of two major sub-assemblies: a "module board" and a "cabinet housing." The module board drives and controls each LED unit, forming images for display. The cabinet encases the device and provides the power supply function.

The module board is assembled in Taiwan and is comprised of two subassemblies that are also assembled in Taiwan: (1) the main printed circuit board assembly ("PCBA") with LED lamps; and (2) the HUB board and receiver card. The main PCBA with LED lamps consists of the main PCBA, which regulates the flow of power to the LED lamps; and the LED lamps (originating in Taiwan), which light to form viewable images. The HUB board and receiver cards assembly consists of the HUB board, a separate PCBA printed in China that relays information between the receiver card and module board; a receiver card (originating in either Taiwan or Romania), which reads programmed command signals regulating the brightness and

[1] *See* "What makes a successful interactive LED wall," available at *https://www.unilumin-usa.com/led-101/what-makes-a-successful-interactive-led-wall/* (accessed Jan. 8, 2024).

[2] UPanelS Product guide, available at *https://www.unilumin-usa.com/wp-content/uploads/2020/02/upanels-1.pdf* (accessed Jan. 8, 2024).

color of the LEDs and sequencing the display; and the indicator light board (originating in Taiwan), which displays power supply indicators to the LED lamps.

Assembly of the main PCBA with LED lamps occurs in Taiwan over approximately 12 steps, which involve the creation of the PCBA via surface mount technology ("SMT") and the placement of LED lamps onto the non-printed side of the PCBA:

1. Mount handling fixture to the integrated circuit ("IC") side of a Chinese-origin bare printed circuit board ("PCB");
2. Print components onto the PCB;
3. Inspect solder paste;
4. Mount remaining miscellaneous components onto PCB;
5. Cure the board in reflow oven;
6. Remove fixture(s) mounted to the IC side of the PCB in step one and mount a fixture to the LED side;
7. Print onto the reverse side of the PCB;
8. Inspect solder paste;
9. Mount components;
10. Cure the board in a reflow oven;
11. Apply conformal coating on PCB;
12. Install gasket onto PCB.

Next, assembly of the HUB board and receiver card occurs in the following steps:

1. Paste installation stickers to a lower/ bottom shell (the "turtle shell") and blacken the bottom with a pen;
2. Insert the receiver card into the HUB board and place the HUB board into the bottom of the turtle shell;
3.Divide the indicator light board into several smaller boards, affix the indicator lights, and connect them with the module board adapter;
4. Paste and scan serial number; and
5. Install the HUB board assembly on the turtle shell and check for flatness and gaps.

The fully assembled PCBA with LED lamps is then combined with the HUB board and receiver card assembly to form the completed module board. Once combined, the LED lamps can light and display video or photographic images.

The cabinet is the second major subassembly of the completed UPanelS. The cabinet houses the module board and provides the power supply to the finished device. The cabinet also enables the combination of multiple module boards to create larger-format arrays (*e.g.,* 4x4 or 2x1 configurations). The cabinet is comprised almost entirely of Chinese-origin components, and contains the following sub-assemblies: power supply adapter board, power supply, motor assembly, power signal combination connector, and wall controller.

The cabinet is assembled in Taiwan in approximately six steps:

1. Affix the power cables to the cabinet;
2. Affix the lacing strip, three core cables, and ground cables to the cabinet;
3. Affix the adapter board to the cabinet;
4. Assemble left and right-side motor and assemble cables with electric screwdriver;
5. Connect internet cables to the power supply adapter board; and
6. Fit the insulating gasket on the power supply cover and affix the power supply cover.

Once the module board and cabinet are completed, they are shipped to China where they are combined into a complete UPanelS unit and tested for functionality. Afterwards, the UPanelS is disassembled and separately packaged for shipment to the United States.

Each UPanelS will be imported into the United States in one of two ways: (1) the UPanelS's finished module board and cabinet are imported as two separately packaged, unique product numbers entered in the same shipment; or (2) the module board and cabinet are entered in the same shipment as separately packaged products along with a separate "wall controller unit."[3] You state that the UpanelS is imported in an unassembled condition because the finished module board and cabinet are delicate and that shipping the components in a single box may damage the panels. To aid installation in the United States, each module board or cabinet will be assigned a serial number or code allowing for the recombination of each module board with its corresponding cabinet.

ISSUE

What is the country of origin of the Unilumin UPanelS for purposes of U.S. Government procurement?

LAW AND ANALYSIS

CBP issues country of origin advisory rulings and final determinations as to whether an article is or would be a product of a designated country or instrumentality for the purposes of granting waivers of certain "Buy American" restrictions in U.S. law or practice for products offered for sale to the U.S. Government, pursuant to subpart B of Part 177, 19 CFR 177.21–177.31, which implements Title III of the TAA, as amended (19 U.S.C. 2511–2518).

CBP's authority to issue advisory rulings and final determinations is set forth in 19 U.S.C. 2515(b)(1), which states:

For the purposes of this subchapter, the Secretary of the Treasury shall provide for the prompt issuance of advisory rulings and final determinations on whether, under section 2518(4)(B) of this title, *an article is or would be a product of a foreign country or instrumentality designated pursuant to section 2511(b) of this title.*

Emphasis added.

The Secretary of the Treasury's authority mentioned above, along with other customs revenue functions, are delegated to CBP in the Appendix to 19 CFR part 0—Treasury Department Order No. 100–16, 68 FR 28,322 (May 23, 2003).

The rule of origin set forth under 19 U.S.C. 2518(4)(B) states:

An article is a product of a country or instrumentality only if (i) it is wholly the growth, product, or manufacture of that country or instrumentality, or (ii) in the case of an article which consists in whole or in part of materials from another country or instrumentality, it has been substantially transformed into a new and different article of commerce with a name, character, or use distinct from that of the article or articles from which it was so transformed.

[3] According to the request, the wall controller unit is a third sub-module that, when connected to the UPanelS, receives data signals from a source and translates and transmits those signals to the receiver card component of the module board. When fully assembled, the UPanelS connects to the wall controller via a category 5 cable. The wall controller unit will originate in Germany, Taiwan, or the United States.

See also 19 CFR 177.22(a).

In rendering advisory rulings and final determinations for purposes of U.S. Government procurement, CBP applies the provisions of subpart B of Part 177 consistent with the Federal Procurement Regulation ("FAR"). *See* 19 CFR 177.21. In this regard, CBP recognizes that the FAR restricts the U.S. Government's purchase of products to U.S.-made or designated country end products for acquisitions subject to the TAA. *See* 48 CFR 25.403(c)(1).

The FAR, 48 CFR 25.003, defines "designated country end product" as:

a WTO GPA [World Trade Organization Government Procurement Agreement] country end product, an FTA [Free Trade Agreement] country end product, a least developed country end product, or a Caribbean Basin country end product.

Section 25.003 defines "WTO GPA country end product" as an article that:

(1) Is wholly the growth, product, or manufacture of a WTO GPA country; or

(2) In the case of an article that consists in whole or in part of materials from another country, has been substantially transformed in a WTO GPA country into a new and different article of commerce with a name, character, or use distinct from that of the article or articles from which it was transformed. The term refers to a product offered for purchase under a supply contract, but for purposes of calculating the value of the end product includes services (except transportation services) incidental to the article, provided that the value of those incidental services does not exceed that of the article itself.

Once again, we note that the subject UPanelS devices are assembled in Taiwan, a TAA-designated country, with components sourced from TAA-designated countries (*e.g.,* Taiwan, Japan) and non-TAA-designated countries (*e.g.,* China).

In determining whether a substantial transformation occurs, CBP considers the totality of the circumstances and makes such determinations on a case-by-case basis. The country of origin of the item's components, extent of the processing that occurs within a country, and whether such processing renders a product with a new name, character, and use are primary considerations in such cases. Additionally, CBP considers factors such as the resources expended on product design and development, the extent and nature of post-assembly inspection and testing procedures, and worker skill required during the actual manufacturing process when determining whether a substantial transformation has occurred. No one factor is determinative.

Assembly operations that are minimal or simple, as opposed to complex or meaningful, will generally not result in a substantial transformation. Factors which may be relevant in this evaluation include the nature of the operation (including the number of components assembled), the number of different operations involved, and whether a significant period of time, skill, detail, and quality control are necessary for the assembly operation. *See* C.S.D. 80–111, C.S.D. 85–25, C.S.D. 89–110, C.S.D. 89–118, C.S.D. 90–51, and C.S.D. 90–97. If the manufacturing or combining process is a minor one, which leaves the identity of the article intact, a substantial transformation has not occurred. *See Uniroyal, Inc.* v. *United States,* 3 CIT 220, 542 F. Supp. 1026 (1982), *aff'd,* 702 F.2d 1022 (Fed. Cir. 1983) (imported shoe uppers added to an outer sole in the United States were the "very essence of the finished shoe" and the character of the product remained unchanged and did not undergo substantial transformation in the United States).

The Court of International Trade ("CIT") more recently interpreted the meaning of "substantial transformation" in *Energizer Battery, Inc.* v. *United States,* 190 F. Supp. 3d 1308 (2016). *Energizer* involved the determination of the country of origin of a flashlight, referred to as the Generation II flashlight. All the components of the flashlight were of Chinese origin, except for a white LED and a hydrogen getter. The components were imported into the United States and assembled into the finished Generation II flashlight. The *Energizer* court reviewed the "name, character and use" test utilized in determining whether a substantial transformation had occurred and noted, citing *Uniroyal, Inc.,* 3 C.I.T. at 226, that when "the post-importation processing consists of assembly, courts have been reluctant to find a change in character, particularly when the imported articles do not undergo a physical change." *Energizer* at 1318. In addition, the court noted that "when the end-use was pre-determined at the time of importation, courts have generally not found a change in use." *Energizer* at 1319, citing as an example, *National Hand Tool Corp.*

In reaching its decision, the *Energizer* court expressed the question as one of whether the imported components retained their names after they were assembled into the finished Generation II flashlights. The court found "[t]he constitutive components of the Generation II flashlight do not lose their individual names as a result [of] the post-importation assembly." The court also found that the components had a predetermined end-use as parts and components of a Generation II flashlight at the time of importation and did not undergo a change in use due to the post-importation assembly process. Finally, the court did not find the assembly process to be sufficiently complex as to constitute a substantial transformation. Thus, the court found that Energizer's imported components did not undergo a change in name, character, or use as a result of the post-importation assembly into a finished Generation II flashlight. Virtually all of the components of the Generation II flashlight, including the most important component, the LED, were of Chinese origin. Accordingly, the court determined that China was the correct country of origin of the Generation II flashlights for purposes of government procurement.

The CIT has also looked at the character of an article to determine whether its identity has been substantially transformed through assembly or processing. For example, in *Uniroyal, Inc.* v. *United States,* 3 C.I.T. at 225, the court held that imported shoe uppers added to an outer sole in the United States were the "very essence of the finished shoe" and thus the character of the product remained unchanged and did not undergo substantial transformation in the United States. Similarly, in *National Juice Products Association* v. *United States,* 10 C.I.T. 48, 61, 628 F. Supp. 978, 991 (1986), the court held that imported orange juice concentrate "imparts the essential character" to the completed orange juice and thus was not substantially transformed into a product of the United States.

As CBP examines the totality of circumstances in its substantial transformation analysis, considerations such as the origin of a light source or a PCBA, while not determinative, may be considered together with the nature of the overall assembly operations. For example, in Headquarters Ruling Letter ("HQ") H304910, dated April 21, 2020, CBP determined the country of origin of three models of LED automotive lamps to be Mexico, the country in which the PCBA and LED lights were assembled together. For all three models, CBP determined that the assembly of the Japanese-origin LEDs and

the Mexican-origin PCBAs in Mexico resulted in a substantial transformation. CBP determined that the SMT and wave soldering processes incorporated a large number of discrete parts onto a printed circuit board, which was a sufficiently "complex and meaningful" operation so as to result in a substantial transformation of the parts making up the product's PCBA. In that case, LEDs were one of the discrete components incorporated into the PCBA. *See also,* HQ H331515, dated December 6, 2023 (citing HQ H304910 in determining the country of origin of a refrigerator shelf light, which included a PCBA and an LED light system, to be Mexico, the country of origin for the light's PCBA); and C.S.D. 85–25, 19 Cust. Bull. 544 (1985) (finding assembly of more than 50 components onto PCB results in substantial transformation).

CBP has also determined the origin of image or video-producing devices to be the country in which the underlying PCBA is produced. In HQ H218360, dated September 11, 2013, CBP considered the origin of devices used to "capture motion picture images and sound and send them digitally . . . to a similar unit at a different location. . . ." In that matter, we found that the origin of the devices was the country in which the underlying "video processing electronic circuit board" and "network filter electronic circuit board" were produced because these items imparted the character of the devices as a video conferencing server. *See also* HQ H114395, dated May 18, 2011 (determining the country of origin of a pocket projector to be the location of assembly of the light engine module and PCBA).

In the present matter, and in accordance with HQ H304910 and H218360, the assembly of the main PCBA in Taiwan results in a substantial transformation. We find that the SMT and curing processes incorporate a large number of discrete component parts onto a PCB, which is a sufficiently complex and meaningful operation so as to result in a substantial transformation of the parts making up the PCBA. Similar to HQ H331515, a variety of electronic components are added to the raw PCB via SMT in Taiwan to create the subject PCBAs. This includes the attachment of the Taiwanese-origin LED lamps. Of particular importance, we also note that it is the PCBA that enables the device to distribute power to the LED lamps and therefore imparts the character of the subject device. In addition, the Taiwanese-origin LED lamps also perform the important function of displaying the images to be viewed. Furthermore, we find that the processing in China, which consists of "installing" and "attaching" the subassemblies together for testing, is not sufficiently complex and meaningful to result in a substantial transformation. Based on the information provided, we therefore conclude that the processing in Taiwan results in a product with a new name, character, and use, *i.e.,* an LED device capable of forming and displaying images.

Finally, as outlined above, after final assembly in China, each UPanelS unit will be separated into the module board, cabinet, and sometimes a wall controller unit for shipment to the United States. Here, we note that, although the devices will be disassembled for shipment, the components will nevertheless represent a single item of commerce if shipped together. *See* HQ H100055, dated May 28, 2010 (finding a medical patient lift imported unassembled to be a single unit for country of origin purposes when shipped together).

Based on the analysis above, we find that the country of origin of the subject UPanelS devices is Taiwan and, therefore, the devices would be the product of a foreign country or instrumentality designated pursuant to 19 U.S.C. 2511(b)(1).

HOLDING

Based on the facts and analysis set forth above, the country of origin of the instant UPanelS will be Taiwan.

Notice of this final determination will be given in the **Federal Register**, as required by 19 CFR 177.29. Any party-at-interest other than the party which requested this final determination may request, pursuant to 19 CFR 177.31, that CBP reexamine the matter anew and issue a new final determination. Pursuant to 19 CFR 177.30, any party-at-interest may, within 30 days of publication of the **Federal Register** Notice referenced above, seek judicial review of this final determination before the U.S. Court of International Trade.

Sincerely,

ALICE A. KIPEL,
Executive Director, Regulations and Rulings,
Office of Trade.

NOTICE OF ISSUANCE OF FINAL DETERMINATION CONCERNING THERMAL PRINTERS

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

ACTION: Notice of final determination.

SUMMARY: This document provides notice that U.S. Customs and Border Protection (CBP) has issued a final determination concerning the country of origin of five models of thermal printers. Based upon the facts presented, CBP has concluded in the final determination that the components of the subject thermal printers do not undergo substantial transformation in Japan when made into the final thermal printer units.

DATES: The final determination was issued on June 10, 2024. A copy of the final determination is attached. Any party-at-interest, as defined in 19 CFR 177.22(d), may seek judicial review of this final determination within July 15, 2024.

FOR FURTHER INFORMATION CONTACT: Austen Walsh, Valuation and Special Programs Branch, Regulations and Rulings, Office of Trade, at (202) 325–0114.

SUPPLEMENTARY INFORMATION: Notice is hereby given that on June 10, 2023, CBP issued a final determination concerning the country of origin of five models of thermal printers for purposes of Title III of the Trade Agreements Act of 1979. This final determination, HQ H328859, was issued at the request of Brother Mobile Solutions, Inc. ("Brother"), under procedures set forth at 19 CFR part 177, subpart B, which implements Title III of the Trade Agreements Act of 1979, as amended (19 U.S.C. 2511–18). In the final determination, CBP has concluded that, based upon the facts presented, the components, which are largely sourced from China, are not substantially transformed in Japan when made into the subject thermal printers.

Section 177.29, CBP Regulations (19 CFR 177.29), provides that notice of final determinations shall be published in the **Federal Register** within 60 days of the date the final determination is issued. Section 177.30, CBP Regulations (19 CFR 177.30), provides that any party-at-interest, as defined in 19 CFR 177.22(d), may seek judicial review of a final determination within 30 days of publication of such determination in the **Federal Register**.

ALICE A. KIPEL,
Executive Director, Regulations and Rulings,
Office of Trade.

HQ H328859
June 10, 2024
OT:RR:CTF:VS H328859 AMW
CATEGORY: Origin

MR. RICK VAN ARNAM, ESQ.
BARNES, RICHARDSON & COLBURN, LLP
100 WILLIAM STREET
SUITE 305
NEW YORK, NY 10038

RE: U.S. Government Procurement; Title III, Trade Agreements Act of 1979 (19 U.S.C. 2511); Subpart B, Part 177; Brother Mobile Solutions, Inc.; Country of Origin of Mobile Thermal Printers; Substantial Transformation

DEAR MR. VAN ARNAM:

This is in response to your request of November 14, 2022, on behalf of your client, Brother Mobile Solutions, Inc. ("Brother"), for a final determination concerning the country of origin of various thermal printer models, pursuant to Title III of the Trade Agreements Act of 1979 ("TAA"), as amended (19 U.S.C. 2511 *et seq.*), and subpart B of Part 177, U.S. Customs and Border Protection ("CBP") Regulations (19 CFR 177.21, *et seq.*). Brother is a party-at-interest within the meaning of 19 CFR 177.22(d)(1) and 177.23(a) and is therefore entitled to request this final determination.

FACTS

Brother seeks a country of origin determination related to five separate models of thermal printers described as the "Brother PocketJet 8 Mobile Thermal Printers" (the "thermal printers"). Your request states that the assembly process for the thermal printers is the same, though the devices differ in type of interface (*i.e.,* USB, Bluetooth, or Wi-Fi) and resolution (either "standard resolution" at 203 dots per inch ("DPI") or "high resolution" at 300 dots per inch). The five models are as follows:

Model	Interface	Resolution
PJ–822	USB	203 DPI.
PJ–823	USB	300 DPI.
PJ–862	USB, Bluetooth	203 DPI.
PJ–863	USB, Bluetooth	300 DPI.
PJ–883	USB, Bluetooth, Wi-Fi	300 DPI.

The thermal printers provide full-page mobile printing, producing text or images by passing specially treated paper (*i.e.,* thermal paper) over a "print head" comprised of a small, electrically heated element. Upon exposure to heat, the coating on the paper turns black, producing the desired text or image. The thermal printers connect with most computer models, including IOS and Android devices.

The thermal printers will undergo final assembly in Japan by Mie Brother Precision Industries, Ltd. ("Mie Brother") utilizing discrete components imported from Taiwan, Vietnam, and China, as well as a Japanese-origin printed circuit board assembly ("PCBA"). As outlined in your request, the thermal printers consist of four main component groupings:

(1) Print Mechanism

The print mechanism utilizes direct thermal technology to apply heat to the treated paper and produce text and images. The print mechanism is comprised of approximately 48 components, including a chassis assembly, head spring, gears, thermal plate, paper guide, screws, and a stepping motor used to move paper through the print mechanism. The print mechanism is comprised entirely of Chinese-origin components (aside from the Taiwanese-origin stepping motor), which are assembled into the thermal printers in Japan.

(2) Covers/Chassis

The covers and chassis are static items that make up the chassis of the thermal printers. They are comprised of approximately 59 components, including a top cover, back cover chute cover, battery latches, face tape, and various labels and screws. Each of these components is produced in China and are assembled into the printers in Japan.

(3) Sensor Unit

The sensor unit consists of five components: a Vietnam-produced membrane switch, which functions as an operator interface, allowing the user to operate and control the device. The remaining components, including flexible printed circuits that control the printer's on/off switch, its LED indicator, and a radio circuit (Bluetooth vs. WiFi in model PJ 863), are all produced in China and assembled into the printers in Japan.

(4) Main PCBA

The main PCBA is produced by a third-party manufacturer in Japan. The PCBA includes the device's firmware, and functions as the motherboard of the printer. It controls communication with the device looking to print (*i.e.,* computer or phone), houses the memory for the printer, and forms the image to be printed.

In addition to the physical components described above, you state that the device's firmware is designed and developed in Japan. The firmware consists of software embedded into the PCBA that will control the device.

All told, your request indicates that slightly more than half of the printers' value, is attributable to production occurring in China. Slightly less than half of the printers' value is produced in Japan. Less than 10% by value is produced in Vietnam and in Taiwan. By quantity, approximately 97% of all components are produced in China, whereas 1% of the printers' components are produced in Japan, 1% in Taiwan, and 1% in Vietnam.

You state that the final assembly of the above-mentioned components occurs in Japan. Specifically, your request indicates that assembly in Japan occurs in roughly the following steps:

Mainframe Assembly

In this stage, the main PCBA is mounted to the main chassis assembly. Then, the stepping motor is attached to the chassis, and the print mechanism components are affixed. Next, the side and upper chassis boards are attached to the main frame, as are three head pressing springs. The platen and transfer gears are added. Finally, the chute cover is attached to this frame.

Cover Assembly

Next, the cover assembly is created. The components of the sensor unit—the membrane switch, LED lamp, and various flexible printed circuits, are assembled to the top cover. The back cover is then attached, followed by the top cover and then the latches. All cover screws are tightened. A dummy battery is inserted, and a label is affixed on the bottom of the cover.

After assembly is complete, the thermal printers undergo a testing process in which the machines receive a function test, printing inspection, Wi-Fi/Bluetooth check, and appearance inspection.

ISSUE

What is the country of origin of the subject thermal printers for purposes of U.S. Government procurement?

LAW AND ANALYSIS

CBP issues country of origin advisory rulings and final determinations as to whether an article is or would be a product of a designated country or instrumentality for the purpose of granting waivers of certain "Buy American" restrictions in U.S. law or practice for products offered for sale to the U.S. Government, pursuant to subpart B of Part 177, 19 CFR 177.21 *et seq.,* which implements Title III, Trade Agreements Act of 1979, as amended (19 U.S.C. 2511–2518).

CBP's authority to issue advisory rulings and final determinations is set forth in 19 U.S.C. 2515(b)(1), which states:

For the purposes of this subchapter, the Secretary of the Treasury shall provide for the prompt issuance of advisory rulings and final determinations on whether, under section 2518(4)(B) of this title, an article is or would be a product of a foreign country or instrumentality designated pursuant to section 2511(b) of this title.[1]

The rule of origin set forth in 19 U.S.C. 2518(4)(B) states:

An article is a product of a country or instrumentality only if (i) it is wholly the growth, product, or manufacture of that country or instrumentality, or (ii) in the case of an article which consists in whole or in part of materials from another country or instrumentality, it has been substantially transformed into a new and different article of commerce with a name, character, or use distinct from that of the article or articles from which it was so transformed.

See also 19 CFR 177.22(a).

In rendering advisory rulings and final determinations for purposes of U.S. Government procurement, CBP applies the provisions of subpart B of Part 177 consistent with the Federal Acquisition Regulations ("FAR"). *See* 19 CFR 177.21. In this regard, CBP recognizes that the FAR restricts the U.S. Government's purchase of products to U.S.-made or designated country end products for acquisitions subject to the TAA. *See* 48 CFR 25.403(c)(1).

Section 25.003 defines "designated country end product" as:

[1] The Secretary of the Treasury's authority mentioned above, along with other customs revenue functions, are delegated to CBP in the Appendix to 19 CFR part 0—Treasury Department Order No. 100–16, 68 FR 28322 (May 23, 2003).

a WTO GPA [World Trade Organization Government Procurement Agreement] country end product, an FTA [Free Trade Agreement] country end product, a least developed country end product, or a Caribbean Basin country end product.

Section 25.003 defines "WTO GPA country end product" as an article that:

(1) Is wholly the growth, product, or manufacture of a WTO GPA country; or

(2) In the case of an article that consists in whole or in part of materials from another country, has been substantially transformed in a WTO GPA country into a new and different article of commerce with a name, character, or use distinct from that of the article or articles from which it was transformed. The term refers to a product offered for purchase under a supply contract, but for purposes of calculating the value of the end product includes services (except transportation services) incidental to the article, provided that the value of those incidental services does not exceed that of the article itself.

Once again, we note that the subject thermal printers are assembled in Japan, a WTO GPA country, with components sourced from both TAA-designated countries (*i.e.,* Taiwan and Japan) as well as non-TAA countries (*i.e.,* China, Vietnam).

In order to determine whether a substantial transformation occurs when components of various origins are assembled into completed products, CBP considers the totality of the circumstances and makes such determinations on a case-by-case basis. The country of origin of the item's components, extent of the processing that occurs within a country, and whether such processing renders a product with a new name, character, and use are primary considerations in such cases. Additionally, factors such as the resources expended on product design and development, the extent and nature of post-assembly inspection and testing procedures, and worker skill required during the actual manufacturing process will be considered when determining whether a substantial transformation has occurred. No one factor is determinative.

A new and different article of commerce is an article that has undergone a change in commercial designation or identity, fundamental character, or commercial use. A determinative issue is the extent of the operations performed and whether the materials lose their identity and become an integral part of the new article. *See Nat'l Hand Tool Corp.* v. *United States,* 16 CIT 308 (1992), *aff'd,* 989 F.2d 1201 (Fed. Cir. 1993). "For courts to find a change in character, there often needs to be a substantial alteration in the characteristics of the article or components." *Energizer Battery, Inc.* v. *United States,* 190 F. Supp. 3d 1308, 1318 (Ct. Int'l Trade 2016) (citations omitted). Courts have looked to "the essence" or essential character of the completed article "to determine whether it has undergone a change in character as a result of post-importation processing." *Id.* (citing *Uniroyal, Inc.* v. *United States,* 542 F. Supp. 1026 (Ct. Int'l Trade 1982), *aff'd,* 702 F.2d 1022 (Fed. Cir. 1983)). In *Uniroyal,* 542 F. Supp. at 1030, the U.S. Court of International Trade ("CIT") held that "it would be misleading to allow the public to believe that a shoe is made in the United States when the entire upper—which is the very essence of the completed shoe—is made in Indonesia and the only step in the manufacturing process performed in the United States is the attachment of an outsole."

In *Energizer Battery, Inc.* v. *United States,* 190 F. Supp. 3d 1308 (2016), the CIT interpreted the meaning of the term "substantial transformation" as

used in the TAA for purposes of government procurement. *Energizer Battery* involved the determination of the country of origin of a flashlight, referred to as the Generation II flashlight, under the TAA. All the components of the Generation II flashlight were of Chinese origin, except for a white LED and a hydrogen getter. The components were imported into the United States where they were assembled into the finished Generation II flashlight.

The *Energizer Battery* court reviewed the "name, character and use" test in determining whether a substantial transformation had occurred and reviewed various court decisions involving substantial transformation determinations. The court noted, citing *Uniroyal,* that when "the post-importation processing consists of assembly, courts have been reluctant to find a change in character, particularly when the imported articles do not undergo a physical change." *Energizer* at 1318. In addition, the court noted that "when the end-use was pre-determined at the time of importation, courts have generally not found a change in use." *Energizer Battery* at 1319, citing as an example, *National Hand Tool.* Furthermore, courts have considered the nature of the assembly, *i.e.,* whether it is a simple assembly or more complex, such that individual parts lose their separate identities and become integral parts of a new article.

In reaching its decision in the *Energizer Battery* case, the court expressed the question as one of whether the imported components retained their names after they were assembled into the finished Generation II flashlights. The court found "[t]he constitutive components of the Generation II flashlight do not lose their individual names as a result [of] the post-importation assembly." The court also found that the components had a pre-determined end-use as parts and components of a Generation II flashlight at the time of importation and did not undergo a change in use due to the post-importation assembly process. Finally, the court did not find the assembly process to be sufficiently complex as to constitute a substantial transformation. Thus, the court found that Energizer's imported components did not undergo a change in name, character, or use because of the post-importation assembly of the components into a finished Generation II flashlight. The court determined that China, the source of all but two components, was the correct country of origin of the finished Generation II flashlights under the government procurement provisions of the TAA.

In this matter, counsel argues that the country of origin of the subject thermal printers will be Japan because: (1) the final assembly of the various components occurs in Japan, and all components undergo a substantial transformation when assembled into the thermal printers; (2) the main PCBA is produced in Japan, which functions as the "brains" of the device and therefore imparts the essential character; and (3) the device's firmware is designed, developed, and embedded in Japan. In doing so, the request cites Headquarters Ruling Letter (HQ) H298653, dated November 19, 2018; HQ H241146, dated May 21, 2013; and HQ H185775, dated December 21, 2011.

In HQ H298653, CBP considered the country of origin of solar panels that were assembled in China using both Chinese and non-Chinese components, including polycrystalline solar cells that were entirely manufactured in Germany. CBP determined that polycrystalline solar cells, which imparted the essential character of the finished panels, did not lose their identity and became an integral part of the solar panels when they were combined with other components during the processing in China. The end-use of the solar cells and other components was pre-determined before the components were

imported into China, and the solar cells (and other components) remained solar cells during processing in China. Therefore, CBP found that the country of origin of the solar panels was Germany. We note, however, that HQ H298653 pertains to solar panels, which is a completely different product class from the subject merchandise, and that does not include a PCBA, firmware, or similar components to the subject merchandise.

In HQ H241146, CBP considered the country of origin of monochrome laser printers. In that case, Chinese-origin subassemblies were imported into the United States, where they were assembled with U.S.-origin PCBs, and programmed with Japanese-origin firmware. While the printers were comprised of subassemblies and components from various countries, they were also comprised of a controller unit assembled in the United States (with U.S.-origin PCBs), which was important to the function of the printers. As a result, CBP found that the last substantial transformation occurred in the United States.

In HQ H185775, CBP considered the country of origin of a multifunction office machine. In that case, the incomplete print engine was produced in Vietnam and consisted of a metal frame, plastic skins, motors, controller board with supplier-provided firmware, a laser scanning system, paper trays, cabling paper transport rollers, and miscellaneous sensing and imaging systems. The incomplete print engine was shipped to Mexico, where the following assemblies were added: the formatter board, scanner/automatic document feeder, control panel, fax card, hard disk drive/solid state drive, firmware (which was developed and written in the United States), along with other minor components and accessories. CBP determined that Mexico was the country of origin because the assembly of the various nonfunctioning assemblies and components, along with the addition of firmware and programming, resulted in a substantial transformation.

In addition to the rulings cited in Brother's request, we identified several additional relevant rulings, as follows: HQ H304677, dated April 21, 2023; HQ H301910, date August 5, 2019; HQ H287548, dated March 23, 2018; HQ H219519, dated April 3, 2013; and HQ H018467, dated January 4, 2008. The applicability of each ruling is discussed below.

In HQ H304677, CBP considered the country of origin of various models of multi-and single-function printers that underwent final assembly in Mexico. Most of the components for the printers were assembled in China to create subassemblies referred to as "printer transports," which consisted of the basic housing and associated structures (*e.g.,* frames, covers, laser scanning unit, power supply unit). The units' PCBAs were manufactured in Mexico via surface mount and pin through hole technology. The devices' firmware was downloaded in Mexico, but was architected and designed in the United States, with support from an entity in the Philippines. In determining the country of origin to be China, CBP noted that the Mexican-origin PCBA did not serve as the only fundamental functioning component of the printers, but that the other Chinese-origin components also proved critical in enabling the units to perform their function, including feeding the paper and printing images onto the paper.

In HQ H301910, CBP considered the country of origin of mailing machine engines used in certain postage meters. In that ruling, the body of the engine was assembled in China and then transported to Japan where the Japanese-origin PCBA, print head, and print control and diagnostic firmware were installed. Testing and packaging also occurred in Japan. CBP determined

that the main PCBA, the print control firmware, and the print head constituted the primary and fundamental essence of the mailing machine engine because these components controlled the engine's function, operations, and enabled the printing of the correct postage. In particular, the main PCBA itself was composed of components essential to the fundamental function and primary purpose of the engine including the CPU, the memory, and the Field-Programmable Gate Array—all of which combined to form the "brain" of the machine. CBP held that, inasmuch as the main PCBA, the print control firmware, and the print head were all produced in Japan, the country of origin of the mailing engine machine was Japan.

In HQ H287548, CBP determined that the country of origin of a monochrome laser printer was Japan despite having component parts sourced from several countries and where the final assembly took place in the United States. In HQ H287548, the main PCB and firmware were produced in Japan, while the fuser unit, automated document feeder unit, photo conductor, toner cartridge, operation panel, and body unit were all assembled in Vietnam from components sourced from a variety of countries, including the Philippines, Vietnam, and China. CBP determined that the Japanese-origin PCB and firmware imparted the essential character of the laser printer because the firmware provided the control program for the printers and enabled the main PCB assembly to function as the electronic "brains" of the printers by controlling all printer functions. Moreover, the production of the feeder unit, fuser unit, photo conductor, toner cartridge and operation panel occurring in Vietnam was inexpensive and did not require a sophisticated skill set to effect production. Likewise, the final manufacturing in the United States was concluded in 40 minutes (including testing), which did not rise to the level of complex processes necessary for a substantial transformation to occur.

In HQ H219519, CBP considered the country of origin of a laser jet printer and fax machine made up of Chinese parts that was assembled in Mexico. The laser jet printer/fax machine was composed of a print engine, motors, control board (with firmware), paper trays, rollers, transfer belt, formatted printed circuit boards, and other components. CBP determined that the assembly in Mexico was not complex or significant enough to result in a substantial transformation, rendering the country of origin as China. CBP explained that the assembly in Mexico did not change or define the use of the finished laser jet printer/fax machine. CBP considered the amount of time to complete the final assembly of the product. In one scenario, the timeframe to complete the assembly was three to four minutes. In the second scenario, it took seven to eight minutes and in a third scenario assembly was completed within two to three minutes. Meanwhile, the complexity, time and skill involved in producing the Chinese-origin controller board (with firmware), printed circuit boards, print engine and the remaining components exceeded the simplistic assembly that took place in Mexico. Finally, CBP reasoned that since the print engine was the central mechanism by which the printer/fax machine performed its printing and because the controller board and PCB were the central command components that determined when and how the machines were to function, these components combined to impart the essential character of the overall printer/fax machine.

Finally, in HQ H018467, CBP considered two manufacturing scenarios for multi-function printers. In one scenario, manufacturing took place in two countries; in the other, it took place in three countries. In the two-country

scenario, 18 units were manufactured in the Philippines from components produced in various countries. The units were sent to Japan where the system control board, engine control board, organic photoconductor ("OPC") drum unit, and the toner reservoir were manufactured and incorporated into the units. The control boards were programmed in Japan with Japanese firmware that controlled the user interface, imaging, memories, and the mechanics of the machines. The machines were then inspected and adjusted as necessary. CBP found that the manufacturing operations in Japan substantially transformed the Philippine units such that Japan was the country of origin. In making the determination (and in addition to the finding that operations performed in Japan were meaningful and complex and resulted in an article of commerce with a new name, character and use), CBP considered the fact that the system control board, the engine control board, and the firmware, which were very important to the functionality of the machines, were manufactured in Japan.

The relevant judicial precedent and CBP rulings indicate that the component (or components) that imparts the character of a product will be a significant factor in determining the country of origin of a product. This matter is most like HQ H304677, in which we determined that certain printer units assembled in Mexico from various Chinese-origin components, a Mexican-origin PCBA, and U.S.-origin firmware to be of China origin. As in HQ H304677, we find that the subject PCBA does not serve as the only fundamental functioning component of the thermal printers. Although the PCBA and Japanese-origin firmware enable the thermal printers to communicate with external devices and process the images to be printed, the other components and assemblies are also critical in enabling the printer to form text or images and apply heat to the paper to create text or images. For instance, the Chinese-origin print head physically applies heat to the treated paper to produce an image. Likewise, a Chinese-origin flexible PCBA controls each printer's on/off function, and a Chinese-origin radio circuit also facilitates the device's communication with external devices. *See also,* HQ H301910, *supra* (noting PCBA, print head, and firmware are all essential to a printer's function). This matter is further distinguishable from HQ H287548 in which we determined that that the Japanese-origin PCBA and firmware conferred the essential character of a printer that was assembled in the United States from components sourced from a variety of countries, including Japan, the Philippines, China, and Vietnam (where many of the foreign-origin components were assembled into discrete subassemblies). In the present matter, by contrast, the largest portion of both cost and components used in producing the subject thermal printers is imparted by the Chinese-origin components.

This matter is also distinguishable from HQ H018467 (which was decided before *Energizer Battery*) in which CBP determined, in relevant part, the country of certain multi-function printers to be Japan where Philippine-origin subassemblies manufactured from components produced in various countries were combined in Japan with Japanese-origin system control board, engine control board, OPC drum unit, toner reservoir and firmware. In finding the country of origin to be Japan, CBP also found the assembly operations occurring in Japan to be complex and meaningful. In contrast to HQ H018467, here, although the PCBA and firmware originated in Japan as in HQ H018467, the subject thermal printers contained no other components originating in Japan; instead, as noted above, the overwhelming majority,

approximately 97%, of components, originated in China. Furthermore, and again unlike in HQ H018467, the assembly operations occurring in Japan are not complex or meaningful. Instead, outside of the PCBA assembly, the Japanese assembly process consists of simple steps such as mounting, attaching, fitting, and screwing the imported components together. *See also,* HQ H219519 (finding final assembly in Mexico not complex or meaningful). Therefore, as with HQ H304677, we find the present scenario is analogous to *Uniroyal* and *Energizer Battery* where the imported material did not undergo a substantial transformation. While *Uniroyal* did not go into detail concerning the manufacture and contribution of the sole to the shoe, the decision recognized that it was the manufacture of the upper, just like the many Chinese printer components here, that provided the character to the finished article. Similarly, we find that the mechanical printing functions are imparted by the Chinese-origin components.

Based on the foregoing, we find that the country of origin of the subject thermal printers is China and, therefore, would not be products of a foreign country or instrumentality designated pursuant to 19 U.S.C. 2511(b)(1).

HOLDING

Based on the facts and analysis set forth above, the country of origin of the instant thermal printers will be China.

Notice of this final determination will be given in the **Federal Register**, as required by 19 CFR 177.29. Any party-at-interest other than the party which requested this final determination may request, pursuant to 19 CFR 177.31, that CBP reexamine the matter anew and issue a new final determination. Pursuant to 19 CFR 177.30, any party-at-interest may, within 30 days of publication of the **Federal Register** Notice referenced above, seek judicial review of this final determination before the U.S. Court of International Trade.

Sincerely,

ALICE A. KIPEL,
Executive Director, Regulations and Rulings,
Office of Trade.

PROPOSED MODIFICATION OF FOUR RULING LETTERS, PROPOSED REVOCATION OF FOUR RULING LETTERS, AND REVOCATION OF TREATMENT RELATING TO THE TARIFF CLASSIFICATION OF CERTAIN COMPOSITE GOODS WITH THE ESSENTIAL CHARACTER OF PERMANENT MAGNETS

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

ACTION: Notice of proposed modification of four ruling letters, proposed modification of four ruling letters, and proposed revocation of treatment relating to the tariff classification of certain composite goods with the essential character of permanent magnets.

SUMMARY: Pursuant to section 625(c), Tariff Act of 1930 (19 U.S.C. § 1625(c)), as amended by section 623 of title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that U.S. Customs and Border Protection (CBP) intends to modify four ruling letters and revoke four rulings letters, all of which concern the tariff classification of composite goods with the essential character of permanent magnets under the Harmonized Tariff Schedule of the United States (HTSUS). Similarly, CBP intends to revoke any treatment previously accorded by CBP to substantially identical transactions. Comments on the correctness of the proposed actions are invited.

DATE: Comments must be received on or before August 2, 2024.

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

FOR FURTHER INFORMATION CONTACT: Michael F. Thompson, Electronics, Machinery, Automotive, and International Nomenclature Branch, Regulations and Rulings, Office of Trade, at (202) 325–1917.

SUPPLEMENTARY INFORMATION:

BACKGROUND

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

Pursuant to 19 U.S.C. § 1625(c)(1), this notice advises interested parties that CBP is proposing to modify or revoke eight ruling letters pertaining to the tariff classification of merchandise the essential character of which is imparted by permanent magnets. Although in this notice, CBP is specifically referring to New York Ruling Letter ("NY") J85077, NY N302039, NY N302895, NY N314064, NY B84458, NY R03088, NY N289369, and NY N290319 (Attachments A through H), this notice also covers any rulings on this merchandise which may exist but have not been specifically identified. CBP has undertaken reasonable efforts to search existing databases for rulings in addition to the one identified. No further rulings have been found. Any party who has received an interpretive ruling or decision (i.e., a ruling letter, internal advice memorandum or decision, or protest review decision) on the merchandise subject to this notice should advise CBP during the comment period.

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

In NY J85077, NY N302039, NY N302895, and NY N314064, CBP classified the subject merchandise under subheading 8505.19, HTSUS, which provides for "Electromagnets; permanent magnets and articles intended to become permanent magnets after magnetization;

electromagnetic or permanent magnet chucks, clamps and similar holding devices; electromagnetic couplings, clutches and brakes; electromagnetic lifting heads; parts thereof: Other." In NY B84458, NY R03088, NY N289369, and NY N290319, CBP classified the subject merchandise under subheading 8505.11, HTSUS, which provides for "Electromagnets; permanent magnets and articles intended to become permanent magnets after magnetization; electromagnetic or permanent magnet chucks, clamps and similar holding devices; electromagnetic couplings, clutches and brakes; electromagnetic lifting heads; parts thereof: Of metal." CBP has reviewed NY J85077, NY N302039, NY N302895, NY N314064, NY B84458, NY R03088, NY N289369, and NY N290319 and has determined the ruling letters to be in error. It is now CBP's position that composite goods with the essential character of permanent magnets of materials other than metal are properly classified, in heading 8505, HTSUS, specifically in subheading 8505.19.30, HTSUS, which provides for "Electromagnets; permanent magnets and articles intended to become permanent magnets after magnetization; electromagnetic or permanent magnet chucks, clamps and similar holding devices; electromagnetic couplings, clutches and brakes; electromagnetic lifting heads; parts thereof: Permanent magnets and articles intended to become permanent magnets after magnetization: Other: Other."

Pursuant to 19 U.S.C. § 1625(c)(1), CBP is proposing to modify NY J85077, NY N302039, NY N302895, and NY N314064, and revoke NY B84458, NY R03088, NY N289369, and NY N290319, and revoke or modify any other ruling not specifically identified to reflect the analysis contained in the proposed Headquarters Ruling Letter ("HQ") H328977, set forth as Attachment I to this notice. Additionally, pursuant to 19 U.S.C. § 1625(c)(2), CBP is proposing to revoke any treatment previously accorded by CBP to substantially identical transactions.

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

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

Attachments

ATTACHMENT A

NY J85077

June 19, 2003
CLA-2–84:RR:NC:1:102 J85077
CATEGORY: Classification
TARIFF NO.: 8481.80.3070, 7012.00.00,
8505.11.00, 7318.24.00, 3926.90.4510,
4016.93.5010

MS. SHELLEY VYBIRAL
SNAP-TITE INC.
8325 HESSINGER DR.
ERIE, PA 16509

RE: The tariff classification of parts for stirred reactors of unspecified origin

DEAR MS. VYBIRAL:

In your letter dated May 15, 2003 you requested a tariff classification ruling on behalf of Snap-tite Inc.

The articles in question are described as a sample/addition valve kit, part numbers MCLAVE10X1SAMP and MCLAVE10X10SAMP and a spares part kit, part number MCLAVE10XSPARES. Descriptive information and samples were submitted.

The valve kits consist of a tee fitting, tubing, full-port ball valve and a septum mounting assembly. The contents of the kit are packaged together as a set and provide all the components necessary to install a septum onto a reactor. One kit includes the components for a singe reactor, while the other includes components for ten reactors. The septum allows for the addition or removal of material to and from the reactor vessel. Based on the information submitted we find that the kit is classifiable as a set and that ball valve imparts the essential character to the set. We also assume for the purpose of this ruling that the valve body is made of stainless steel.

The spare parts kit includes 20 glass liners, 20 stirrer bars, which are essentially Teflon-coated magnets, 10 Viton o-rings, 10 EPDM o-rings, 4 snap rings for jack screws, and 5 snap rings for vessels. Here we find that the spare parts kit is not classifiable as a set because it includes a variety of spare parts that are not intended to be used together for any one specific purpose. Accordingly, each of the items included in the kit shall be separately classified.

The applicable subheading for the valve kit, if presented with a valve of stainless steel, will be 8481.80.3070, Harmonized Tariff Schedule of the United States (HTSUS), which provides for ball type, hand-operated valves of steel. The general rate of duty will be 5.6 percent ad valorem.

The applicable subheading for the glass liners will be 7012.00.00, HTSUS, which provides for glass inners for vacuum flasks or other vacuum vessels. The general rate of duty will be 6.6 percent ad valorem.

The applicable subheading for the stirrer bars will be 8505.11.00, HTSUS, which provides for permanent magnets of metal. The general rate of duty will be 2.1 percent ad valorem.

The applicable subheading for the snap rings, if made of iron or steel, will be 7318.24.00, HTSUS, which provides for cotters and cotter pins of iron or steel. The general rate of duty will be 3.8 percent ad valorem.

The applicable subheading for the Viton o-rings will be 3926.90.4510, which provides for o-rings of plastic. The general rate of duty will be 3.5 percent ad valorem.

The applicable subheading for the EPDM o-rings will be 4016.93.5010, which provides for o-rings of other vulcanized rubber other than hard rubber. The general rate of duty will be 2.5 percent ad valorem.

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

A copy of the ruling or the control number indicated above should be provided with the entry documents filed at the time this merchandise is imported. If you have any questions regarding the ruling, contact National Import Specialist Kenneth T. Brock at 646–733–3009.

Sincerely,

ROBERT B. SWIERUPSKI
Director,
National Commodity Specialist Division

ATTACHMENT B

N302039

February 5, 2019
CLA-2–85:OT:RR:NC:N1:102
CATEGORY: Classification
TARIFF NO.: 8505.19.3000, 9903.88.03

MICHAEL KNOWLES
KCI CUSTOMS BROKERS, INC
1900 NW 82ND AVE
MIAMI, FL 33126

RE: The tariff classification of a magnet from China

DEAR MR. KNOWLES:

In your letter dated December 3, 2018 you requested a tariff classification ruling on behalf of your client American Gift Corporation. Pictures of the item were included.

The item under consideration is referred to as a Sea Turtle PVC magnet, item number 88277. The item consists of a PVC turtle with a circular magnet affixed to the underside of the turtle. The hard magnet is described as a ceramic (ferrite) magnet that is primarily of iron oxide material. The Sea Turtle PVC magnet allows for notes, pictures, and the like to be secured to metal surfaces.

In your letter, you suggest that the Sea Turtle PVC magnet is classified in subheading 8505.11.0030, Harmonized Tariff Schedule of the United States, HTSUS, which provides for permanent magnets and articles intended to become permanent magnets after magnetization: of metal: ceramic.

While we agree that the article is classified within heading 8505, we disagree at the subheading level. The Sea Turtle PVC magnet is a composite good that consists of a PVC turtle with a hard magnet. Such articles have been classified in subheading 8505.19.3000. See NYR N019818, dated December 11, 2007 and NYR N062663, dated June 11, 2009.

As such, the applicable subheading for the Sea Turtle PVC magnet, item number 88277 will be 8505.19.3000, Harmonized Tariff Schedule of the United States (HTSUS), which provides for Permanent magnets and articles intended to become permanent magnets after magnetization: Other: Other. The rate of duty will be 4.9 percent ad valorem.

Effective July 6, 2018, the Office of the United States Trade Representative (USTR) imposed an additional tariff on certain products of China classified in the subheadings enumerated in Section XXII, Chapter 99, Subchapter III U.S. Note 20(b), HTSUS. The USTR imposed additional tariffs, effective August 23, 2018, on products classified under the subheadings enumerated in Section XXII, Chapter 99, Subchapter III U.S. Note 20(d), HTSUS. Subsequently, the USTR imposed further tariffs, effective September 24, 2018, on products classified under the subheadings enumerated in Section XXII, Chapter 99, Subchapter III U.S. Note 20(f) and U.S. Note 20(g), HTSUS.

For additional information, please see the relevant Federal Register notices dated June 20, 2018 (83 F.R. 28710), August 16, 2018 (83 F.R. 40823), and September 21, 2018 (83 F.R. 47974). Products of China that are provided for in subheading 9903.88.01, 9903.88.02, 9903.88.03, or 9903.88.04 and classified in one of the subheadings enumerated in U.S. Note 20(b), U.S. Note 20(d), U.S. Note 20(f) or U.S. Note 20(g) to subchapter III shall continue to be

subject to antidumping, countervailing, or other duties, fees and charges that apply to such products, as well as to those imposed by the aforementioned Chapter 99 subheadings.

Products of China classified under subheading 8505.19.3000, HTSUS, unless specifically excluded, are subject to the additional 10 percent ad valorem rate of duty. At the time of importation, you must report the Chapter 99 subheading, i.e., 9903.88.03, in addition to subheading 8505.19.3000, HTSUS, listed above.

The tariff is subject to periodic amendment so you should exercise reasonable care in monitoring the status of goods covered by the Notice cited above and the applicable Chapter 99 subheading.

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

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

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

Sincerely,

STEVEN A. MACK
Director
National Commodity Specialist Division

ATTACHMENT C

N302895

April 3, 2019
CLA-2–85:OT:RR:NC:N1:102
CATEGORY: Classification
TARIFF NO.: 8505.19.3000, 9903.88.03

MS. HEATHER LAVERTY
THE CAMELOT COMPANY
9865 W. LELAND AVENUE
SCHILLER PARK, IL 60176

RE: The tariff classification of magnetic floor sweeper from China

DEAR MS. LAVERTY:

In your letter dated December 28, 2018 you requested a tariff classification ruling on behalf of your client, Charles Amash Imports Inc., dba GRIP On Tools. A sample was provided and is being returned to you.

The product in question is referred to as the 17" Mini Magnetic Floor Sweeper, item number GRIP 53417. The floor sweeper consists of a ceramic (iron oxide material) magnetic bar that is attached to a steel bar with a rubber grip. Two rubber wheels are attached to the outer sections of the magnetic bar and as the user pushes the steel bar, the floor sweeper rolls over the ground and this allows the magnet, which imparts the essential character, to retrieve metal articles, such as screws and nails.

Classification of merchandise under the Harmonized Tariff Schedule of the United States (HTSUS) is governed by the General Rules of Interpretation (GRIs). GRI 1 provides that classification is determined first in accordance with the terms of the headings of the tariff and any relative section or chapter notes. Although not dispositive, the Explanatory Notes (ENs) to the Harmonized Commodity Description and Coding System represent the official interpretation of the tariff at the international level and facilitate classification under the HTSUS by offering guidance in understanding the scope of the headings and the GRIs.

Consideration was given to classifying the magnetic floor sweeper in heading 8716, HTSUS, which provides for non-mechanically propelled vehicles, as you suggested. The ENs describe these goods as non-mechanically propelled vehicles equipped with one or more wheels and constructed for the transport of goods or persons. The main function of the sweeper is not to transport the goods, but rather to remove items from a surface (floor).

Furthermore, the ENs state that "the classification of units consisting of vehicles with permanently built-on machines or appliances is determined according to the essential character of the whole. The heading therefore covers such units which derive their essential character from the vehicle itself. On the other hand, units deriving their essential character from the machine or appliance they incorporate are excluded." In this instance, the sweeper incorporates a magnet, which imparts the essential character of the sweeper. As a result, classification of the magnetic floor sweeper in heading 8716, HTSUS, is precluded.

In your letter, you also suggest that the 17" Mini Magnetic Floor Sweeper be classified in subheading 8505.11.0030, HTSUS, which provides for permanent magnets and articles intended to become permanent magnets after

magnetization: of metal: ceramic. While we agree that the article is classified within heading 8505, we disagree at the subheading level.

The 17" Mini Magnetic Floor Sweeper is a composite good that consists of a handle, rollers and a non-flexible magnet that imparts the essential character. Composite goods in which a magnet is used to retrieve metal articles have previously been classified in subheading 8505.19.3000. See NYR N061775 dated May 28, 2009. This office notes that in your letter, you mention that the magnetic floor sweeper is similar to the magnets classified in NYR N289369 and NYR N290319, which classified ceramic magnets in subheading 8505.11.0030. However, this office does not find any of aforementioned rulings relevant, as the subject floor sweeper is a composite good.

As such, the applicable subheading for the 17" Mini Magnetic Floor Sweeper, item number GRIP 53417, will be 8505.19.3000, HTSUS, which provides for Permanent magnets and articles intended to become permanent magnets after magnetization: Other: Other. The rate of duty will be 4.9 percent ad valorem.

Effective July 6, 2018, the Office of the United States Trade Representative (USTR) imposed an additional tariff on certain products of China classified in the subheadings enumerated in Section XXII, Chapter 99, Subchapter III U.S. Note 20(b), HTSUS. The USTR imposed additional tariffs, effective August 23, 2018, on products classified under the subheadings enumerated in Section XXII, Chapter 99, Subchapter III U.S. Note 20(d), HTSUS. Subsequently, the USTR imposed further tariffs, effective September 24, 2018, on products classified under the subheadings enumerated in Section XXII, Chapter 99, Subchapter III U.S. Note 20(f) and U.S. Note 20(g), HTSUS. For additional information, please see the relevant Federal Register notices dated June 20, 2018 (83 F.R. 28710), August 16, 2018 (83 F.R. 40823), and September 21, 2018 (83 F.R. 47974). Products of China that are provided for in subheading 9903.88.01, 9903.88.02, 9903.88.03, or 9903.88.04 and classified in one of the subheadings enumerated in U.S. Note 20(b), U.S. Note 20(d), U.S. Note 20(f) or U.S. Note 20(g) to subchapter III shall continue to be subject to antidumping, countervailing, or other duties, fees and charges that apply to such products, as well as to those imposed by the aforementioned Chapter 99 subheadings.

Products of China classified under subheading 8505.19.3000, HTSUS, unless specifically excluded, are subject to the additional 10 percent ad valorem rate of duty. At the time of importation, you must report the Chapter 99 subheading, i.e., 9903.88.03, in addition to subheading 8505.19.3000, HTSUS, listed above.

The tariff is subject to periodic amendment so you should exercise reasonable care in monitoring the status of goods covered by the Notice cited above and the applicable Chapter 99 subheading.

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

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

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

Sincerely,

STEVEN A. MACK
Director
National Commodity Specialist Division

ATTACHMENT D

N314064
September 14, 2020
CLA-2–85:OT:RR:NC:N1:103
CATEGORY: Classification
TARIFF NO.: 8505.19.3000; 9903.88.03

MELISSA CANNON
MASTER MAGNETICS, INC.
1211 ATCHISON COURT
CASTLE ROCK, CO 80109

RE: The tariff classification of a 3-in-1 magnetic sweeper from China

DEAR MS. CANNON:

In your letter dated August 19, 2020 you requested a tariff classification ruling.

The item under consideration is a 3-in-1 magnetic sweeper, part numbers MS3N1–48, MS3N1–60, MS3N1–72, MS3N1–84, and MS3N1–96, designed to magnetically attract ferrous metal debris, such as nails, screws, metal filings, and other metal scrap from floors, walkways, driveways, parking lots, and work areas. The item consists of ceramic magnets (predominantly ferric oxide material) and a steel bar enclosed in a heavy-gauge steel and aluminum housing. Attached is a quick release handle, mounting brackets, removable tow handle, and semi-pneumatic wheels on both sides. As the sweeper moves across the ground, the magnets attract ferrous metal debris. When the quick release handle is pulled, it creates a gap wide enough to dislodge the collected debris, where it can then be cleaned up. The item can be used in several configurations including being pushed or pulled by the handle, mounted using eyebolts on the forks of a forklift, hung from a vehicle, and towed behind a vehicle. Each part number is identical in design with the exception of the sweeping width, which come in 48 inches, 60 inches, 72 inches, 84 inches, or 96 inches.

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

In your request you suggest the 3-in-1 magnetic sweeper is properly classified in subheading 8505.11.0030, HTSUS, which provides for Electromagnets; permanent magnets and articles intended to become permanent magnets after magnetization; electromagnetic or permanent magnet chucks, clamps and similar holding devices; electromagnetic couplings, clutches and brakes; electromagnetic lifting heads; parts thereof: Permanent magnets and articles intended to become permanent magnets after magnetization: Of metal: Ceramic. While we agree that the article is classified within heading 8505, HTSUS, we disagree at the subheading level.

The 3-in-1 magnetic sweeper is a composite good consisting of steel, aluminum, and rubber materials, which make up components including magnets, wheels, a steel bar, a handle and various hardware to form a complete

article. It is the opinion of this office that the article is distinguished by the magnetic component, which allows it to function as a magnet. Accordingly, the magnetic portion appears to be of primary importance to the composite article and the component which imparts its essential character. Composite goods in which a magnet is used to "sweep" metal articles have previously been classified in subheading 8505.19.3000. See NY ruling N302895 dated April 3, 2019.

As such, the applicable subheading for the 3-in-1 magnetic sweeper, part numbers MS3N1–48, MS3N1–60, MS3N1–72, MS3N1–84 and MS3N1–96, will be 8505.19.3000, Harmonized Tariff Schedule of the United States (HTSUS), which provides for Electromagnets; permanent magnets and articles intended to become permanent magnets after magnetization; electromagnetic or permanent magnet chucks, clamps and similar holding devices; electromagnetic couplings, clutches and brakes; electromagnetic lifting heads; parts thereof: Permanent magnets and articles intended to become permanent magnets after magnetization: Other: Other. The rate of duty will be 4.9 percent ad valorem.

Pursuant to U.S. Note 20 to Subchapter III, Chapter 99, HTSUS, products of China classified under subheading 8505.19.3000, HTSUS, unless specifically excluded, are subject to an additional 25 percent ad valorem rate of duty. At the time of importation, you must report the Chapter 99 subheading, i.e., 9903.88.03, in addition to subheading 8505.19.3000, HTSUS, listed above.

The HTSUS is subject to periodic amendment so you should exercise reasonable care in monitoring the status of goods covered by the Note cited above and the applicable Chapter 99 subheading. For background information regarding the trade remedy initiated pursuant to Section 301 of the Trade Act of 1974, you may refer to the relevant parts of the USTR and CBP websites, which are available at https://ustr.gov/issue-areas/enforcement/section-301-investigations/tariff-actions and https://www.cbp.gov/trade/remedies/301-certain-products-china, respectively.

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

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

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

Sincerely,

STEVEN A. MACK
Director
National Commodity Specialist Division

ATTACHMENT E

NY B84458

May 15, 1997
CLA-2–85:RR:NC:1: 112 B84458
CATEGORY: Classification
TARIFF NO.: 8505.11.0000

MR. HIROFUMI KURODA
WORLD LINK TRADING CO., LTD.
18726 WESTERN AVENUE
GARDENA, CA 90248

RE: The tariff classification of a "Bye-Bye Birdie" from Japan

DEAR MR. KURODA:

In your letter dated April 18, 1997 you requested a tariff classification ruling.

As indicated by the submitted samples and descriptive literature, "Bye-Bye Birdie" is a device which claims to be successful in keeping birds away from a specified area through the action of a specialized magnetic system which disturbs the geomagnetic field that birds use to find their direction. There are two basic models identified as the "Wing" and the "Ninja". In both cases, the magnetic system consists of a combination of ferrite magnets and neodymium magnets which are stacked with the magnetic poles in a N-S-N-S orientation.

The "Wing" model, which is designed to hang suspended from an overhead point, features an octagonal cylinder which contains the magnets. This cylinder has a holographic surface with wing-like attachments on each side. The "Ninja" model is designed to be placed on building ledges or other flat surfaces and consists of a base unit which incorporates the magnets, and spoke-like plastic attachments which radiate off the base.

The applicable subheading for the "Bye-Bye Birdie" will be 8505.11.0000, Harmonized Tariff Schedule of the United States (HTS), which provides for permanent magnets of metal. The rate of duty will be 2.5 percent ad valorem.

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

A copy of the ruling or the control number indicated above should be provided with the entry documents filed at the time this merchandise is imported. If you have any questions regarding the ruling, contact National Import Specialist David Curran at 212–466–5680.

Sincerely,

ROBERT SWIERUPSKI
Chief, Metals and Machinery Branch
National Commodity Specialist Division

ATTACHMENT F

NY R03088
February 10, 2006
CLA-2–85:RR:NC:MM:109 R03088
CATEGORY: Classification
TARIFF NO.: 8505.11.0000

MS. CYNTHIA ELLEN KAEHLER
IMPORT & CUSTOMS BROKERAGE FASTENEL
4730 SERVICE DRIVE
WINONA, MN 55987

RE: The tariff classification of welding magnets from China

DEAR MS. KAEHLER:

In your letter dated January 12, 2006, you requested a tariff classification ruling.

The merchandise subject of this ruling is identified in your letter as welding magnets. Pictures of these magnets, with Factory Part #s, were included with your submission. The Factory Part #s are MINI 8LBS, 6001 25LBS, 6002 50LBS, and 6003 75LBS. These magnets are used to hold pieces of pipe together while welding them. The composition of the magnets consists of a ceramic center encased in steel. They are basically functional magnets made of steel.

The applicable subheading for the welding magnets (Factory Part #s MINI 8LBS, 6001 25LBS, 6002 50LBS, and 6003 75LBS) will be 8505.11.0000 Harmonized Tariff Schedule of the United States (HTSUS), which provides for "Permanent magnets and articles intended to become magnets after magnetization: Of metal." The rate of duty will be 2.1 percent ad valorem.

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

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

A copy of the ruling or the control number indicated above should be provided with the entry documents filed at the time this merchandise is imported. If you have any questions regarding the ruling, contact National Import Specialist Linda M. Hackett at 646–733–3015.

Sincerely,

ROBERT B. SWIERUPSKI
Director,
National Commodity Specialist Division

ATTACHMENT G

N289369
September 13, 2017
CLA-2–73:OT:RR:NC:N1:121
CATEGORY: Classification
TARIFF NO.: 7318.15.8066; 7318.15.8069; 7326.90.8688; 8409.99.9190; 8505.11.0030

MS. LAUREN BENWAY
TRANS-BORDER GLOBAL FREIGHT SYSTEMS
2103 ROUTE 9
ROUND LAKE, NY 12151

RE: The tariff classification of fasteners, a gasket, a drain plug and a magnet from Taiwan

DEAR MS. BENWAY:

In your letter dated August 9, 2017, you requested a tariff classification ruling on behalf of Marli Manufacturing. The submitted samples will be retained by this office.

The products under consideration are five articles used in the automobile industry.

Product number 44–06 is a hex head cap screw made of medium carbon steel. It has a fully threaded shank and a washer face. Although specific dimensions have not been provided, measurement with a caliper determines the shank to exceed 6 mm in diameter. You indicate that it has general applications throughout the vehicle.

Product number 85–68, described as an "exhaust manifold bolt," is an indented hex flange shoulder bolt, M8 x 1.25, made of medium carbon steel that serves to mount the catalytic convertor to the exhaust system. Specifically, it fastens the exhaust pipes to the exhaust headers. You indicate that the bolt is used in conjunction with a spring (not included) and a nut (not included) to allow flex and protect the converter from the shock of the road.

Consideration was given to classifying product numbers 44–06 and 85–68 as bolts in subheading 7318.15.2065, Harmonized Tariff Schedule of the United States (HTSUS), as you proposed. However, after consulting ANSI/ASME Standard B18.2.1 and reviewing the features of these fasteners in relation to the criteria, product numbers 44–06 and 85–68 are determined to be screws, greater than 6 mm in diameter.

The applicable subheading for product number 44–06 (hex head cap screw) will be 7318.15.8066, HTSUS, which provides for screws, bolts, nuts, coach screws, screw hooks, rivets, cotters, cotter pins, washers (including spring washers) and similar articles, of iron or steel: threaded articles: other screws and bolts, whether or not with their nuts or washers: other: having shanks or threads with a diameter of 6 mm or more: other: other: with hexagonal heads: other: cap screws. The duty rate will be 8.5% ad valorem.

The applicable subheading for product number 85–68 (exhaust manifold bolt) will be 7318.15.8069, HTSUS, which provides for screws, bolts, nuts, coach screws, screw hooks, rivets, cotters, cotter pins, washers (including spring washers) and similar articles, of iron or steel: threaded articles: other screws and bolts, whether or not with their nuts or washers: other: having shanks or threads with a diameter of 6 mm or more: other: other: with hexagonal heads: other: other. The duty rate will be 8.5% ad valorem.

Product number 74–08 is an oil drain plug gasket made of metal and rubber. It works with an oil drain plug (not included) to seal the oil pan.

You propose classification of the metal/rubber oil drain plug gasket in subheading 4016.93.1050, HTSUS, which provides for other articles of vulcanized rubber other than hard rubber: other: gaskets, washers, and other seals: of a kind used in the automotive goods of chapter 87: other. However, based on the sample and the information provided, the rubber content is minimal in relation to the metal and does not impart the essential character to this product.

The applicable subheading for product number 74–08 (oil drain plug gasket) will be 7326.90.8688, HTSUS, which provides for other articles of iron or steel, other, other, other, other, other. The rate of duty will be 2.9 percent ad valorem.

Product number 80–39 is an oil drain plug, which serves as a plug for the oil pan within an automotive engine. It is installed either by hand or with a 3/8 drive into mating grooves that lock the plug into place in the pan. The main function the plug is to seal the oil pan of the engine, and to facilitate the draining and the changing of the engine oil. It consists of 96.43 % polyamide body and 3.57% rubber washer. You state in your request that part 80–39 can be used either with spark ignited or diesel engines.

You suggested classification of the oil drain plug in subheading 8708.99.6890, HTSUS. This office disagrees. It is a long-standing classification principle that "a part of [a] particular part is more specifically provided for as a part of the part than as a part of the whole." C.F. Liebert v. United States, 287 F. Supp. 1009 (1968). The plug under review is an internal component of the engine within a vehicle. Therefore, the plug is more immediately a part of the engine than a part of an entire vehicle.

The applicable subheading for part number 80–39 (oil drain plug) will be 8409.99.9190, HTSUS, which provides for parts suitable for use solely or principally with the engines of heading 8407 or 8408: other: other: other: for vehicles of subheading 8701.20, or heading 8702, 8703 or 8704: other." The general rate of duty will be 2.5%.

Part number MA-3010 disk magnet is a ceramic (ferrite) magnet primarily composed of iron oxide.

The applicable subheading for part number MA-3010 (disk magnet) will be 8505.11.0030, HTSUS, which provides for permanent magnets and articles intended to become permanent magnets after magnetization: of metal: ceramic. The general rate of duty will be 2.1 percent ad valorem.

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

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

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

Sincerely,

STEVEN A. MACK
Director
National Commodity Specialist Division

ATTACHMENT H

N290319
October 18, 2017
CLA-2–85:OT:RR:NC:N1:102
CATEGORY: Classification
TARIFF NO.: 8505.11.0030

MS. JOY PAN
OFFICEMATE INTERNATIONAL CORPORATION
90 NEWFIELD AVENUE
EDISON, NEW JERSEY 08837

RE: The tariff classification of magnets in a tub from China.

DEAR MS. PAN:

In your letter dated September 19, 2017 you requested a tariff classification ruling.

Product number 92500 consists of 30 magnets contained in a plastic tub packaged ready for retail sale. The assorted colored magnets are primarily of isotropic ferrite material embedded in a circular shaped cover of plastic material. The magnets are available in three sizes that measure 5/8", 1 1/8" or 1 1/2" in diameter. The magnets can be used on metal surfaces, such as cabinets and presentation boards.

The applicable subheading for product number 92500, which consists of 30 magnets contained in a plastic tub, will be 8505.11.0030, Harmonized Tariff Schedule of the United States (HTSUS), which provides for Electromagnets; permanent magnets and articles intended to become permanent magnets after magnetization...Of metal, Ceramic. The general rate of duty is 2.1 percent ad valorem.

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

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

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

Sincerely,

STEVEN A. MACK
Director
National Commodity Specialist Division

ATTACHMENT I

HQ H328977
OT:RR:CTF:EMAIN H328977 MFT
CATEGORY: Classification
TARIFF NO.: 8505.19.30

MS. MELISSA CANNON
MASTER MAGNETICS, INC.
1211 ATCHINSON COURT
CASTLE ROCK, CO 80109

RE: Modification of NY J85077, NY N302039, NY N302895, and NY N314064; Revocation of NY B84458, NY R03088, NY N289369, and NY N290319; Classification of certain permanent magnets and articles with the essential character of permanent magnets

DEAR MS. CANNON:

This letter is in response to your request, submitted September 22, 2020, seeking reconsideration of New York Ruling Letter (NY) N314064 (dated September 14, 2020). That ruling considered the classification under the Harmonized Tariff Schedule of the United States (HTSUS) of a certain three-in-one magnetic sweeper from China. We have re-examined NY N314064 and find its ultimate classification of the merchandise to be correct; however, we hereby modify that ruling to emend certain dicta expressed therein. Furthermore, after reviewing NY N302039 (dated February 5, 2019) and NY N302895 (dated April 3, 2019), we similarly affirm their ultimate classification determinations but hereby modify those rulings as to certain dicta.

We have also reviewed NY J85077 (dated June 19, 2003); NY B84458 (dated May 15, 1997); NY R03088 (dated February 10, 2006); NY N289369 (dated September 13, 2017); and NY N290319 (dated October 18, 2017). Each of these rulings classified certain permanent magnets of materials other than metal under subheading 8505.11.00, HTSUS, which provides for "Electromagnets; permanent magnets and articles intended to become permanent magnets after magnetization; electromagnetic or permanent magnet chucks, clamps and similar holding devices; electromagnetic couplings, clutches and brakes; electromagnetic lifting heads; parts thereof: Permanent magnets and articles intended to become permanent magnets after magnetization: Of metal." We have determined that the tariff classification of these magnets is incorrect and hereby revoke or modify those rulings, accordingly, as explained below.

FACTS:

In NY N314064, the merchandise at issue was a three-in-one magnetic sweeper described in the ruling as follows:

> The item under consideration is a 3-in-1 magnetic sweeper, part numbers MS3N1–48, MS3N1–60, MS3N1–72, MS3N1–84, and MS3N1–96, designed to magnetically attract ferrous metal debris, such as nails, screws, metal filings, and other metal scrap from floors, walkways, driveways, parking lots, and work areas. The item consists of ceramic magnets (predominantly ferric oxide material) and a steel bar enclosed in a heavy-gauge steel and aluminum housing. Attached is a quick release handle, mounting brackets, removable tow handle, and semi-pneumatic wheels on both sides. As the sweeper moves across the ground, the magnets

> attract ferrous metal debris. When the quick release handle is pulled, it creates a gap wide enough to dislodge the collected debris, where it can then be cleaned up. The item can be used in several configurations including being pushed or pulled by the handle, mounted using eyebolts on the forks of a forklift, hung from a vehicle, and towed behind a vehicle. Each part number is identical in design with the exception of the sweeping width, which come in 48 inches, 60 inches, 72 inches, 84 inches, or 96 inches.

We noted that the magnetic sweeper was a composite good and that a prior decision classified another composite good under subheading 8505.19.30, HTSUS:

> The 3-in-1 magnetic sweeper is a composite good consisting of steel, aluminum, and rubber materials, which make up components including magnets, wheels, a steel bar, a handle and various hardware to form a complete article. It is the opinion of this office that the article is distinguished by the magnetic component, which allows it to function as a magnet. Accordingly, the magnetic portion appears to be of primary importance to the composite article and the component which imparts its essential character. *Composite goods in which a magnet is used to "sweep" metal articles have previously been classified in subheading 8505.19.3000.* See NY ruling N302895 dated April 3, 2019. [*emphasis* added]
>
> As such, the applicable subheading for the 3-in-1 magnetic sweeper, part numbers MS3N1–48, MS3N1–60, MS3N1–72, MS3N1–84 and MS3N1–96, will be [subheading] 8505.19.3000, Harmonized Tariff Schedule of the United States (HTSUS), which provides for Electromagnets; permanent magnets and articles intended to become permanent magnets after magnetization; electromagnetic or permanent magnet chucks, clamps and similar holding devices; electromagnetic couplings, clutches and brakes; electromagnetic lifting heads; parts thereof: Permanent magnets and articles intended to become permanent magnets after magnetization: Other: Other.

The article at issue in NY N302039 is discussed therein as follows:

> The item under consideration is referred to as a Sea Turtle PVC magnet, item number 88277. The item consists of a PVC turtle with a circular magnet affixed to the underside of the turtle. The hard magnet is described as a ceramic (ferrite) magnet that is primarily of iron oxide material. The Sea Turtle PVC magnet allows for notes, pictures, and the like to be secured to metal surfaces. [. . .]
>
> While we agree that the article is classified within heading 8505, we disagree at the subheading level. *The Sea Turtle PVC magnet is a composite good that consists of a PVC turtle with a hard magnet. Such articles have been classified in subheading 8505.19.3000. See* NYR N019818, dated December 11, 2007[,] and NYR N062663, dated June 11, 2009. [*emphasis* added]
>
> As such, the applicable subheading for the Sea Turtle PVC magnet, item number 88277 will be 8505.19.3000, Harmonized Tariff Schedule of the United States (HTSUS) [Annotated], which provides for Permanent mag-

> nets and articles intended to become permanent magnets after magnetization: Other: Other. The rate of duty will be 4.9 percent ad valorem.

In NY N302895, U.S. Customs and Border Protection (CBP) considered the classification of a magnetic floor sweeper from China and described the article as follows:

> The product in question is referred to as the 17" Mini Magnetic Floor Sweeper, item number GRIP 53417. The floor sweeper consists of a ceramic (iron oxide material) magnetic bar that is attached to a steel bar with a rubber grip. Two rubber wheels are attached to the outer sections of the magnetic bar and as the user pushes the steel bar, the floor sweeper rolls over the ground and this allows the magnet, which imparts the essential character, to retrieve metal articles, such as screws and nails.

That ruling similarly considered the fact that the sweeper constituted a composite good and stated as follows:

> The 17" Mini Magnetic Floor Sweeper is a composite good that consists of a handle, rollers and a non-flexible magnet that imparts the essential character. *Composite goods in which a magnet is used to retrieve metal articles have previously been classified in subheading 8505.19.3000. See* NYR N061775 dated May 28, 2009. This office notes that in your letter, you mention that the magnetic floor sweeper is similar to the magnets classified in NYR N289369 and NYR N290319, which classified ceramic magnets in subheading 8505.11.0030. *However, this office does not find any of [the] afor*[e]*mentioned rulings relevant, as the subject floor sweeper is a composite good*. [*emphasis* added]
>
> As such, the applicable subheading for the 17" Mini Magnetic Floor Sweeper, item number GRIP 53417, will be 8505.19.3000, HTSUS, which provides for Permanent magnets and articles intended to become permanent magnets after magnetization: Other: Other. The rate of duty will be 4.9 percent ad valorem.

In NY J85077, the merchandise at issue is described as follows: "The articles in question are described as a sample/addition valve kit, part numbers MCLAVE10X1SAMP and MCLAVE10X10SAMP and a spares [sic] part kit, part number MCLAVE10XSPARES. [. . .] The spare parts kit includes [. . .] 20 stirrer bars, which are essentially Teflon-coated magnets [. . . .]" We classified the stirrer bars under subheading 8505.11.00, HTSUS, as permanent magnets of metal.

In NY B84458, the merchandise under consideration is described as follows:

> As indicated by the submitted samples and descriptive literature, "Bye-Bye Birdie" is a device which claims to be successful in keeping birds away from a specified area through the action of a specialized magnetic system which disturbs the geomagnetic field that birds use to find their direction. There are two basic models identified as the "Wing" and the "Ninja". In both cases, the magnetic system consists of a combination of ferrite magnets and neodymium magnets which are stacked with the magnetic poles in a N-S-N-S orientation.

We found that the "Bye-Bye Birdie" was classifiable under subheading 8505.11.00, HTSUS, as a permanent magnet of metal.

NY R03088 describes the merchandise under consideration as follows:

> The merchandise subject of this ruling is identified in your letter as welding magnets. Pictures of these magnets, with Factory Part #s, were included with your submission. The Factory Part #s are MINI 8LBS, 6001 25LBS, 6002 50LBS, and 6003 75LBS. These magnets are used to hold pieces of pipe together while welding them. The composition of the magnets consists of a ceramic center encased in steel. They are basically functional magnets made of steel.

The magnets in NY R03088 were classified under subheading 8505.11.00, HTSUS, as permanent magnets of metal.

CBP also considered the classification of a certain magnet from Taiwan in NY N289369: "Part number MA-3010 disk magnet is a ceramic (ferrite) magnet primarily composed of iron oxide." We found that the merchandise in that ruling was classified as a permanent magnet of metal under subheading 8505.11.00, HTSUS.

Finally, in NY N290319, the merchandise at issue is described as follows:

> Product number 92500 consists of 30 magnets contained in a plastic tub packaged ready for retail sale. The assorted colored magnets are primarily of isotropic ferrite material embedded in a circular shaped cover of plastic material. The magnets are available in three sizes that measure 5/8", 1 1/8" or 1 1/2" in diameter. The magnets can be used on metal surfaces, such as cabinets and presentation boards.

We held that the thirty magnets were classified under subheading 8505.11.00, HTSUS, as permanent magnets of metal.

ISSUE:

Whether the subject magnets are "of metal," and thus properly classified in subheading 8505.11, HTSUS, or are properly classified under subheading 8505.19, HTSUS, as magnets of materials other than metal.

LAW AND ANALYSIS:

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

The classification of goods consisting of more than one material or substance follows the principles of GRI 3. In relevant part, GRI 3(b) states that composite goods that cannot be classified by reference to GRI 3(a) are to be classified as if they consisted of the component that gives them their essential character.

GRI 6 provides that for legal purposes, the classification of goods in the subheadings of a heading shall be determined according to the terms of those subheadings and any related subheading notes and, *mutatis mutandis*, to the above rules, on the understanding that only subheadings at the same level are comparable.

The Harmonized Commodity Description and Coding System Explanatory Notes (ENs) constitute the official interpretation of the HTSUS. Although the ENs are not legally binding or dispositive, they provide commentary on the scope of each heading of the HTSUS and generally indicate the proper interpretation of these headings at the international level.[1]

The HTSUS subheadings under consideration are as follows:

8505	Electromagnets; permanent magnets and articles intended to become permanent magnets after magnetization; electromagnetic or permanent magnet chucks, clamps and similar holding devices; electromagnetic couplings, clutches and brakes; electromagnetic lifting heads; parts thereof:
	Permanent magnets and articles intended to become permanent magnets after magnetization:
8505.11	Of metal
	* * * * *
8505.19	Other:

There is no dispute that the magnets identified in the rulings above impart the essential character of the above-described composite goods, and likewise by application of GRI 3(b), are classified as "permanent magnets" of heading 8505, HTSUS. By application of GRI 6, the classification of each of the permanent magnets shall be determined according to the terms of subheadings 8505.11 and 8505.19, HTSUS. The terms of subheading 8505.11, HTSUS, limit classification therein to permanent magnets (and articles intended to become permanent magnets after magnetization) that are "of metal." Therefore, if a permanent magnet of heading 8505, HTSUS, is not "of metal," it does not meet the terms of subheading 8505.11, HTSUS. It follows that permanent magnets of heading 8505, HTSUS, *not* of metal would be *prima facie* classifiable under subheading 8505.19, HTSUS, as "other" permanent magnets.

We previously recognized that iron oxide, also known as "ferrite," is not a metal for purposes of subheading 8505.11, HTSUS.[2] In Headquarters Ruling Letter (HQ) 965543, we considered the tariff classification of a magnetic race car figurine where the article's magnet was composed of anisotropic ferrite. There, the protestant submitted in the alternative that the figurine should be classified under subheading 8505.11, HTSUS, as a metal magnet. After determining that the magnet imparted the essential character of the figurine under GRI 3(b), we reviewed the physical characteristics of ferrite and found it was not a metal:

> The appropriate subheading is 8505.19.00, HTSUS, which provides for permanent magnets made of materials other than metal. Protestant argues that if the subject merchandise is classified under heading 8505, HTSUS, that the appropriate subheading is 8505.11.00, HTSUS, which provides for permanent magnets composed of metal. However, according to protestant's submission, the subject article's magnet is composed of anisotropic ferrite. Webster's II New College Dictionary (Houghton Mifflin Company, 1999), defines ferrite as "[a]ny of a group of nonmetallic, ceramic[-]like, usu. ferromagnetic compounds of ferric oxide with other oxides, esp. such a compound with spinel crystalline structure, marked by

[1] *See* Treasury Decision (T.D.) 89–80, 54 Fed. Reg. 35127, 35127–28 (Aug. 23, 1989).

[2] Magnets containing ferrite are also referred to as "ceramic" magnets.

> high electrical resistivity and used in computer memory elements, permanent magnets, and solid-state devices." Thus, the magnet's ferrite composition excludes the merchandise from classification under subheading 8505.11.00, HTSUS. The articles are properly classified under subheading 8505.19.00, HTSUS, as permanent magnets and articles intended to become permanent magnets after magneti[z]ation: other.

We have also read the EN to heading 8505, HTSUS, as distinguishing permanent magnets of ferrite from those "of metal." The EN provides: "Articles intended to become permanent magnets after magneti[z]ation are recogni[z-]able as such by their shape and composition, generally being cubes or discs (tags) of metal *or* of agglomerated ferrite (e.g., barium ferrite)" [*emphasis* added]. Based on this distinction, we previously held that the magnet's composition is the main determinant, and that permanent magnets of ferrite must be classified differently from permanent magnets of metal. For example, in classifying an adhesive magnetic bandage where the permanent magnet imparted the essential character of the good, we stated:

> This provision [i.e., "permanent magnets . . ." under heading 8505, HTSUS] is divided into two categories, "of metal," and "other." The August 19, 1998, letter which requested this ruling does not describe the composition of the magnets. If the magnets are of ferrrite [sic] or some other non-metallic substance, the merchandise is classified as a permanent magnet "other" than of metal. See EN 85.05 (2) (which notes the distinction between metal and ferrite "...of metal or of agglomerated ferrite"). If the magnets are of metal, then the merchandise falls in the provision for permanent magnets of metal.[3]

Accordingly, we have applied this distinction between ferrite and metal in other decisions.[4] For example in NY C81811, we considered the classification of two types of "cow magnets," which were designed to be "ingested by cows and remain in the stomach to attract metal shavings and other metallic object which could harm a cow's intestines if swallowed." One of the magnets was a ceramic magnet, while the other was an "alnico type [. . .] comprised of various metals, with iron the predominant element." The classification of the cow magnets turned on their composition. As such, we held that the ceramic magnet was classified under subheading 8505.19, HTSUS, as a permanent magnet of a material other than metal, while the alnico magnet was classified under subheading 8505.11, HTSUS, as a permanent magnet of metal.

Lastly, we emphasize that the mere fact an article consisting of a permanent magnet and another component may constitute a composite good does *not*, in and of itself, remove the good from the compass of subheading 8505.11, HTSUS. Subject to the relevant facts, rules, and principles of classification – and unless the context otherwise requires – the classification of composite goods consisting of a permanent magnet and another material or substance must follow the principles of GRI 3. If that good cannot be classified by reference to GRI 3(a), then GRI 3(b) instructs that we classify the goods "as

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[3] HQ 962172 (dated May 5, 1999).

[4] *See* HQ 962611 (dated May 4, 1999) ("Within heading 8505, the magnet falls within the provision for permanent magnets of 'other' than metal as it has been permanently magnetized and is of ferrite, not metal. See EN 85.05 (2) (which notes the distinction between metal and ferrite '...of metal or of agglomerated ferrite')"); HQ 962612 (dated May 4, 1999) (same).

if they consisted of the component that gives them their essential character." If the permanent magnet imparts the essential character of a composite good, the good must be classified as if it consisted *solely* of the permanent magnet (even if the composite good consists of other materials besides the magnet). Therefore, as far as subheadings 8505.11 and 8505.19, HTSUS, are concerned, such classification would turn on the composition of the magnet *alone*. Once it is determined that the permanent magnet of heading 8505, HTSUS, imparts the essential character of the composite good, all other materials or components comprising the composite good are irrelevant for purposes of GRI 3(b).[5]

In HQ H217623, we stood for the principle that being a composite good does not necessarily disqualify an article from classification under subheading 8505.11, HTSUS. There, we modified HQ 562821, which wrongly classified certain name badges consisting of "metal magnets encased in plastic" under subheading 8505.19, HTSUS. As we stated:

> The magnets at issue consist of the following components: (1) two metal inflexible magnets and (2) plastic holders, holding the magnets. The function of the magnets encased in plastic is to hold the name badges in place, which is accomplished by the two metal magnets. The plastic holders function as mere casing for the magnets. Applying GRI 2(b), we find that the fact that the magnets are encased in plastic does not deprive the good of having the character of a magnet of metal. See EN XII to GRI 2(b). Accordingly, it follows that the subject magnets encased in plastic are classified in subheading 8505.11.00, HTSUS, which provides for magnets of metal.

I. Modification of NY N302039, NY N302895, and NY N314064

In NY N302039, NY N302895, and NY N314064, we suggested that classification under subheading 8505.19, HTSUS, was appropriate in part because the subject merchandise constituted composite goods. Specifically:

(1) In NY N302039, we stated, "The Sea Turtle PVC magnet is a composite good that consists of a PVC turtle with a hard magnet. Such articles have been classified in subheading 8505.19.3000."

(2) In NY N302895, we stated, "Composite goods in which a magnet is used to retrieve metal articles have previously been classified in subheading 8505.19.3000. This office notes that in your letter, you mention that the magnetic floor sweeper is similar to the magnets classified in NYR N289369 and NYR N290319, which classified ceramic magnets in subheading 8505.11.0030. However, this office does not find any of [the] afor[e]mentioned rulings relevant, as the subject floor sweeper is a composite good [internal citations omitted]."

[5] We stress that this analysis and these conditions are narrow and subject to the specific facts and applicable rules of a particular transaction. As such, the principles set forth in this letter may not apply to distinguishable transactions. See 19 C.F.R. § 177.9(b) on the applicability of rulings to certain transactions: "Each ruling letter is issued on the assumption that all of the information furnished in connection with the ruling request and incorporated in the ruling letter, either directly, by reference, or by implication, is accurate and complete in every material respect. The application of a ruling letter by a [CBP] field office to the transaction to which it is purported to relate is subject to the verification of the facts incorporated in the ruling letter, a comparison of the transaction described therein to the actual transaction, and the satisfaction of any conditions on which the ruling was based."

(3) In NY N314064, we justified classification of the three-in-one magnet sweeper by stating, "Composite goods in which a magnet is used to 'sweep' metal articles have previously been classified in subheading 8505.19.3000."

Although it is true that the merchandise at issue in each ruling constituted composite goods, this fact *alone* does not warrant classification under subheading 8505.19, HTSUS. As we discussed above, if it is determined that a permanent magnet of heading 8505, HTSUS, imparts the essential character of a composite good per GRI 3(b), then the good is to be classified as if it consisted *solely* of the permanent magnet. No other material or component is relevant. To the extent that NY N302039, NY N302895, and NY N314064 expressed dicta suggesting a contrary principle, those rulings are hereby modified.

The watchword here is "dicta": the errant principle opined in NY N302039, NY N302895, and NY N314064 was not necessary in determining that the goods are classifiable under subheading 8505.19, HTSUS. In each case, the permanent magnets at issue consist of ferrite (iron oxide). Ferrite is not a metal, as explained above. Seeing as the permanent magnets in each of the rulings are composed of non-metal material, they cannot be classified as permanent magnets "of metal" under subheading 8505.11, HTSUS. As a result, the merchandise in NY N302039, NY N302895, and NY N314064 is still classifiable under subheading 8505.19, HTSUS, as "other" permanent magnets. Although the aforementioned erroneous dicta does not trigger the notice and comment requirements of 19 U.S.C. 1625(c), we nevertheless are taking the opportunity to clarify the clarify the classification.

II. Modification of NY J85077 and Revocation of NY B84458, NY R03088, N289369, and N290319

The permanent magnets in NY B84458, NY J85077, NY R03088, NY N289369, and N290319 each are composed, at least in part, of non-metal material that excludes the respective merchandise from classification under subheading 8505.11, HTSUS. Specifically:

(1) In NY B84458, the "Bye-Bye Birdie" magnetic bird repellant device contained ferrite.
(2) In NY J85077, the stirrer bars were coated with Teflon.
(3) In NY R03088, the welding magnets contained a ceramic magnet center.
(4) In NY N289369, the disk magnet was "primarily composed of iron oxide."
(5) In NY N290319, the thirty magnets were "primarily of isotropic ferrite material."

None of these materials are "of metal" as specified in subheading 8505.11, HTSUS: ferrite (iron oxide) is not a metal, as explained above; neither is Teflon. Thus, each of these magnets are appropriately classified under subheading 8505.19, HTSUS, as "other" permanent magnets. We therefore modify NY J85077 as to its classification of the stirrer bars and revoke NY B84458, NY R03088, NY N289369, and NY N290319.

HOLDING:

By application of GRIs 1, 3(b), and 6, the subject merchandise is classified in heading 8505, HTSUS, specifically in subheading 8505.19.30, HTSUS, which provides for "Electromagnets; permanent magnets and articles intended to become permanent magnets after magnetization; electromagnetic

or permanent magnet chucks, clamps and similar holding devices; electromagnetic couplings, clutches and brakes; electromagnetic lifting heads; parts thereof: Permanent magnets and articles intended to become permanent magnets after magnetization: Other: Other." The general, column one rate of duty is 4.9 percent ad valorem.

Pursuant to U.S. Note 20 to Subchapter III, Chapter 99, HTSUS, products of China classified under subheading 8505.19.30, HTSUS, unless specifically excluded, are subject to an additional 25 percent ad valorem rate of duty. At the time of importation, you must report the Chapter 99 subheading, i.e., 9903.88.03, in addition to subheading 8505.19.30, HTSUS, listed above.

The HTSUS is subject to periodic amendment, so you should exercise reasonable care in monitoring the status of goods covered by the Note cited above and the applicable Chapter 99 subheading. For background information regarding the trade remedy initiated pursuant to Section 301 of the Trade Act of 1974, including information on exclusions and their effective dates, you may refer to the relevant parts of the USTR and CBP websites, which are available at https://ustr.gov/issue-areas/enforcement/section-301-investigations/tariff-actions and https://www.cbp.gov/trade/remedies/301-certain-products-china, respectively.

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

EFFECT ON OTHER RULINGS:

NY N302039, NY N302895, and NY N314064 are modified as explained above.

NY J85077 is hereby modified as to its classification of stirrer bars.

NY R03088, NY B84458, NY N289369, and NY N290319 are hereby revoked.

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

Sincerely,

YULIYA A. GULIS,
Director
Commercial and Trade Facilitation Division

U.S. Court of International Trade

Slip Op. 24–69

GREENTECH ENERGY SOLUTIONS, INC., Plaintiff, v. UNITED STATES, Defendant.

Before: Mark A. Barnett, Chief Judge
Court No. 23–00118
PUBLIC VERSION

[Granting Defendant's motion to dismiss for lack of subject-matter jurisdiction.]

Dated: June 10, 2024

Mark B. Lehnardt, Law Office of David L. Simon, PLLC, of Washington, DC, argued for Plaintiff Greentech Energy Solutions, Inc.

Emma E. Bond, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC, argued for Defendant United States. Also 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 were *Spencer Neff*, Attorney, Office of the Chief Counsel for Trade Enforcement & Compliance, U.S. Department of Commerce, and *Alexandra Khrebtukova*, Senior Attorney, Office of the Chief Counsel for International Trade Litigation, U.S. Customs and Border Protection.

OPINION AND ORDER

Barnett, Chief Judge:

This case involves the U.S. Department of Commerce's ("Commerce") decision in 2012 to impose ongoing certification requirements on importers of solar modules that contain solar cells produced in countries other than the People's Republic of China ("the PRC" or "China"). U.S. Customs and Border Protection ("CBP") implements the certification requirements at Commerce's direction. Consequently, this case also involves actions taken by CBP to suspend liquidation and collect cash deposits from noncompliant importers, such as Plaintiff, and, thereafter, to liquidate entries inclusive of antidumping ("AD") and countervailing ("CVD") duties. For its claims, Plaintiff Greentech Energy Solutions, Inc. ("Greentech") invokes the court's jurisdiction pursuant to 28 U.S.C. § 1581(i)(1)(B) and (D) (2018 & Supp. II 2020).[1] Confid. Am. Compl. ¶ 12, ECF No. 11.[2]

[1] Further citations to the U.S. Code are to the 2018 edition, unless otherwise specified.

[2] The public version of the amended complaint is docketed at ECF No. 10. The court references the confidential version of the amended complaint and exhibits attached thereto, unless otherwise specified.

This matter is before the court following Defendant United States' ("the Government") motion to dismiss this case. Confid. Def.'s Mot. to Dismiss ("Def.'s Mot."), ECF No. 15; *see also* Confid. Def.'s Reply in Supp. of Mot. to Dismiss ("Def.'s Reply"), ECF No. 24. The Government seeks dismissal for lack of subject-matter jurisdiction pursuant to United States Court of International Trade ("USCIT") Rule 12(b)(1), or, in the alternative, for failure to state a claim pursuant to USCIT Rule 12(b)(6). Def.'s Mot. at 1, 14–15. Greentech opposes the Government's motion. Confid. Pl. [Greentech's] Resp. to Def.'s Mot. to Dismiss ("Pl.'s Resp."), ECF No. 20.

For the following reasons, the court finds that Greentech raises issues that may adequately be addressed in the protests pending before CBP and, thus, has a remedy pursuant to 28 U.S.C. § 1581(a). Accordingly, section 1581(i) jurisdiction is unavailable, and this action will be dismissed.

BACKGROUND

I. Certification Requirements

In 2012, Commerce published antidumping duty and countervailing duty orders covering crystalline silicon photovoltaic cells ("CSPV cells" or "solar cells") from the PRC in 2012. *See Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled Into Modules, From the People's Republic of China*, 77 Fed. Reg. 73,018 (Dep't Commerce Dec. 7, 2012) (am. final determination of sales at less than fair value, and antidumping duty order) ("*AD Order*"); *Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled Into Modules, From the People's Republic of China*, 77 Fed. Reg. 73,017 (Dep't Commerce Dec. 7, 2012) (countervailing duty order) ("*CVD Order*") (together, "the *AD/CVD Orders*" or, in reference to the proceeding generally, "*Solar Cells From China*"). The scope of each order covers, *inter alia*, "[CSPV cells], and modules, laminates, and panels, consisting of [CSPV cells], whether or not partially or fully assembled into other products, including, but not limited to, modules, laminates, panels and building integrated materials." *AD Order*, 77 Fed. Reg. at 73,018; *CVD Order*, 77 Fed. Reg. at 73,017. The *AD/CVD Orders* also cover "[m]odules, laminates, and panels produced in a third-country from cells produced in the PRC . . . ; however, modules, laminates, and panels produced in the PRC from cells produced in a third-country are not covered." *AD Order*, 77 Fed. Reg. at 73,019; *CVD Order*, 77 Fed. Reg. at 73,017.

In the final determination underlying the *AD Order*, Commerce set forth certification requirements for importers and, as necessary, China-based exporters,[3] of solar panels or modules from third countries that do not contain solar cells produced in the PRC. *See Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled into Modules, From the People's Republic of China*, 77 Fed. Reg. 63,791, 63,796–97 (Dep't Commerce Oct. 17, 2012) (final determination of sales at less than fair value, and aff. final determination of critical circumstances, in part) ("*AD Final*"). In an appendix to the *AD Final*, Commerce published the required certifications. *Id.* at 63,797–98.

The simultaneously published final determination underlying the *CVD Order* did not contain or discuss the certification requirement. *See Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled into Modules, From the People's Republic of China*, 77 Fed. Reg. 63,788, 63,791 (Dep't Commerce Oct. 17, 2012) (final aff. CVD determination and final aff. critical circumstances determination) ("*CVD Final*"). Commerce's unpublished decision memoranda accompanying the *AD Final* and *CVD Final* determinations discussed the certification requirement in response to arguments regarding the scope of the respective investigations. *See* Issues and Decision Mem. for Solar Cells From the PRC (AD), A-570–979 (Oct. 9, 2012) at 8–9; Issues and Decision Mem. for Solar Cells From the PRC (CVD), C-570–980 (Oct. 9, 2012) at 80–81.[4]

In December 2012, Commerce issued public antidumping and countervailing duty instructions to CBP addressing implementation of the certification requirements. *See* Def.'s Mot., Ex. 5 (Message No. 2356306 (Dec. 21, 2012)) ("Final AD Instructions"), ECF No. 15–5; Def.'s Mot., Ex. 6 (Message No. 2346303 (Dec. 11, 2012)) ("Final CVD Instructions"), ECF No. 15–6. Those instructions restate the requisite importer and exporter certifications and provide additional information.

The importer certification begins as follows:

> I hereby certify that I am an official of (insert name of company importing solar panels/modules), that I have knowledge of the facts regarding the importation of the solar panels/modules or other products containing solar panels/modules that entered under entry number(s) (insert entry number(s) covered by the certification), and that these solar panels/modules do not con-

[3] Subsequent references to the exporter certification requirement should be taken to mean China-based exporters.

[4] While they are not published in the Federal Register, Commerce's decision memoranda are publicly available at https://access.trade.gov/public/FRNoticesListLayout.aspx, with separate links for pre- and post-June 2021 memoranda.

> tain solar cells produced in the People['s] Republic of China. By signing this certificate, I also hereby certify that (insert name of [importer company]) maintains sufficient documentation supporting this certification for all solar cells used to produce the solar panels/modules imported under the above-referenced entry number(s). I understand that agents of the importer, such as brokers, are not permitted to make this certification. Also, I am aware that records pertaining to this certification may be requested by CBP.

Final AD Instructions ¶ 3.[5] The exporter certification is largely identical except with respect to the last sentence reproduced above, whereby exporters must instead certify that "records pertaining to this certification may be subject to verification by Department of Commerce officials and I consent to verification with respect to this certification and these records." *Id.* Importers or exporters, as the case may be, must also certify that the certifications "*should* be completed at the time of the entry" or "at the time of shipment," respectively. *Id.* (emphasis added).[6] The instructions further require importers and exporters to certify

> [t]hat failure to maintain the required certification or failure to substantiate the claim that the panels/modules do not contain solar cells produced in the People['s] Republic of China will result in suspension of all unliquidated entries for which these requirements were not met and the requirement that the importer post an AD cash deposit or, where applicable, a bond, on those entries equal to the PRC-wide rate in effect at the time of the entry and a CVD cash deposit, or where applicable, a bond rate equal to the all-others rate in effect at the time of the entry.

Id.

In the following paragraph, the instructions inform importers and exporters that the "certifications and supporting documentation must be maintained by the parties described above but will *only* be provided to [CBP] by the importer *at the request of CBP*" and that the "documents should not be provided by the importer as part of the

[5] Because the certifications are identical, *see* Final AD Instructions ¶ 3; Final CVD Instructions ¶ 3, the court cites solely to the certifications in the Final AD Instructions.

[6] Notwithstanding the odd phrasing, the instructions provide that maintaining the certifications is mandatory ("must") while the certifications contain the directory ("should") language regarding timing. Final AD Instructions ¶ 3. Specifically, the instructions state that "[t]he importer certification *must* be completed, signed, and dated at the time of the entry of the panels/modules" and "[t]he exporter certification *must* be completed, signed, and dated at the time of shipment of the relevant entries." *Id.* ¶ 5 (emphases added); *see also* Final CVD Instructions ¶ 5.

entry document package, unless specifically requested by CBP." *Id.* ¶ 4 (emphases added). Commerce further explained that "CBP may accept the above certifications (and if required by CBP, supporting documentation) to establish that the merchandise is not covered by the scope of this order." *Id.* ¶ 6. If an importer fails to provide CBP with any requested certifications or documentation, "CBP is instructed to suspend all unliquidated entries for which the certification or documentation requirements were not provided," and, in antidumping cases, "require the posting of a cash deposit or bond on those entries equal to the PRC-wide rate in effect at the time of entry," *id.* ¶ 6, or, for countervailing duty purposes, "require the posting of a cash deposit or bond on those entries equal to the all others rate in effect at the time of entry," Final CVD Instructions ¶ 6.[7]

This case concerns an importer that claims to have been unaware of the certification requirements and failed to provide timely-signed certifications when CBP requested them almost two years after the entries were made.

II. Greentech's Entries

Greentech is an importer of solar modules exported to the United States from Vietnam and which incorporate solar cells allegedly produced in Vietnam. Am. Compl. ¶ 9. From July 2019 through October 2019, Greentech made 19 such entries of solar modules from Vietnam ("the subject entries"). *Id.* ¶ 23. Greentech did not maintain importer or exporter certifications (to the extent the latter were necessary) signed and dated as of the date of entry. *See id.* ¶¶ 26, 32.[8]

CBP issued two extensions of liquidation for each of the subject entries. *See* Confid. Def.'s Resp. to Ct. Order Regarding the Status of

[7] In September 2021, Commerce promulgated 19 C.F.R. § 351.228 setting forth, among other things, a new regulation regarding certification requirements. *Regulations To Improve Admin. and Enforcement of Antidumping and Countervailing Duty Laws*, 86 Fed. Reg. 52,300, 52,362–63 (Dep't Commerce Sept. 20, 2021) (final rule) ("*Preamble*"). The regulation went into effect on October 20, 2021, after the subject entries were made. *See id.* at 52,300. Commerce described the new regulation as being adopted "to codify and enhance Commerce's existing authority and practice" with respect to certifications. *Id.* at 52,302.

[8] Whether the exporter certification requirement applied to the subject entries [[ ]]. *See* Def.'s Mot. at 10–12.

Entries from July 2019 to August 2021 at 2, ECF No. 27.[9] On June 10, 2021, CBP issued a request for information ("RFI") to Greentech regarding two of the subject entries and in which CBP requested "documentation to show the products imported are exempt from AD/CVD duties or out of scope." Am. Compl., Ex. 3, ECF No. 11–2. CBP stated that "[s]ome of this documentation includes but is not limited to" the importer/exporter certifications required by Commerce and other documentation such as certificates of origin for both the solar cells and modules as well as production and shipping records. *Id.*, Ex. 3. Greentech provided an importer certification dated after the RFI and additional documentation. *See id.* ¶¶ 26, 31; *id.*, Ex. 4, ECF No. 11–2 (email communications between a CBP official and Greentech's customs broker concerning Greentech's responses to the RFI).[10]

On August 31, 2021, CBP issued a Notice of Action to Greentech. *Id.*, Ex. 5, ECF No. 11–2. In the notice, CBP explained that it was suspending liquidation of the subject entries and requiring cash deposits at the PRC-wide rate for the *AD Order* and the all-others rate for the *CVD Order*. *See id.* CBP explained that it was acting pursuant to Commerce's instructions accompanying the agency's preliminary antidumping and countervailing duty solar cell investigation determinations. *See id.* (citing Message No. 2153302 (June 1, 2012) (prelim. AD instructions), and Message No. 2163303 (June 11, 2012) (prelim. CVD instructions)).[11] CBP noted that Greentech had provided certificates dated after the RFI and thus failed to provide "the proper documents." *Id.* CBP stated that Greentech was free to "protest the additional duties upon liquidation." *Id.* CBP subsequently issued invoices to Greentech in connection with the AD/CVD cash deposits. *See id.* ¶ 35.[12] Thereafter, CBP liquidated the subject entries

[9] Greentech does not dispute that the extensions occurred. Greentech, however, characterizes the extensions as "improper" and requests the court to "nullify" the extensions and order reliquidation without regard to AD/CVD duties. Pl. [Greentech's] Resp. to Def.'s Resp. to Ct. Order Regarding the Status of Entries from July 2019 to August 2021 at 4, ECF No. 29. The court declines to consider Greentech's request. Greentech has neither alleged a legal or factual basis for challenging the extensions of liquidation in its amended complaint nor established the court's jurisdiction to entertain this newly asserted claim. *Cf. Chemsol, LLC v. United States*, 755 F.3d 1345, 1353–54 (Fed. Cir. 2014) (explaining that challenges to CBP's final liquidation and "any interim decisions merged therein" may be adjudicated, if at all, pursuant to the court's section 1581(a) jurisdiction).

[10] In one email, Greentech stated that it was unaware of the certification requirement. Am. Compl., Ex. 4 (Greentech's response to the RFI); *see also* Pl.'s Resp. at 1 ("Greentech was unaware of the certification requirement at the time of shipment and import . . . .").

[11] Commerce's preliminary AD/CVD instructions are identical in relevant respects to Commerce's final AD/CVD instructions. *Compare* Am. Compl., Ex. 2, ECF No. 11–2 (Message No. 2153302 (June 1, 2012)), *and* Def.'s Mot., Ex. 3, ECF No. 15–3 (Message No. 2163303 (June 11, 2012)), *with* Final AD Instructions, *and* Final CVD Instructions.

[12] CBP invoiced Greentech for almost [[ ]] dollars in duties. Pl.'s Resp., Att. 1; *see also* Am. Compl., Ex. 6 (CBP's invoices to Greentech).

inclusive of the invoiced AD/CVD duties. *See, e.g.*, *id.*, Ex. 7 (Part 1), ECF No. 11–3 (documenting the date of liquidation for one of the entries).[13]

On November 12, 2021, Greentech submitted a letter to CBP providing additional information regarding the subject entries. *Id.*, Ex. 7 (Part 1) at Att. 2. Greentech also protested CBP's liquidation of the subject entries and, for one protest, filed an application for further review. *See id.*, Ex. 7 (Parts 1–14), ECF Nos. 11–3 to 11–16 (documenting the protests); Def.'s Mot., Ex. 1 (Decl. of Merari Ortiz (Aug. 25. 2023) ("Ortiz Decl.")) ¶¶ 3–4, ECF No. 15–1.

On June 5, 2023, CBP requested additional information from Greentech regarding two of the subject entries in order to evaluate Greentech's claimed exemption from AD/CVD duties. Ortiz Decl. ¶¶ 8–9. In July 2023, Greentech provided CBP with information regarding one entry and informed CBP that it was gathering information regarding the second entry. *See id.* ¶ 10. CBP suspended action on Greentech's protests and application for further review when Greentech commenced this case. *See id.* ¶¶ 6–7, 11; 19 U.S.C. § 1515(c).[14]

III. Procedural History

On June 9, 2023, Greentech commenced this case through the concurrent filing of a summons and complaint. Summons, ECF No. 1; Compl., ECF No. 4.[15] On June 27, 2023, Greentech filed an amended complaint to correct a typographical error. Am. Compl.

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[13] The Government indicates that CBP liquidated the subject entries pursuant to the automatic liquidation instructions for the period covering December 1, 2018, through November 30, 2019. *See* Def.'s Mot. at 11 (citing Def.'s Mot., Ex. 8, ECF No. 15–8 (Message No. 0062401 (Mar. 2, 2020)) ("Auto Liq. Instructions")). Those instructions address entries covered by the *AD/CVD Orders* that were made during the period of review and as to which no review was requested. *See* Auto Liq. Instructions ¶¶ 1–2.

[14] Section 1515(c) provides:

> If an action is commenced in the Court of International Trade that arises out of a protest or an application for further review, all administrative action pertaining to such protest or application shall terminate and any administrative action taken subsequent to the commencement of the action is null and void.

[15] Prior to commencing this case, Greentech had "not paid any of the outstanding bills for [the subject entries]." Ortiz Decl. ¶ 12.

[Redline Version], ECF No. 11–1.[16] Greentech invokes the court's jurisdiction pursuant to 28 U.S.C. § 1581(i) "to challenge certain instructions sent by Commerce to CBP, as applied to Greentech." *Id.* ¶ 12. Greentech alleges that it was "adversely affected or aggrieved by the actions of Commerce and CBP within the meaning of [5 U.S.C. § 702]." *Id.* ¶ 17.

Greentech's amended complaint asserts three claims. Count One, titled "Commerce's Certification Provision as Applied to Greentech Is Unlawful," alleges as follows:

> Under U.S. law, AD and CVD duties can only be imposed when Commerce investigates and finds the existence of dumping or countervailable subsidies and the U.S. International Trade Commission investigates and finds a domestic industry has been injured or is threatened with injury by reason of the imports from the country subject to the investigation.

Id. ¶ 38 (citing 19 U.S.C. §§ 1671, 1673, *et seq.*). Count One further alleges:

> Defendant seeks to impose AD and CVD duties on solar module imports from Vietnam even though there are no dumping, subsidy, or injury findings pertaining to imports from that country, and no finding of circumvention pertaining to those entries, even though Greentech submitted documentation to CBP showing that the solar modules in question were not subject to the AD/CVD orders on China. The lack of a certificate dated at the time of shipment or entry cannot alter the clear and unambiguous requirements of U.S. law.

Id. ¶ 39.

Count Two, titled "Defendant's Imposition of AD/CVD Duties Based Solely on Greentech's Failure to Provide Contemporaneously Dated Certificates, When Greentech Submitted Ample Documentation Showing the Imports Were Not Subject to the China AD/CVD Orders, Is Unlawful," alleges as follows:

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[16] During the course of this litigation, the court expressed concern with Greentech's overly inclusive bracketing of what appeared to constitute public information in the sealed exhibits attached to the amended complaint, resulting in overly inclusive bracketing in the Government's confidential motion to dismiss. *See* Order (Feb. 26, 2024), ECF No. 36; Order (Mar. 5, 2024), ECF No. 40. In responsive filings, Greentech has indicated that some of this information may be made public and has submitted revised exhibits. *See* Pl. [Greentech's] Resp. to the Ct.'s Feb. 26, 2024 Order, ECF Nos. 38 (public), 39 (confid.); Pl. [Greentech's] Am. Resp. to the Ct.'s Mar. 5, 2024 Order, ECF Nos. 51 (confid.), 52 (public). For ease of reference, while the court cites to the original versions of Greentech's confidential amended complaint in ECF No. 11, the exhibits appended thereto, and the Government's motion to dismiss in ECF No. 15, the court accounts for Greentech's responses when identifying business proprietary information.

> Assuming *arguendo* Commerce could lawfully require Greentech to have certification[s] for its imports from Vietnam, at their core, the certifications Commerce requires are merely signed statements by the importer and exporter that the merchandise does not contain solar cells from China. But the commercial documentation Greentech submitted is far more reliable and probative of the country of production and origin than a mere self-serving statement. Indeed, [Commerce's] instructions identify commercial documentation to confirm the accuracy of the certifications. Under those circumstances, Commerce's certification provision and instructions were unlawful because they led to the imposition of AD and CVD duties on Greentech's imports from Vietnam.

Id. ¶ 41.

Count Three, titled "Defendant's Fine is Excessive and Violates the Eighth Amendment of the United States' Constitution," alleges just that—that "the penalty Defendant seeks to collect is excessive and, thus, violates the Eighth Amendment to the U.S. Constitution." *Id.* ¶ 43.

By way of relief, Greentech requests the court to 1) hold unlawful Commerce's certification requirement "as applied to Greentech's imports of solar modules from Vietnam," or, "[i]n the alternative," hold that the imposition of AD/CVD duties is an unconstitutional excessive fine; 2) "refund any AD or CVD deposits collected and withdraw all requests for payment for AD or CVD duties"; 3) order the Government to reliquidate the subject entries without regard to AD/CVD duties; and 4) grant any additional relief deemed appropriate, including attorney fees. *Id.* at 13.

The court heard oral argument on the Government's motion on March 20, 2024. *See* Docket Entry, ECF No. 54.

STANDARD OF REVIEW

To adjudicate a case, a court must have subject-matter jurisdiction over the claims presented. *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94–95 (1998). Plaintiff bears the burden of establishing subject-matter jurisdiction. *Norsk Hydro Can., Inc. v. United States*, 472 F.3d 1347, 1355 (Fed. Cir. 2006). The scope of section 1581(i) jurisdiction "is strictly limited" in order to "preserve[ ] the congressionally mandated procedures and safeguards provided in the other subsections." *Erwin Hymer Grp. N. Am., Inc. v. United States*, 930 F.3d 1370, 1374 (Fed. Cir. 2019) (alteration in original) (citations

omitted). Thus, when the plaintiff asserts jurisdiction pursuant to 28 U.S.C. § 1581(i), it "bears the burden of showing that another subsection is either unavailable or manifestly inadequate." *Id.* at 1375.

Because the pending motion to dismiss rests on the availability of jurisdiction pursuant to another subsection, and therefore challenges the existence of jurisdiction, "the factual allegations in the complaint are not controlling and only uncontroverted factual allegations are accepted as true." *Shoshone Indian Tribe of Wind River Rsrv. v. United States*, 672 F.3d 1021, 1030 (Fed. Cir. 2012).

DISCUSSION

I. Legal Framework

"Subject matter jurisdiction is a threshold inquiry," without which the court may not reach the merits of Defendant's arguments for dismissal for failure to state a claim. *United States v. Robert E. Landweer & Co.*, 36 CIT 200, 202, 816 F. Supp. 2d 1364, 1367 (2012). The USCIT, like all federal courts, is a "court[] of limited jurisdiction marked out by Congress." *Norcal/Crosetti Foods, Inc. v. United States*, 963 F.2d 356, 358 (Fed. Cir. 1992) (quoting *Aldinger v. Howard*, 427 U.S. 1, 15 (1976)). The court's jurisdiction is governed by 28 U.S.C. §§ 1581 and 1582. *See id.*

Relevant here, section 1581(a) grants the court jurisdiction to review a denied protest. 28 U.S.C. § 1581(a); 19 U.S.C. § 1515. Section 1515 governs CBP's review of protests filed under 19 U.S.C. § 1514. 19 U.S.C. § 1515(a). Section 1514(a), in turn, sets forth the exclusive list of CBP decisions that are subject to protest. 19 U.S.C. § 1514(a)(1)–(7).[17]

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[17] Section 1514(a) of Title 19 states, with exceptions not relevant here, that

> any clerical error, mistake of fact, or other inadvertence, whether or not resulting from or contained in an electronic transmission, adverse to the importer, in any entry, liquidation, or reliquidation, and, decisions of the Customs Service, including the legality of all orders and findings entering into the same, as to--
>
> . . .
>
> (2) the classification and rate and amount of duties chargeable;
> (3) all charges or exactions of whatever character within the jurisdiction of the Secretary of the Treasury;
>
> . . .
>
> (5) the liquidation or reliquidation of an entry, or reconciliation as to the issues contained therein, or any modification thereof, including the liquidation of an entry, pursuant to either section 1500 of this title or section 1504 of this title;
>
> . . .
>
> shall be final and conclusive upon all persons (including the United States and any officer thereof) unless a protest is filed in accordance with this section, or unless a civil action contesting the denial of a protest, in whole or in part, is commenced in the United States Court of International Trade . . . .

Section 1581(i)(1) grants the court jurisdiction to entertain "any civil action commenced against the United States, its agencies, or its officers, that arises out of any law of the United States providing for— . . . (B) tariffs, duties, fees, or other taxes on the importation of merchandise for reasons other than the raising of revenue," and "(D) administration and enforcement with respect to the matters referred to in subparagraphs (A) through (C) of this paragraph and subsections (a)–(h) of this section." 28 U.S.C. § 1581(i)(1)(B), (D).

It is well settled that "[a] party may not expand a court's jurisdiction by creative pleading." *Norsk Hydro*, 472 F.3d at 1355. Instead, the court must "look to the true nature of the action . . . in determining jurisdiction of the appeal." *Id.* (citation omitted). Relevant to that inquiry is an understanding of the relief that a plaintiff seeks. *See Sunpreme Inc. v. United States*, 892 F.3d 1186, 1193 (Fed. Cir. 2018) (explaining that the plaintiff's requested relief is "associated with a scope ruling determination" that may be judicially reviewable pursuant to 28 U.S.C. § 1581(c) such that the plaintiff could not invoke 28 U.S.C. § 1581(i)).

II. Parties' Contentions

The Government contends that Greentech's challenge to "Commerce's certification requirement *as applied* to Greentech" may only be raised pursuant to 28 U.S.C. § 1581(a) following any denial of Greentech's protests. Def.'s Mot. at 18 (emphasis added) (quoting Am. Compl. ¶ 36); *see also id.* at 23–24 (arguing that Greentech has failed to exhaust its protest procedures). Reading Greentech's amended complaint primarily to challenge certain actions taken, or findings made, by CBP, *see id.* at 19–20, Defendant asserts that Greentech has not established that 28 U.S.C. § 1581(a) jurisdiction is manifestly inadequate to resolve those claims, *id.* at 22. The Government avers that "Congress has established separate statutory roles for CBP and Commerce in administering and enforcing the antidumping and countervailing duty scheme" with corresponding "separate methods for challenging CBP's and Commerce's respective decisions." *Id.*

The Government further contends that it does not presently "dispute that Greentech could invoke section 1581(i) residual jurisdiction to challenge Commerce's certification requirement imposed in the final determinations, to the extent that Greentech was not—*and could not have been*—an interested party to the investigations in which Commerce issued that requirement." *Id.* at 24 n.10.[18] The

[18] Greentech argues at length that jurisdiction pursuant to 28 U.S.C. § 1581(c) is not, and was not, available to Greentech to challenge Commerce's certification requirement. Pl.'s Resp. at 10–13. The Government does not presently dispute this point. Def.'s Mot. at 24 n.10; Def.'s Reply at 5.

Government argues, however, that "Greentech has not pursued a standalone challenge" to Commerce's certification requirement and that any such challenge "would be untimely." *Id.* In connection with this argument, the Government asserts that CBP acts in a "ministerial" capacity when implementing Commerce's instructions but that "any injury associated with CBP's application of the certification requirement—and ultimate liquidation—must be raised (if at all) pursuant to 28 U.S.C. § 1581(a)." *Id.* at 27.

Characterizing the Government's statement that CBP acts ministerially in carrying out Commerce's instructions as a concession, Pl.'s Resp. at 9, Greentech contends that 28 U.S.C. § 1581(a) jurisdiction is unavailable to resolve the pending claims, *id.* at 5–9. Greentech further asserts that, in this case, it seeks to challenge Commerce's authority to instruct CBP to apply the *AD/CVD Orders* to solar modules that incorporate non-Chinese origin solar cells. *See id.* at 1. Rather than "a run-of-the-mill challenge to a routine CBP decision," Greentech contends, "this case is one of first impression" that raises the question "whether Commerce exceeded its authority" when it imposed the certification requirement. *Id.* at 2.

In its reply brief, the Government contends that any challenge to Commerce's certification requirement must be dismissed as untimely and any challenge to CBP's application of the certification requirement must be dismissed for lack of subject-matter jurisdiction. Def.'s Reply at 5–15.

III. Analysis

The court begins by ascertaining the true nature of Greentech's action and whether the requested relief may instead be obtained pursuant to 28 U.S.C. § 1581(a). *See Sunpreme*, 892 F.3d at 1193; *Norsk Hydro*, 472 F.3d at 1355.

Greentech's amended complaint contains a mix of factual allegations and legal conclusions regarding Commerce's imposition of the certification requirements and CBP's application of those requirements to Greentech. *See, e.g.*, Am. Compl. ¶ 3 (alleging that AD/CVD duties "cannot be collected on imports" absent affirmative dumping or subsidization and injury findings); *id.* ¶ 17 (stating that Greentech was "adversely affected or aggrieved by the *actions* of Commerce *and* CBP") (emphases added); *id.* ¶¶ 27–28 (referring to the imposition of AD/CVD duties despite Greentech's alleged nonuse of solar cells from China and stating that certifications should not have been required "[u]nder those facts"); *id.* at 11 (in Count One, referencing Com-

merce's certification requirement "as applied to Greentech"); *id.* at 12 (in Count Two, referencing the imposition of duties despite Greentech's "ample documentation").

Despite the lack of clarity in the amended complaint regarding the precise nature of Greentech's legal challenge, Greentech's requested relief is clear: Greentech seeks to avoid liability for duties pursuant to the *AD/CVD Orders* in connection with the subject entries, and only those entries. *Id.* at 13 (prayer for relief). Greentech does not presently allege a facial challenge to Commerce's certification requirements or seek broader relief in the form of vacatur of the requirements as to any entity besides Plaintiff. Rather, Greentech seeks a narrow judicial holding that the "certification requirement and instructions *as applied* to [the subject entries]" are unlawful. *Id.* (emphasis added).[19] The alleged basis for that holding is specific to Greentech: the "documentation showing that the merchandise was produced [in] and exported from Vietnam." *Id.* ¶ 5. The question, then, is whether these claims may be addressed by CBP such that Greentech can obtain its requested relief by concluding the protest proceedings and, if necessary, seeking judicial review pursuant to 28 U.S.C. § 1581(a).

It is well-settled that "a protestable decision" giving rise to section 1581(a) jurisdiction requires CBP to have "engage[d] in some sort of decision-making process." *U.S. Shoe Corp. v. United States*, 114 F.3d 1564, 1569 (Fed. Cir. 1997), *aff'd sub nom. United States v. U.S. Shoe Corp.*, 523 U.S. 360 (1998). Ministerial actions are not protestable because CBP "must have the 'authority to grant relief in [the] protest action.'" *Indus. Chems., Inc. v. United States*, 941 F.3d 1368, 1371 (Fed. Cir. 2019) (alteration in original) (quoting *Gilda Indus., Inc. v. United States*, 446 F.3d 1271, 1276 (Fed. Cir. 2006)). At this time, the court is unaware of any case addressing CBP's role in connection with Commerce's certification requirements pursuant to the *AD/CVD Orders*. The court agrees with the Government, however, that Green-

[19] Greentech characterizes its claims differently in response to the Government's motion to dismiss. There, Greentech tries to limit its claims to the allegedly unlawful action of Commerce alone. *See, e.g.*, Pl.'s Resp. at 3 ("Greentech brought this case to challenge the lawfulness of Commerce's certification requirement that CBP applied to the [subject entries]."). Referencing a requirement *that CBP applied* is different from referencing a requirement *as applied* because the latter suggests the fact-specific application of the requirement to a certain entity. *See, e.g.*, *Odyssey Logs. and Tech. Corp. v. Iancu*, 959 F.3d 1104, 1112 (Fed. Cir. 2020) (comparing a facial challenge to an as-applied challenge). Greentech has not, however, requested to further amend its complaint to set out this facial challenge with clarity and specificity. The court may not consider Greentech's characterization of its claims in its response brief as operative to the extent they differ from the allegations of the amended complaint. *See, e.g.*, *Statewide Bonding, Inc. v. U.S. Dep't Homeland Sec.*, 980 F.3d 109, 117 n.5 (D.C. Cir. 2020) ("[I]t 'is axiomatic that a complaint may not be amended by briefs in opposition to a motion to dismiss.'" (citation omitted)).

tech's claims are amenable to protest and, thus, section 1581(a) jurisdiction would be available to Greentech and would not be manifestly inadequate.

The instructions at issue contemplate ministerial action by CBP, if at all, with respect to suspending liquidation and rate advancing the relevant entries. However, while Plaintiff and Defendant appear to agree that CBP had no choice but to suspend liquidation and require Greentech to post cash deposits when Greentech was unable to produce certifications signed as of the date of importation,[20] the certification language set forth in paragraph three of the instructions potentially allows some leeway in the timing requirement. That language states that the importer signing the certification "understand[s] that this certification *should* be completed at the time of entry, Final AD Instructions ¶ 3 (emphasis added), where "should" may be considered "directory," not "mandatory," *see New England Tank Indus. of N.H., Inc. v. United States*, 861 F.2d 685, 694 (Fed. Cir. 1988). However, even if Greentech's failure in that regard required CBP to suspend liquidation and collect cash deposits, the instructions are silent on what CBP should do when an importer lacks timely-signed certifications but can provide documentation potentially supporting the claimed country of origin and which, if so proven, would demonstrate that the imported products are *not* covered by the *AD/CVD Orders*.[21]

The U.S. Supreme Court "consistently has held that some form of hearing is required before an individual is finally deprived of a property interest." *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976). "[I]mporters in antidumping [and countervailing duty] proceedings are

[20] During oral argument, the Government responded to the court's questions regarding CBP's authority to make a country-of-origin determination during the protest proceeding by suggesting that CBP had no such authority and that the lack of a certification was dispositive. Oral Arg. 38:00–39:00, 46:00–46:20, available at https://www.cit.uscourts.gov/audio-recordings-select-public-court-proceedings (reflecting the time stamp from the recording). The Government's statement is difficult to reconcile with its assertion that section 1581(a) jurisdiction is available to Greentech and is not manifestly inadequate to obtain the relief that Greentech seeks. *See, e.g.*, Def.'s Mot. at 14; Oral Arg. 41:00–42:00. Furthermore, the Government relied on the instructions to support this contention, Oral Arg. 39:50–40:15, but as discussed further in, the instructions do not speak to what CBP may do, or even should do, after suspending liquidation. Plaintiff, for its part, relies on the notion that CBP acts ministerially when implementing Commerce's liquidation instructions. Pl.'s Resp. at 8. The instructions at issue here are not, however, liquidation instructions; they are cash deposit instructions. *See* Final AD Instructions ¶ 8; Final CVD Instructions ¶ 8.

[21] Paragraphs five and six of the instructions state that the "certification *must* be completed, signed, and dated at the time of the entry of the panels/modules" and that "[i]f the importer does not provide the aforementioned required certification or documentation at [CBP's] request, CBP is instructed to suspend all unliquidated entries for which the certification or documentation requirements were not provided, and require the posting of a cash deposit on those entries." Final AD Instructions ¶¶ 5–6 (emphasis added). The instructions do not preclude the possibility of liquidation without regard to AD and CVD duties based on subsequently provided information.

entitled to procedural due process," *Royal Brush Mfg., Inc. v. United States*, 75 F.4th 1250, 1257 (Fed. Cir. 2023), which includes "the right to notice and a meaningful opportunity to be heard," *id.* at 1257 n.5 (quoting *PSC VSMPO-Avisma Corp. v. United States*, 688 F.3d 751, 761–66 (Fed. Cir. 2012)). Relevant to this question, the Government cites to other Commerce proceedings to establish that Commerce's certification requirements are part of an existing practice. Def.'s Mot. at 33 n.12 (citing, *inter alia*, *Sugar from Mexico*, 79 Fed. Reg. 78,044 (Dep't Commerce Dec. 29, 2014) (suspension of countervailing duty investigation); and *Low Enriched Uranium From France*, 67 Fed. Reg. 6,680 (Dep't Commerce Feb. 13, 2002) (notice of am. final determination of sales at less than fair value and antidumping duty order)). In those proceedings, however, Commerce established certification requirements on importers or exporters of merchandise from the subject countries. *See Sugar From Mexico*, 79 Fed. Reg. at 78,048 (requiring certifications from Mexican exporters that customers agree not to engage in prohibited circumvention activities); *Low Enriched Uranium From France*, 67 Fed. Reg. at 6,680 (requiring certifications from importers and end-users of low enriched uranium from France that the imported product meets the criteria for exclusion because it is "owned by a foreign utility end-user and imported into the United States by or for such end-user solely for [specified] purposes"). By contrast, this case involves certification requirements published in 2012 in the *Solar Cells From China* proceeding that apply ostensibly to nonsubject merchandise imported into the United States from countries other than China. Thus, this case implicates the procedures required before the Government may extract substantial AD/CVD duties from importers, such as Greentech, in this specific scenario.

The Government argues that the statutory obligation for Greentech to use "reasonable care" in making its entries required Greentech to familiarize itself with the *AD/CVD Orders*. Def.'s Mot. at 27–28 (citing 19 U.S.C. § 1484(a)(1)).[22] Plaintiff disputes this argument. Pl.'s Resp. at 16–17. The requirements attendant to section 1484 in these circumstances are not squarely before the court. As such, the court need not address the Government's position that reasonable care *required* importers to review *Solar Cells From China* simply because that proceeding "cover[s] solar panels assembled *in any country* using solar cells *from China*." Def.'s Mot. at 28 (second emphasis added). The point here is that no agency has determined, as a factual matter, that Greentech's entries incorporated "solar cells from China." The Government's reliance on 19 U.S.C. § 1484(a)(1) suggests

[22] The Government also cites to the *CVD Final*. Def.'s Mot. at 28. That determination does not discuss the certification requirements. *See CVD Final*, 77 Fed. Reg. 63,788.

that it does not consider *any* further process to be required for importers such as Greentech but offers no explanation why that position comports with principles of due process. Thus, while noncompliance with the certification requirements may give rise to a rebuttable presumption of Chinese origin solar cells, effectuated by suspension of liquidation, the Government must provide recourse for importers to rebut that presumption.[23]

When CBP informed Greentech via the Notice of Action of the steps taken to suspend liquidation, CBP stated that Greentech could contest the assessment of AD/CVD duties by protesting the liquidation. *See* Am. Compl., Ex. 5. Shortly thereafter, CBP began liquidating the subject entries. *See, e.g.*, *id.*, Ex. 7 (Part 1).[24] CBP acted consistent with its stated view that Greentech could contest the assessment of duties via protest when, on June 5, 2023, as part of CBP's evaluation of the protests, CBP requested additional information from Greentech relevant to country of origin. Ortiz Decl. ¶¶ 8–9. CBP only suspended action on the protest when Greentech commenced this case. *See id.* ¶ 11 (citing 19 U.S.C. § 1515(c)). Thus, it appears that CBP reasonably intended to resolve Greentech's claims during the protest proceeding and thus provide Greentech with a bona fide opportunity to avoid liability, notwithstanding that the Government has not clearly stated that CBP had the authority to do so and, during oral argument, suggested that CBP may lack such authority. Oral Arg. 38:00–39:00, 46:00–46:20.[25] In any event, it may be the case that

[23] The court does not disregard the Government's circumvention concerns underlying the certification requirements, particularly when the country of export has a third country case number under the *AD/CVD Orders*. Oral Arg. 39:00–39:45. However, an importer with knowledge (or that otherwise should know) that the solar panels it is importing from a third country incorporate Chinese solar cells would, if it made those entries as Type 01/nonsubject merchandise, risk substantial penalties pursuant to 19 U.S.C. § 1592 or an evasion determination pursuant to 19 U.S.C. § 1517, or both. Both of those statutes require certain procedures before CBP may affirmatively determine that a violation has occurred. *See* 19 U.S.C. §§ 1517(b), 1592(b). The Government offers no persuasive reason why due process requires fewer protections here.

[24] Indeed, the automatic liquidation instructions that CBP apparently used here apply to entries made by firms that had notice of the opportunity to request a review of their entries for the proper ascertainment of duties and did not do so. *See* Def.'s Mot., Ex. 8; *Antidumping or Countervailing Duty Order, Finding, or Suspended Investigation; Opportunity To Req. Admin. Review*, 84 Fed. Reg. 66,880, 66,882 (Dep't Commerce Dec. 6, 2019) (applicable to the *AD Order*); *Antidumping or Countervailing Duty Order, Finding, or Suspended Investigation; Opportunity To Req. Admin. Review*, 85 Fed. Reg. 77,431, 77,433 (Dep't Commerce Dec. 2, 2020) (applicable to the *CVD Order*).

[25] For example, the Government argues that the protest remedy is adequate for Greentech's challenge "disput[ing] CBP's adherence to Commerce's instructions." Def.'s Mot. at 19. It is difficult to ascertain what relief Greentech may obtain if, as the Government asserts, CBP acted ministerially in this case, *see id.* at 27. Challenging some procedural aspect of CBP's application of the instructions to Greentech is likely of no moment if that challenge does not allow Greentech to contest the applicability of the AD/CVD duties announced in the Notice of Action.

CBP erred in liquidating Greentech's entries without first consulting with Commerce about the propriety of doing so.

Commerce's recent regulation set forth in 19 C.F.R. § 351.228 is instructive regarding the procedure CBP should have followed and, indeed, may have been intending to follow. While the regulation is not directly applicable, *see supra* note 7 (noting the effective date), Commerce has stated that 19 C.F.R. § 351.228 "merely codifies existing practice," *Preamble*, 86 Fed. Reg. at 52,363. Thus, section 351.228 is indicative of the procedures that should have been followed here. The regulation provides, *inter alia*:

> (b) Consequences for no provision of a certificate; provision of a false certificate.
>
> (1) The Secretary may instruct U.S. Customs and Border Protection to suspend liquidation of entries of the importer or entries associated with the other interested party and require a cash deposit of estimated duties at the applicable rate if:
>
> (i) The importer or other interested party has not provided to the Secretary or U.S. Customs and Border Protection, as appropriate, the certification described under paragraph (a) of this section either as required or upon request for such entries; or
>
> (ii) The importer or other interested party provided a certification in accordance with paragraph (a) of this section for such entries, but the certification contained materially false, fictitious or fraudulent statements or representations, or contained material omissions.

19 C.F.R. § 351.228(b).[26] The regulation further provides that Commerce "may also instruct [CBP] to assess antidumping or countervailing duties . . . at the applicable rate," *id.* § 351.228(b)(2), which is consistent with the notion that there must be a process for demonstrating, in appropriate circumstances, nonapplication of antidumping or countervailing duties, beyond the certification requirement itself.

In response to concerns that the regulation is redundant or infringes on CBP's existing authority, or could lead to "opposing or contradictory conclusions" when "both CBP and Commerce investi-

[26] Paragraph (a) of the regulation allows Commerce to determine "that an importer or other interested party shall . . . [m]aintain a certification for entries of merchandise into the . . . United States"; "[p]rovide a certification by electronic means at the time of entry or entry summary"; or "[o]therwise *demonstrate compliance* with a certification requirement as determined by [Commerce], in consultation with [CBP]." 19 C.F.R. § 351.228(a) (emphasis added).

gate certifications," Commerce stated that although "CBP has its own independent authority to address import documentation related to negligence, gross negligence, or fraud," the "enforcement of the AD/CVD laws, including taking steps to prevent evasion and circumvention of AD and CVD orders by producers, exporters, and importers, is well within Commerce's authority." *Preamble*, 86 Fed. Reg. at 52,364. Commerce also stated that "a formal finding by CBP [is not] required for Commerce to determine, within its own authority, that [a] certification is deficient and unreliable," and that "[w]hether a certification contains 'material' or 'fraudulent' information is a determination that would be made by Commerce pursuant to its own authority and consideration of the normal meaning of those terms (although determinations by other agencies may be informative)." *Id.* Accordingly, when promulgating the regulation, Commerce maintained for itself an ongoing role in resolving issues that arise when dealing with compliance with the certification requirements.[27]

Most relevant here, this role is reflected in subparagraph two of the regulation, which addresses the consequences for noncompliance. In addition to instructing CBP to suspend liquidation and collect cash deposits when an "importer or other interested party" fails to provide certifications or provides certifications containing "materially false, fictitious or fraudulent statements or representations," 19 C.F.R. § 351.228(b)(1)(i)–(ii), the regulation states that, "[u]nder paragraph (b)(1)(i) or (ii) of this section, [Commerce] may also instruct [CBP] to assess antidumping or countervailing duties, as the case may be, at the applicable rate," *id.* § 351.228(b)(2). The regulation thus suggests that, when presented with noncompliance, Commerce will determine whether to instruct CBP to liquidate the relevant entries inclusive of AD/CVD duties and, thus, that decision is not CBP's to make absent consultation with, or involvement by, Commerce. While, in this case, it is too late for CBP to remedy any missteps that occurred before liquidation,[28] CBP may, indeed must, work in concert with Commerce to consider all relevant information in the course of resolving Greentech's protests.

It is well-settled that section 1581(i) generally "may not be invoked when jurisdiction under another subsection of [section] 1581 is or

[27] This role is reflected in the instructions at issue here, which state that "records pertaining to [the exporter's] certification may be subject to verification by *Department of Commerce officials*." Final AD Instructions ¶ 3 (emphasis added) (exporter certification). That language suggests that Commerce is the agency with the authority to decide whether an exporter has adequately supported its certification.

[28] Liquidation is "the final computation or ascertainment of duties." 19 C.F.R. § 159.1. While the finality of liquidation may be forestalled by protesting the liquidation and commencing a civil action before the USCIT, *see* 19 U.S.C. § 1514(a), liquidation represents the "final challengeable event" in the life of an entry, *Chemsol*, 755 F.3d at 1350 (citations omitted).

could have been available." *Sunpreme*, 892 F.3d at 1191. Because the court finds that section 1581(a) jurisdiction is available to Greentech and is not manifestly inadequate, the court lacks section 1581(i) jurisdiction with respect to Counts One and Two of Greentech's amended complaint.

Count Three will also be dismissed. Relief pursuant to Count Three was requested in the alternative. *See* Am. Compl. at 13. Regarding the underlying claim, the Government contends that, "consistent with the overall antidumping and countervailing duty scheme, the certification requirement is solely remedial in nature" and therefore the Excessive Fines Clause of the Eighth Amendment does not apply. Def.'s Mot. at 34; *see also* Def.'s Reply at 19–20 (arguing that "the certification requirement serves the remedial purpose of protecting against evasion of antidumping and countervailing duty orders"); U.S. Const. amend. VIII (prohibiting the imposition of excessive fines). Greentech contends that its claim must proceed because the subject entries were of Vietnamese origin, the duties at issue are punitive, not remedial, and the amount of duties imposed are disproportional to the offense of not having timely-signed certifications. Pl.'s Resp. at 19–29.

Insofar as Greentech may obtain the relief associated with Counts One and Two via the opportunity to demonstrate nonliability for AD/CVD duties, Count Three seeks no additional relief. As best the court can ascertain, Count Three seeks relief in the event the Government seeks to impose AD/CVD duties on Greentech based solely on the missing or untimely certification(s) and without any evaluation of the documentation that Greentech has submitted, or presumably will submit, when protest proceedings resume. *See* Am. Compl. ¶¶ 43–44; Ortiz Decl. ¶ 10 (noting that Greentech was still compiling information requested by CBP when CBP suspended action on the protests).

To that end, the justiciability doctrine of ripeness "considers whether 'further factual development would significantly advance [the court's] ability to deal with the legal issues presented' and whether 'the complained-of conduct has an "immediate and substantial impact" on the plaintiff.'" *Sandoz Inc. v. Amgen Inc.*, 773 F.3d 1274, 1278 (Fed. Cir. 2014) (alteration in original) (citations omitted). Further development is required here before Greentech can allege the facts necessary to support this claim.

Greentech makes no allegation that the duties assessed at liquidation rested on violations of the statutory scheme governing AD/CVD duties. Greentech has acknowledged the absence of an Eighth Amendment violation when duties are lawfully determined. Oral Arg.

1:07:30–1:08:00. That principle was recently affirmed by the Federal Circuit, which noted that "Commerce could typically dispose of [this] constitutional issue by reviewing the rates for statutory compliance (i.e., finding the rates not excessive)." *Rimco Inc. v. United States*, 98 F.4th 1046, 1054 (Fed. Cir. 2024).[29] The issue here, however, is whether the Government may impose those duties based not on a factual determination that Greentech's entries contained Chinese solar cells, but only on Greentech's failure to submit timely-signed certifications. Because further administrative proceedings relevant to this question will take place, the court finds that Count Three must be dismissed as unripe.[30] *See Sandoz*, 773 F.3d at 1278 ("A claim is not ripe for adjudication if it rests upon contingent future events that may not occur as anticipated, or indeed may not occur at all." (citation omitted)).

CONCLUSION AND ORDER

For the foregoing reasons, the court **GRANTS** Defendant's motion to dismiss for lack of jurisdiction. Judgment will enter accordingly.

Dated: June 10, 2024
New York, New York

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

[29] The *Rimco* court left open the possibility for "a scenario, however unlikely, where a calculated rate might comply with statutory reasonableness but nonetheless violate the excessive fines component of the Eighth Amendment." 98 F.4th at 1055. The appellate court explained, however, that "administrative exhaustion would still be required." *Id.*

[30] The court declines to address whether Greentech will be able to allege an Eighth Amendment violation at the conclusion of the protest proceedings or what the appropriate jurisdictional basis would be for such a claim.

Slip Op. 24–75

EREĞLI DEMIR VE ÇELIK FABRIKALARI T.A.Ş., Plaintiff, v. UNITED STATES INTERNATIONAL TRADE COMMISSION, Defendant, and UNITED STATES STEEL CORPORATION, CLEVELAND CLIFFS INC., STEEL DYNAMICS, INC., SSAB ENTERPRISES, LLC, and NUCOR CORPORATION, Defendant-Intervenors.

Before: Gary S. Katzmann, Judge
Court No. 22–00351

[The court denies Plaintiff's Motion for Judgment on the Agency Record.]

Dated: June 20, 2024

David L. Simon, Law Office of David L. Simon, PLLC, of Washington, D.C., argued for Plaintiff Ereğli Demir ve Çelik Fabrikalari T.A.Ş. With him on the brief was *Mark B. Lehnardt*.

Spencer J. Toubia, Attorney-Advisor, U.S. International Trade Commission, of Washington, D.C., argued for Defendant the United States International Trade Commission. With him on the brief were *Dominic L. Bianchi*, General Counsel, and *Andrea C. Casson*, Assistant General Counsel for Litigation.

Jeffrey D. Gerrish, Schagrin Associates, of Washington, D.C., argued for Defendant-Intervenors United States Steel Corporation, Cleveland-Cliffs Inc., Steel Dynamics, Inc., SSAB Enterprises, LLC, and Nucor Corporation. With him on the brief were *Roger B. Schagrin* and *Nicholas Phillips*.

Thomas M. Beline and *Sarah E. Shulman*, Cassidy Levy Kent (USA) LLP, of Washington, D.C., for Defendant-Intervenor United States Steel Corporation.

Alan H. Price, *Christopher B. Weld*, and *Theodore P. Brackemyre*, Wiley Rein LLP, of Washington, D.C., for Defendant-Intervenor Nucor Corporation.

Stephen P. Vaughn, *Neal Reynolds*, and *Barbara Medrado*, King & Spalding LLP, of Washington, D.C., for Defendant-Intervenor Cleveland-Cliffs Inc.

OPINION

Katzmann, Judge:

This case requires the court to peer into a kaleidoscope of administrative determinations related to the issuance of antidumping and countervailing duty orders on imports of hot-rolled steel from Turkey.

In 2016, the U.S. Department of Commerce ("Commerce") determined that hot-rolled steel flat products imported from Turkey were being sold in the United States at less than fair value. *See Certain Hot-Rolled Steel Flat Products From the Republic of Turkey: Final Determination of Sales at Less Than Fair Value*, 81 Fed. Reg. 53428 (Dep't Com. Aug. 12, 2016) ("*Original Antidumping Determination*"). The U.S. International Trade Commission ("Commission"), after conducting its own investigation, determined that these less-than-fair-value ("dumped") import sales inflicted material injury on a U.S. industry. *Certain Hot-Rolled Steel Flat Products from Australia, Brazil, Japan, Korea, the Netherlands, Turkey, and the United Kingdom*,

81 Fed. Reg. 66996 (ITC Sept. 29, 2016) ("*Original Determination*"). Commerce then issued an antidumping duty order. *See Certain Hot-Rolled Steel Flat Products From Australia, Brazil, Japan, the Republic of Korea, the Netherlands, the Republic of Turkey, and the United Kingdom: Amended Final Affirmative Antidumping Determinations for Australia, the Republic of Korea, and the Republic of Turkey and Antidumping Duty Orders*, 81 Fed. Reg. 67962 (Dep't Com. Oct. 3, 2016) ("*Antidumping Duty Order*").

Three and a half years later, Commerce determined that one (but not all) of the Turkish importers of hot-rolled steel that the Commission had investigated was not in fact dumping merchandise. *See Certain Hot-Rolled Steel Flat Products From Turkey: Notice of Court Decision Not in Harmony With the Amended Final Determination in the Less-Than-Fair-Value Investigation; Notice of Amended Final Determination, Amended Antidumping Duty Order; Notice of Revocation of Antidumping Duty Order in Part; and Discontinuation of the 2017–18 and 2018–19 Antidumping Duty Administrative Reviews, in Part*, 85 Fed. Reg. 29399 (Dep't Com. May 15, 2020) ("*Amended Antidumping Determination*"). The Commission then revisited its original material-injury determination in a five-year "sunset" review. *See Hot-Rolled Steel From Australia, Brazil, Japan, Netherlands, Russia, South Korea, Turkey, and the United Kingdom*, 87 Fed. Reg. 74167 (ITC Dec. 2, 2022), P.R. 357 ("*Five-Year Determination*"). The Commission determined that revoking the antidumping order was likely to lead to continuation or recurrence of dumping and material injury. *See id.*; *see also* 19 U.S.C. § 1675(c)(1).

In this case, Plaintiff Eregli Demir ve Celik Fabrikalarti T.A.S. ("Erdemir"),[1] a Turkish producer of hot-rolled steel, argues in a Motion for Judgment on the Agency Record that the Commission's *Five-Year Determination* unlawfully fails to take proper account of Commerce's *Amended Antidumping Determination*. *See* Compl., Dec. 26, 2022, ECF. No. 4.

The court concludes that the challenged elements of the *Five-Year Determination* are supported by substantial evidence and in accordance with law. The court accordingly enters Judgment on the Agency Record for Defendant (the Commission) and Defendant-Intervenors.

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[1] To ensure internal consistency and to reduce the risk of transcription errors in electronic publication formats, the court in this opinion (apart from this demonstrative footnote) represents Turkish proper names without diacritics. *See Assan Aluminyum Sanayi ve Ticaret v. United States*, 48 CIT __, __ n.1, Slip Op. 24–44, at 2 n.1 (Apr. 11, 2024). Thus, for example, Ereğli Demir ve Çelik Fabrikalari T.A.Ş." becomes "Eregli Demir ve Celik Fabrikalarti T.A.S." and "Çolakoğlu Dis Ticaret A.Ş." becomes "Colakoglu Dis Ticaret A.S."

BACKGROUND

I. Legal and Regulatory Framework

A. Antidumping and Countervailing Duties

The Tariff Act of 1930, as amended, requires Commerce to order the imposition of countervailing duties on imported merchandise upon finding that "the government of a country or any public entity within the territory of a country is providing, directly or indirectly, a countervailable subsidy with respect to the manufacture, production, or export of" that merchandise. 19 U.S.C. § 1671(a)(1); *see also id.* § 1671e. Commerce is also required to order the imposition of antidumping duties on imported merchandise that "is being, or is likely to be, sold in the United States at less than its fair value." *Id.* § 1673(1); *see also id.* § 1673e. The amount of an antidumping duty that Commerce assesses is based on Commerce's calculation of a "dumping margin," which is "the amount by which the normal value exceeds the export price or constructed export price of the subject merchandise." *Id.* § 1677(35)(A).

Commerce cannot impose either type of duty, however, unless the Commission separately determines (as relevant here) that "an industry in the United States (i) is materially injured, or (ii) is threatened with material injury . . . by reason of imports of that merchandise or by reason of sales (or the likelihood of sales) of [the subject] merchandise for importation." *Id.* §§ 1671(a)(2), 1673(2).

B. The Commission's Five-Year Review

Every five years after the publication of an antidumping or countervailing duty order, the Commission is required to conduct a "sunset" review of that order. *Id.* § 1675(c)(1); *Nucor Corp. v. United States*, 32 CIT 1380, 1385, 594 F. Supp. 2d 1320, 1333 (2008), *aff'd*, 601 F.3d 1291 (Fed. Cir. 2010). The Commission's task in conducting this review is to determine whether "revocation of [the] order . . . would be likely to lead to a continuation or recurrence of material injury within a reasonably foreseeable time." 19 U.S.C. § 1675a(a)(1). In doing so, the Commission is to consider the "likely volume, price effect, and impact of imports of the subject merchandise on the industry if the order is revoked or the suspended investigation is terminated." *Id.* If the Commission determines that revocation would likely lead to continued or recurrent material injury, Commerce cannot revoke the order. *Id.* § 1675(d)(2)(B). But if the Commission concludes that revocation would not have this effect, Commerce must

revoke the subject order if Commerce does not separately determine "that dumping or a countervailable subsidy, as the case may be, would be likely to continue or recur . . . ." *Id.* § 1675(d)(2)(A). The Commission's material-injury analysis is thus a critical determinant of whether an antidumping or countervailing duty order will remain in effect after the five-year sunset review.

C. Cumulation in the Five-Year Review Context

In conducting its likely-material-injury analysis, the Commission "may cumulatively assess the volume and effect of imports" from multiple source countries if those imports satisfy certain threshold criteria. 19 U.S.C. § 1675a(a)(7). The imports must be (1) "likely to compete with each other and with domestic like products in the United States market" and (2) not be "likely to have no discernible adverse impact on the domestic industry." *Id.* If these criteria are satisfied, the Commission "may cumulatively assess the volume and effect of imports of the subject merchandise from all countries" subject to review. *Id.* But as the word "may" indicates, the Commission retains discretion *not* to make a cumulative assessment (that is, "cumulate") even where the statutory criteria are satisfied. *Id.* § 1675a(a)(7); *Nucor*, 601 F.3d at 1293. If the Commission declines to cumulate imports from a source country, it proceeds to a likely-material-injury analysis for the decumulated imports on an independent, country-specific basis. *See* 19 U.S.C. § 1675a(a)(2).

Section 1675a does not delineate any factors that the Commission must consider in determining whether to cumulate imports from a given country. *See Nucor*, 601 F.3d at 1295; *Neenah Foundry Co. v. United States*, 25 CIT 702, 709, 155 F. Supp. 2d 766, 772 (2001). The Commission accordingly enjoys "wide latitude" in identifying relevant factors for cumulation in sunset reviews. *Allegheny Ludlum Corp. v. United States*, 30 CIT 1995, 2002, 475 F. Supp. 2d 1370, 1380 (2006). At the same time, however, the Commission's discretion must "be predicated upon a judgment anchored in the language and spirit of the relevant statutes and regulations." *Freeport Mins. Co. v. United States*, 766 F.2d 1029, 1032 (Fed. Cir. 1985).

D. De Minimis Margins and Negligibility

When calculating an antidumping duty, Commerce "shall disregard any weighted average dumping margin that is de minimis . . ." 19 U.S.C. § 1673d(a)(4). "[A] weighted average dumping margin is de minimis if it is less than 2 percent ad valorem or the equivalent specific rate for the subject merchandise." *Id.* § 1673b(b)(3). As Commerce can apply different weighted average dumping margins to

different respondents in an investigation, *id.* § 1677(35)(B), a *de minimis* finding for one respondent does not necessarily compel the termination of an antidumping order with respect to all respondents.

When calculating a countervailing duty, Commerce is to disregard as *de minimis* any countervailable subsidy where "the aggregate of the net countervailable subsidies is less than 1 percent ad valorem or the equivalent specific rate for the subject merchandise." *Id.* § 1671b(b)(4)(A); *see also id.* § 1671d(a)(3).

As these provisions indicate, Commerce's calculation of a *de minimis* margin for dumping or a countervailable subsidy reflects a low degree of dumping or subsidization. The Commission's negligibility analysis, by contrast, involves a straightforward comparison of the volume of dumped or subsidized imports from a country against the volume of all imports of the same merchandise from all countries. "[I]mports from a country of merchandise corresponding to a domestic like product identified by the Commission are 'negligible' if such imports account for less than 3 percent of the volume of all such merchandise imported into the United States . . . ." *Id.* § 1677(24)(A)(i). In an original (non-sunset) material injury investigation, the Commission is directed to terminate the investigation upon determining negligibility. *Id.* § 1671d(b)(1)(B). The five-year review provision, however, does not expressly provide such a requirement. *See id.* § 1675a.

II. History of Relevant Administrative Proceedings

In September 2016, the Commission determined that the U.S. hot-rolled steel industry was materially injured or threatened with material injury by less-than-fair-value (that is, "dumped") imports of hot-rolled steel from Turkey. *See* Certain Hot-Rolled Steel Flat Products from Australia, Brazil, Japan, Korea, the Netherlands, Turkey, and the United Kingdom, Inv. Nos. 701-TA-545–547 and 731-TA-1291–1297 (Final), USITC Pub. 4638, (Sep. 2016) ("*Original Determination* Views"); *see also Original Determination*.

At the same time, the Commission terminated its investigation of material injury by Turkish imports of hot-rolled steel that received countervailable subsidies. *See Original Determination* Views at 14. The Commission explained that Commerce had earlier determined that Turkish hot-rolled steel producer Colakoglu Metalurji A.S. and its affiliates (collectively, "Colakoglu") received a *de minimis* countervailable subsidy margin. *Id.* at 13 (citing *Countervailing Duty Investigation of Certain Hot-Rolled Steel Flat Products From the Republic of Turkey: Final Affirmative Determination*, 81 Fed. Reg. 53433 (Dep't Com. Aug. 12, 2016)). This meant that for the remaining Turkish

producers subject to Commerce's countervailing duty order, including Erdemir, "there is not a potential that subsidized subject imports from Turkey will imminently exceed three percent [that is, the non-negligibility threshold provided by 19 U.S.C. § 1677(24)(A)(i)] of total imports." *Id.* at 14. But because Colakoglu at the time remained subject to Commerce's *Antidumping Order*, the Commission did not make a similar negligibility finding with respect to dumped imports of hot-rolled steel from Turkey. *See id.* at 13 & n.52.

Pursuant to the *Original Determination*, as well as the results of its own investigation, *see Original Antidumping Determination*, Commerce issued an antidumping duty order on Turkish imports of hot-rolled steel in October 2016. *See Antidumping Duty Order*. Commerce calculated dumping margins above the *de minimis* level for both Erdemir and Colakoglu. *Original Antidumping Determination* at 53429.

Later in October 2016, Erdemir and Colakoglu challenged the Original Antidumping Determination in consolidated actions before this court. *See Eregli Demir ve Celik Fabrikalari T.A.S. v. United States*, 44 CIT __, __, 435 F. Supp. 3d 1378, 1379 (2020). And after three remands in that case, *see id.*, Commerce amended the *Antidumping Duty Order*. *See Amended Antidumping Determination*.

In the *Amended Antidumping Determination*, Commerce calculated Colakoglu's dumping margin as zero and excluded Colakoglu's imports from the antidumping duty order. *See Amended Antidumping Determination* at 29400. But Commerce clarified that "[t]his exclusion does not apply to merchandise that is not both produced and exported by Colakoglu." *Id*. Commerce calculated an above *de minimis* dumping margin of 2.73% for Erdemir and accordingly left the antidumping order in place with respect to Erdemir's imports of dumped merchandise. *See id.*; *see also* 19 U.S.C. § 1673b(b)(3).

On May 18, 2020, Erdemir requested that the Commission reconsider its *Original Determination* on account of Commerce's exclusion of Colakoglu from the antidumping order in the *Amended Antidumping Determination*. *See* Letter from Erdemir to ITC, re: Request for Reconsideration (May 18, 2020), P.R. 1 ("Reconsideration Request").

One year later, following, the U.S. Court of Appeals for the Federal Circuit ("Federal Circuit") dismissed an appeal from this court's decision sustaining Commerce's *Amended Antidumping Determination*. *See Eregli Demir ve Celik Fabrikalari T.A.S. v. United States*, No. 20–2003 (Fed. Cir. dismissed June 4, 2021), P.R. 18; *see also Eregli Demir*, 435 F. Supp. 3d 1378. Erdemir then requested that the Commission initiate a Changed Circumstances Review of its *Original Determination* on account of the finality of the *Amended Antidumping*

Determination. *See* Letter from Erdemir to ITC, re: Changed Circumstances Review Request (Sept. 10, 2021), P.R. 18 ("CCR Request"). The Commission denied both the Reconsideration Request and the CCR Request on November 29, 2022. *See Denial of Request To Institute a Section 751(b) Review; Denial of Request To Institute a Section 751(b) Review or Reconsideration Proceeding Concerning the Commission's Affirmative Determination in Investigation No. 731-TA-1296 (Final), Hot-Rolled Steel Flat Products From Turkey*, 87 Fed. Reg. 73331 (ITC Nov. 29, 2022), P.R. 356.

Meanwhile, the Commission conducted a five-year sunset review of the *Original Determination*. Erdemir submitted a pre-hearing administrative brief on September 8, 2022. *See* Pre-Hearing Br., Sept. 8, 2022, P.R. 261, C.R. 267. The Commission held a public hearing on September 15, 2022, *see* Hr'g Tr., Sept. 16, 2022, P.R. 307, and Erdemir submitted a post-hearing administrative brief shortly afterward. *See* Post-Hr'g Br., Sept. 27, 2022, P.R. 323, C.R. 292 ("Erdemir's Post-Hr'g Br.").

The Commission published the results of its sunset review in the *Federal Register* on December 2, 2022. *See Five-Year Determination*. The Commission determined that revoking the antidumping duty order on Turkish imports of hot-rolled steel "would be likely to lead to continuation or recurrence of material injury to an industry in the United States within a reasonably foreseeable time." *Id.* at 74167.

The Commission explained its reasoning at greater length in a separate Commission-issued publication. *See* Hot-Rolled Steel from Australia, Brazil, Japan, Netherlands, Russia, South Korea, Turkey, and the United Kingdom, USITC Pub. No. 5380, Inv. Nos. 701-TA-545–546 and 731-TA-1291–1297 (Review), and 731-TA-808 (Fourth Review) (Nov. 2022), P.R. 355 ("Public Views"), C.R. 336 ("Confidential Views").[2] The Commission explained that in reaching[3] its determination, it cumulatively assessed ("cumulated") less-than-fair-value imports of subject merchandise from Turkey with those from Australia, Japan, the Netherlands, South Korea, Russia, and the United King-

[2] The Commission published both public and confidential versions of this document. As these versions are paginated differently, citations in this opinion refer to both versions.

[3] "The Commission makes its determinations by tallying the votes of the six individual commissioners, each of whom is obligated to determine whether particular imports cause or threaten to cause the requisite harm." *U.S. Steel Grp. v. United States*, 96 F.3d 1352, 1360 (Fed. Cir. 1996). Only five commissioners took part in issuing the *Five-Year Determination*: David S. Johanson, Rhonda K. Schmidtlein, Jason E. Kearns, Randolph J. Stayin, and Amy A. Karpel. While Commissioners Schmidtlein and Stayin dissented as to the majority's decision not to cumulatively assess Brazilian imports of hot-rolled steel, the commissioners were unanimous as to the aspects of the *Five-Year Determination* that are subject to challenge in this case. *See* Public Views at 108; Confidential Views at 156.

dom (but not Brazil, the remaining subject country). *See* Public Views at 67; Confidential Views at 96–97.

III. Procedural History

Erdemir filed a complaint against the Commission before the U.S. Court of International Trade ("CIT") on December 26, 2022. *See* Compl. Five U.S. producers of hot-rolled steel (United States Steel Corporation, Cleveland-*Cliffs* Inc., Steel Dynamics, Inc., SSAB Enterprises, LLC, and Nucor Corporation) then moved to intervene as Defendant-Intervenors. *See* Mot. to Intervene, Jan. 12, 2023, ECF No. 19; Mot. to Intervene., Jan. 24, 2023, ECF No. 21; Mot to Intervene, Jan. 24, 2023, ECF No. 26; Mot. to Intervene, Jan. 25, 2023, ECF No. 31. The court granted each motion. *See* Order, Jan. 12, 2023, ECF No. 20; Order, Jan. 24, 2023, ECF No. 25; Order, Jan. 25, 2023, ECF No. 30; Order, Jan. 26, 2023, ECF No. 35.

On July 14, 2023, Erdemir filed the instant Motion for Judgment on the Agency Record under USCIT Rule 56.2. *See* Pl.'s Mot. for J. on the Agency R., July 14, 2023, ECF No. 45 ("Pl.'s Br."). After filing a motion for an extension of time, *see* Def.'s Mot. for Extension of Time, Sept. 20, 2023, ECF No. 48, which was granted, *see* Order, Sept. 20, 2023, ECF No. 49, the Government filed a response. *See* Def.'s Mem. in Opp'n. to Pl.' Mot. for J. on the Agency R., Nov. 16, 2023, ECF No. 52. Defendant-Intervenors also filed a response, *see* Resp. of Def.-Inters. in Opp'n to Pl.'s Mot. for J. on the Agency R., Nov. 16, 2023, ECF No. 54, and Erdemir filed a reply. *See* Pl.'s Reply, Dec. 21, 2023, ECF No. 57 ("Pl.'s Reply"). After the court scheduled oral argument for April 10, 2024, *see* Order, Mar. 1, 2024, ECF No. 62, Erdemir moved to bifurcate that argument into public and closed sessions. *See* Pl.'s Mot. to Bifurcate Oral Arg., March 9, 2024, ECF No 63. The court denied that motion, *see* Order, Apr. 2, 2024, ECF No. 64, and issued a list of questions to the parties on to the parties later that day. *See* Letter re: Qs. for Oral Arg., Apr. 2, 2024, ECF No. 65. The parties timely filed written responses to those questions. *See* Pl.'s Resp. to Ct.'s Qs. for Oral Arg., Apr. 8, 2024, ECF No. 66; Def.'s Resp. to Ct.'s Qs. for Oral Arg., Apr. 8, 2024, ECF No. 67; Def.-Inters.' Resp. to Ct.'s Qs. for Oral Arg., Apr. 8, 2024, ECF No. 68.

At oral argument, which was held as a single public session, the court invited the parties to file additional written submissions. The parties did so. *See* Pl.'s Post-Oral Arg. Subm., April 22, 2024 ("Pl.'s Supp. Br."), ECF No. 73; Def.-Inters.' Post-Oral Arg. Subm., Apr. 22, 2024, ECF No. 74; Def.'s Post-Oral Arg. Subm., Apr. 22, 2024, ECF No. 75.

JURISDICTION AND STANDARD OF REVIEW

Jurisdiction lies under 28 U.S.C. § 1581(c). The standard of review in this action is set forth in 19 U.S.C. § 1516a(b)(1)(B)(i), which states that "[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 . . . ."

"[A] party challenging the Commission's determination under the substantial evidence standard has chosen a course with a high barrier to reversal." *Nippon Steel Corp. v. United States*, 458 F.3d 1345, 1358 (Fed. Cir. 2006) (internal quotation marks and citation omitted). Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Broadcom Corp. v. Int'l Trade Comm'n*, 28 F.4th 240, 249 (Fed. Cir. 2022) (internal quotation marks and citation omitted). To be supported by substantial evidence, a determination must account for "whatever in the record fairly detracts from its weight," including "contradictory evidence or evidence from which conflicting inferences could be drawn." *Suramerica de Aleaciones Laminadas, C.A. v. United States*, 44 F.3d 978, 985 (Fed. Cir. 1994) (quoting *Universal Camera Corp. v. N.L.R.B.*, 340 U.S. 474, 487–88 (1951)).

DISCUSSION

Erdemir presents two main arguments: that (1) the *Five-Year Determination* is not in accordance with law because it does not rest on a predicate material injury as required by 19 U.S.C. § 1675a(a)(1)(A), and that (2) it is unsupported by substantial evidence because the Commission improperly considered imports of non-subject merchandise. Neither argument is availing.

I. The Five-Year Determination is in Accordance With Law

Erdemir first argues that the Commission could not have lawfully determined (as it did) that revoking the *Antidumping Order* "would be likely to lead to continuation or recurrence of material injury." Pl.'s Br. at 18 (quoting 19 U.S.C. § 1675a(a)(1)). This, Erdemir asserts, is because the *Amended Antidumping Determination*'s negligibility finding with respect to Colakoglu rendered the Commission's *Original Determination* inoperative as a means of establishing a material injury by any Turkish producer of subject merchandise—and that without an underlying material injury, there can be no "continuation or recurrence" of that injury as a matter of law. *See* 19 U.S.C. § 1675a(a)(1)(A). In a nutshell: "The Commission cannot find that material injury is likely to continue or recur because of subject Turkish

imports—which were negligible during the [Period of Investigation]—did not previously cause material injury." Pl.'s Br. at 23.

This argument falters because the Commission's *Original Determination* remains a final and binding agency action. Erdemir did not challenge it by the appeal deadline, and separate litigation related to Erdemir's petitions for reconsideration and a changed circumstances review of the *Original Determination* is currently pending before another judge of this court. *See Eregli Demir ve Celik Fabrikalari T.A.S. v. United States Int'l Trade Comm'n*, Court No. 22–349 (CIT filed Dec. 26, 2022); *see also Eregli Demir ve Celik Fabrikalari T.A.S. v. United States Int'l Trade Comm'n*, Court No. 22–350 (CIT filed Dec. 26, 2022). (Oral argument in those cases took place on June 13, 2024). Accordingly, despite possible tension with Commerce's *Amended Antidumping Determination*,[4] the *Original Determination* remains a current statement of the Commission's determination that "an industry in the United States is materially injured by reason of subject imports" of dumped hot-rolled steel from Turkey. *Original Determination* at 52. The *Original Determination* establishes a predicate material injury—a "condition precedent," as Erdemir styles it, Pl.'s Br. at 21—from which the Commission may lawfully find that a "continuation or recurrence" will "likely" ensue.[5]

The court declines Erdemir's suggestion that it treat elements of the *Original Determination* as having been "nullifie[d]" by Commerce's subsequent *Amended Antidumping Determination*. Pl.'s Br. at 23. Doing so would deprive all interested parties, including Erdemir, of the ability to ascertain the present legal effect of the Commission's *Original Determination* by reference to its published text. This, in turn, would upset the basic principles of finality and certainty that underlie administrative law. *See Vt. Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, Inc.*, 435 U.S. 519, 554–55, (1978) (quoting *Interstate Com. Comm'n v. Jersey City*, 322 U.S. 503, 514–15 (1944));

[4] The court need not, and does not, reach the issue of whether the *Amended Antidumping Determination* is ultimately reconcilable with the *Original Determination*.

[5] All parties rest aspects of their arguments on the *Statement of Administrative Action accompanying the Uruguay Rounds Agreements Act*, H.R. Doc. No. 103–316, vol. I, *reprinted in* 1994 U.S.C.C.A.N. 4040 ("*SAA*"). Erdemir asserts that the SAA "carries authoritative weight." Pl.'s Reply at 10 n.3 (quoting *AK Steel Corp. v. United States*, 226 F.3d 1361, 1368 (Fed. Cir. 2000)). The statutory provision to which this quoted language refers, however, does not elevate the SAA to the status of a statute. *See* 19 U.S.C. § 3512(d). It limits the authority of the SAA to "judicial proceeding[s] in which a question arises concerning . . . interpretation or application" of the Uruguay Round Agreements Act. *Id.* And no argument in this case, as briefed by the parties, turns on such a question of interpretation or application. *Cf. AK Steel*, 226 F.3d at 1367 (invoking the SAA to analyze, through close statutory interpretation, the effect of Congress's revision of a statute). Accordingly, the court does not consider the SAA in reaching its decision in this case. Nor would such consideration be necessary to the court's disposition.

see also ThyssenKrupp Acciai Speciali Terni S.p.A. v. United States, 603 F.3d 928, 934 (Fed. Cir. 2010) ("Parties to a proceeding have an interest in relying on final decisions of adjudicatory bodies.").

Preserving the legal effect of final and unrevoked administrative determinations is particularly important in the trade context, where special complexities heighten the need for beacons of certainty. The administration of U.S. trade remedy laws involves the coordinated behavior of several agencies. This behavior is iterated, and not synchronously: Commerce may conduct annual administrative reviews of its determinations, and the Commission conducts five-year sunset reviews like the one Erdemir challenges in this case. Judicial review complicates matters even further, as do court-ordered remand redeterminations—which take time to prepare and may themselves be remanded. *See, e.g.*, *Green Farms Seafood Joint Stock Co. v. United States*, 48 CIT __, __, Slip Op. 24–46, at 1 (Apr. 17, 2024) (remanding, in a case involving two consolidated challenges, Commerce's determination in the seventeenth administrative review of an antidumping order that was originally issued in 2003). The result is that tracing the determinations underlying a given antidumping or countervailing duty order—each of which represents a "consummation of the administrative process," *Chicago & S. Air Lines v. Waterman S. S. Corp.*, 333 U.S. 103, 113 (1948), can be a perplexing endeavor. A party seeking to understand its obligations and preserve its rights must keep track of a host of administrative and judicial developments. *See, e.g.*, *Goodluck India Ltd. v. United States*, 47 CIT __, __, 670 F. Supp. 3d 1353, 1379–80 (2023).

It is thanks to administrative finality that this task is merely difficult and not impossible. When Commerce or the Commission issues or revokes a determination, it must describe the nature and grounds of its decision. *See* 19 U.S.C. §§ 1677f, 1673d(d). This means that even though a particular duty order may rest a complex network of agency actions, the network remains susceptible to analysis as a set of discrete, indexed, and outwardly legible components—each of which, unless further modified or superseded, can be safely relied on as an order from which "rights or obligations have been determined or legal consequences will flow." *Port of Bos. Marine Terminal Ass'n v. Rederiaktiebolaget Transatlantic*, 400 U.S. 62, 71 (1970).

The approach Erdemir urges the court to adopt would leave navigators of the trade law labyrinth without this crucial navigational thread. An interested party could not simply look to a Commission material injury determination as a controlling statement of the legal

effects that flowed at the time of issuance. Instead, those effects would be subject to retroactive, undefined revisions and nullifications by subsequent non-Commission determinations—which, like the *Amended Antidumping Determination*, do not purport to automatically execute a change in the Commission's material injury determination.

Treating the *Amended Antidumping Determination* as a de facto amendment to the *Original Determination* would also frustrate the administrative scheme that Commerce and the Commission are jointly charged with administering. As the court recognized early on, "[t]he very strict controls on administrative review of prior determinations . . . are [a] good indication that Congress did not want these determinations to remain in a state of flux". *Royal Bus. Machines, Inc. v. United States*, 1 CIT 80, 87 n.18, 507 F. Supp. 1007, 1014 n.18 (1980), *aff'd*, 669 F.2d 692 (C.C.P.A. 1982). Pursuing "what the court perceives to be the best or correct result would render judicial review totally unpredictable." *PSC VSMPO-Avisma Corp. v. United States*, 688 F.3d 751, 761 (Fed. Cir. 2012) (quoting *Vt. Yankee*, 435 U.S. at 546) (internal quotation marks omitted).

If Commerce determinations could impliedly divest Commission determinations of their legal effect, parties (and the court) would be left to guess as to whether a divestment has occurred—and, if it has occurred, what its boundaries are. Sophisticated actors can make sophisticated guesses, but at the level of complexity typical of trade remedy–related determinations there is simply no way to deduce the totality of downstream legal consequences. Ascertaining those consequences is the province of litigation, not divination: if a party wants to cut off the legal effect of a past determination that it alleges is irreconcilable with subsequent determinations, it can sue for that remedy. Otherwise, the past determination remains in force.

Consider the nuances of the legal effect that Erdemir attributes to the *Amended Antidumping Determination*. It is not a "straightforward mathematical adjustment." *NTN Bearing Corp. v. United States*, 74 F.3d 1204, 1208 (Fed. Cir. 1995). Erdemir argues that if Commerce calculates a *de minimis* dumping margin for Colakoglu, the Commission should consider all remaining entries dumped by other Turkish importers to be negligible. Pl.'s Br. at 19. Erdemir further insists that if the Commission makes a negligibility determination for all Turkish importers on the basis of Commerce's finding that Colakoglu's countervailable subsidies are *de minimis*, the Commission must also make a parallel negligibility determination for all Turkish importers upon Commerce's amended finding that Colakoglu's dumping margin is *de minimis*. *Id.* Along the way, Erdemir

implies that a *de minimis* dumping margin (as defined by 19 U.S.C. § 1673b(b)(3)) necessarily compels the Commission's finding of negligibility as provided in 19 U.S.C. § 1673d(b)(1)(B).

This is a non-obvious line of reasoning: erroneous or not, it is at the very least unclear without the aid of substantial explanation. And Erdemir effectively[6] asks the court to retroactively incorporate its conclusions into the *Original Determination* without any kind of administrative proceeding or notice. This of course is an action that the Commission itself is not even authorized by statute to perform, and the court declines to treat it as completed. If Erdemir wishes to sap the *Original Determination* of the force that establishes a "condition precedent" material injury, it must challenge (or have challenged) the *Original Determination* itself. That course of action would give the Commission a chance to consider Erdemir's negligibility arguments in the first instance.

The court observes that Erdemir has separately petitioned the Commission for reconsideration of the *Original Determination* and for the initiation of a changed circumstance review. Although the Commission denied both petitions, Erdemir has challenged both denials in separate actions before the CIT. *See Eregli Demir*, Court No. 22–349; *Eregli Demir*, Court No. 22–350. The court in this case expresses no view as to the potential disposition of those actions, which (as noted above) are before a different judge. The court merely observes that if Erdemir hopes to arrest the continuing legal effects of an *Original Determination* that it asserts is out of date, there exist more suitable channels for that endeavor than the one it has chosen here.

This is accordingly not a circumstance where "equity will, for the purposes of justice, treat that to have been done, which ought to have been done." *Taylor v. Longworth*, 39 U.S. 172, 177 (1840) (Story, J.).

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[6] Erdemir argues that "[t]he Commission, in declining to initiate the [changed circumstance review] on grounds of duplicativeness, essentially wrote into the sunset review the mandate to consider the impact of the changed circumstances, *i.e.*, the Colakoglu exclusion, and then proceeded to ignore its own mandate." Pl.'s Supp. Br. at 3. Whether this is a valid imputation or not, such "writing-in" is beyond the Commission's power. The Commission cannot replace by declaration the parameters of a review that Congress has imposed through legislation. *See Civ. Aeronautics Bd. v. Delta Air Lines, Inc.*, 367 U.S. 316, 334 (1961) ("[W]e think that both administrative and judicial feelings have been opposed to the proposition that the agencies may expand their powers of reconsideration without a solid foundation in the language of the statute." It may be (although the court does not entertain the question here) that the Commission erroneously declined to initiate a changed circumstance review. *See Eregli Demir*, Court No. 22–350. Erroneous or not, however, that decision does not broaden the statutory scope of the Commission's sunset review.).

II. The Five-Year Determination is Supported by Substantial Evidence

Erdemir also challenges the Commission's exercise of discretion to cumulatively assess (that is, "cumulate") imports of subject merchandise alongside imports from other countries. Erdemir argues that the cumulation determination is unsupported by substantial evidence and should accordingly be held unlawful pursuant to 19 U.S.C. § 1516a(b)(l)(B)(i). This, Erdemir alleges, is because the Commission improperly considered Colakoglu's non-subject imports in finding that Turkish imports of subject merchandise would not be "likely to have no discernible adverse impact on the domestic industry." *See* Pl.'s Br. at 24; 19 U.S.C. § 1675a(a)(7). According to Erdemir, "[a]ny analysis including Colakoglu's non-subject imports is in error and cannot provide record support for the Commission's findings or conclusions." Pl.'s Br. at 26.

This argument is without merit because (1) the Commission did not consider Colakoglu's non-subject imports as support for its discernible-adverse-impact finding and (2) the Commission reasonably concluded that likely imports of subject merchandise from Turkey—even without Colakoglu's sales—would clear the low threshold for discernibility.

A. The Commission did not Consider Colakoglu's Data in its Cumulation Analysis

Although Erdemir's brief refers generally to a "cumulation analysis,"[7] the Commission's determination to cumulate actually rests on two separate statutorily mandated inquiries. 19 U.S.C. § 1675a(a)(7). Before exercising its discretion to cumulatively assess imports, the Commission must assess (1) whether the imports to be cumulated are "likely to compete with each other and with domestic like products in the United States market,"[8] and (2) whether the imports are "likely to

[7] As noted above, the Commission's task in a Five-Year review of a duty order is to determine whether "revocation of [the] order . . . would be likely to lead to a continuation or recurrence of material injury within a reasonably foreseeable time." l9 U.S.C. § l675a(a)(l).

[8] The Commission's practice in carrying out this statutory mandate is to undertake what it terms a "conditions-of-competition" analysis. *See Nucor Corp. v. United States*, 601 F.3d 1291, 1296 (Fed. Cir. 2010).

have no discernible adverse impact on the domestic industry." *Id.* The statute's text confirms that these are independent prerequisites. [9]

In the proceeding before the Commission, Erdemir asserted that the second "no discernible impact" prerequisite was not satisfied. *See* Erdemir's Posthearing Br. at 14. The Commission summarized this challenge and responded to it as follows:

> Regarding Erdemir's argument that, since imports of hot-rolled steel from Colakoglu are not subject merchandise in these reviews, subject imports from Turkey will not have a discernible adverse impact, we disagree. Given the relative attractiveness of the U.S. market and the Turkish industry's excess capacity, we find that it is not likely that there will be no discernible adverse impact if the antidumping duty order on hot-rolled steel from Turkey is revoked even if exports from Colakoglu are no longer subject merchandise

Public Views at 48 n.298; Confidential Views at 68 n.298. The Commission supported its reference to the attractiveness of the U.S. market with a discussion of four points: the average unit value of shipments from Turkey to the United States, the acknowledgment of a respondent in its Foreign Producer Questionnaire Response that the U.S.'s market offers higher prices than other countries' markets, the trend in Erdemir's export volume during the investigation underlying the *Original Determination*, and the fact that Turkish imports of hot-rolled steel are subject to an antidumping order in the European Union. *See* Public Views at 47–48; Confidential Views at 68. The Commission supported its reference to the Turkish industry's excess capacity with a discussion of Turkish producers' reported excess capacity in 2021 and an individual non-Colakoglu respondent's plan to expand capacity for 2023. *See* Public Views at 46–47; Confidential Views at 67–68.

None of these factors involved Colakoglu's U.S. sales of non-subject merchandise. While the Commission did reference data collected during the original investigation—that is, before Colakoglu's imports lost

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[9] 19 U.S.C. § 1675a(a)(7) provides as follows:

> [T]he Commission may cumulatively assess the volume and effect of imports of the subject merchandise from all countries with respect to which reviews . . . were initiated on the same day, if such imports would be likely to compete with each other and with domestic like products in the United States market. The Commission shall not cumulatively assess the volume and effects of imports of the subject merchandise in a case in which it determines that such imports are likely to have no discernible adverse impact on the domestic industry

Id.

their status as subject imports following the *Amended Antidumping Determination*—the Commission generally employed those references either as background[10] or as a means of establishing an illustrative comparison with data collected during the review underlying the *Five-Year Determination*. *See id.* at 67. In the one instance where the Commission did apparently directly rely on *Original Determination* data, that data pertained to a trend in the commercial activity of Erdemir alone. *See id.* at 68. At no point did the Commission directly rely on a data set that includes Colakoglu's pre-exclusion imports as a basis for its negative "no discernible adverse impact" finding. *See id.* at 64–68. As the Commission stated, "Colakoglu is no longer a producer of subject merchandise and data for it is not included in the data for subject imports from Turkey during the current review." *Id.* at 64 n.276.

B. The Commission Reasonably Concluded that Turkish Hot-Rolled Steel Imports Would Not Have No Discernible Adverse Impact on Domestic Industry

Erdemir argues that without the "taint" of Colakoglu's data, the Commission could not have lawfully determined that Turkish hot-rolled steel imports would not have no discernible adverse impact on U.S. industry. *See* Pl.'s Reply at 20. This, Erdemir suggests, is because the collective value of non-Colakoglu imports during the review period underlying the *Five-Year Determination* was too low to effect a discernible impact. *See id.*; *see also* Pl.'s Br. at 29–30. Erdemir raised the same argument during the Commission proceeding below: without factoring in Colakoglu's imports, Erdemir argued, "[Hot-rolled steel] imports from Turkey have remained limited . . . with no expectation of increased imports from subject Turkish producers." Erdemir's Post-Hr'g Br. at 14–15.

Discernibility, however, is a low bar. "[S]atisfying the 'no discernible adverse impact' element of the cumulation determination merely requires a finding that a set of imports clears a baseline discernability threshold for adverse impact." *Cleveland-Cliffs Inc. v. United States*, 48 CIT __, __, Slip Op. 24–34, at 21–22 (Mar. 20, 2024) (citing *Nippon Steel Corp. v. U.S. Int'l Trade Comm'n*, 494 F.3d 1371, 1379 n.6 (Fed. Cir. 2007)). An impact need not even inflict material injury—that is,

[10] Erdemir asserts that "[i]n the very first sentence of the Commission's cumulation analysis for Turkey [the Commission] included Colakoglu's non-subject imports in a review of subject import volume from Turkey." Pl.'s Br. at 25. But the fact that the Commission referenced this information early on—by way of background, as context later clarifies—does not mean that the Commission relied on Colakoglu's data from the *Original Determination* in reaching its discernible-adverse-impact finding for the *Five-Year Determination*.

"harm which is not inconsequential, immaterial, or unimportant," 19 U.S.C. § 1677—to be discernible. *See Usinor v. United States*, 28 CIT 1107, 1123, 342 F. Supp. 2d 1267, 1281–82 (2004). Accordingly, as the court "may not reweigh the evidence or substitute its own judgment for that of the agency," *id.* at 1111, the court concludes that the Commission cited "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion" when it rejected Erdemir's preferred weighting. *Broadcom*, 28 F.4th at 249 (internal quotation marks and citation omitted).

C. The Commission's Determination to Cumulate Turkish Imports Is Reconcilable With its Determination not to Cumulate Brazilian Imports

In the *Five-Year Determination*, the Commission declined to cumulate imports of hot-rolled steel from Brazil. Erdemir argues that this presents an inconsistency: "[t]he Commission's failure to exclude Colakoglu's non-subject imports from its baseline analysis of investigation data tainted the cumulation analysis such that it cannot be reconciled with the Commission's decision not to cumulate subject imports from Brazil." Pl.'s Br. at 31.

Even assuming the validity of Erdemir's predicate assertion that the Commission's analysis was "tainted" (an assertion which, as explained above, the court finds unpersuasive), Erdemir's argument is misplaced. Here, Erdemir challenges only the Commission's finding that subject imports from Turkey would not inflict no discernible impact on U.S. industry. But when the Commission conducted the same discernible-impact inquiry regarding imports from Brazil, the Commission also found discernibility. *See* Public Views at 32, Confidential Views at 44. These findings are not just reconcilable—they are the same. The Commission declined to cumulate Brazilian imports for the entirely distinct reason that "subject imports from Brazil would not be likely to compete under similar conditions of competition with subject imports from other subject countries . . . ." Public Views at 59, Confidential Views at 86.

Erdemir claims that "[t]he Commission's division of the cumulation analysis between 'no discernible adverse impact' and 'conditions of competition' is effectively meaningless given the similarity of analysis between the two." Pl.'s Br. at 34. That is not so. For one thing, the Commission does not divide its cumulation analysis on its own initiative. Section 1675a(a)(7) requires separate and independent inquiries. It is possible, for example, that imports that do not "compete

with each other and with domestic like products in the United States market" could nevertheless inflict a "discernible adverse impact on the domestic industry." *Id.*; *see, e.g.*, *Allegheny Ludlum*, 30 CIT at 2000.

The two inquiries also involve different metrics. In a conditions-of-competition inquiry, the Commission assesses the degree of similarity among markets that export subject merchandise. *See id.* at 19–20; *see also U.S. Steel Corp. v. United States*, 36 CIT 1172, 1177–78 (2012), 856 F. Supp. 2d 1318, 1324, *aff'd*, 550 F. App'x 893 (Fed. Cir. 2014) (noting that the Commission "thoroughly examined and identified potential differences in conditions of competition relating to export orientation, historic volume trends, export market focus, and historic pricing patterns"). In the discernibility analysis, the Commission looks not to difference but whether the imports in question clear a low threshold of discernibility. *See Nippon Steel,* 494 F.3d at 1379 n.6; *Allegheny Ludlum*, 30 CIT at 2000 ("In its determination of whether imports are likely to have no discernible adverse impact on the domestic industry, the Commission generally considers the likely volume of subject imports . . . ."). Even though the Commission's analyses of these metrics may rest on overlapping data, *see* Pl.'s Br. at 31, it does not follow that data which cuts against a finding of similar conditions of competition must also cut against a finding of discernibility. Import volume is only one of the many axes along which conditions of competition can differ.

For this reason, the court concludes that the Commission's cumulation of imports from Turkey is not irreconcilable with its determination not to cumulate imports from Brazil.

CONCLUSION

The aspects of the Commission's *Five-Year Determination* that Erdemir challenges are in accordance with law and supported by substantial evidence. The court concludes that (1) Commerce's *Amended Antidumping Determination* did not foreclose an affirmative material injury determination as to Turkey in the Commission's sunset review and that (2) the Commission's determination to cumulatively assess subject Turkish imports of hot-rolled steel is supported by substantial evidence.

The Commission's *Five-Year Determination* is sustained. Judgment on the agency record will enter accordingly for Defendant and Defendant-Intervenors.

SO ORDERED.
Dated: June 20, 2024
New York, New York

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

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