U.S. Customs and Border Protection

CBP Dec. 24–11

CUSTOMS USER FEES TO BE ADJUSTED FOR INFLATION IN FISCAL YEAR 2025

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

ACTION: General notice.

SUMMARY: This document announces that U.S. Customs and Border Protection (CBP) is adjusting certain customs user fees and corresponding limitations established by the Consolidated Omnibus Budget Reconciliation Act (COBRA) for Fiscal Year 2025 in accordance with the Fixing America's Surface Transportation Act (FAST Act) as implemented by the CBP regulations.

DATES: The adjusted amounts of customs COBRA user fees and their corresponding limitations set forth in this notice for Fiscal Year 2025 are required as of October 1, 2024.

FOR FURTHER INFORMATION CONTACT: Kari Deppe, Assistant Director—User Fee and Reimbursable Controls Branch, Office of Finance, 317–294–2144, *UserFeeNotices@cbp.dhs.gov.*

SUPPLEMENTARY INFORMATION:

I. Background

A. Adjustments of Customs COBRA User Fees and Corresponding Limitations for Inflation

On December 4, 2015, the Fixing America's Surface Transportation Act (FAST Act, Pub. L. 114–94) was signed into law. Section 32201 of the FAST Act amended section 13031 of the Consolidated Omnibus Budget Reconciliation Act (COBRA) of 1985 (19 U.S.C. 58c) by requiring the Secretary of the Treasury (Secretary) to adjust certain customs COBRA user fees and corresponding limitations to reflect certain increases in inflation.

Sections 24.22 and 24.23 of title 19 of the Code of Federal Regulations (19 CFR 24.22 and 24.23) describe the procedures that implement the requirements of the FAST Act. Specifically, paragraph (k) in

section 24.22 (19 CFR 24.22(k)) sets forth the methodology to determine the change in inflation as well as the factor by which the fees and limitations will be adjusted, if necessary. The fees and limitations subject to adjustment, which are set forth in Appendix A and Appendix B of part 24, include the commercial vessel arrival fees, commercial truck arrival fees, railroad car arrival fees, private vessel arrival fees, private aircraft arrival fees, commercial aircraft and vessel passenger arrival fees, dutiable mail fees, customs broker permit user fees, barges and other bulk carriers arrival fees, and merchandise processing fees, as well as the corresponding limitations.

B. Determination of Whether an Adjustment Is Necessary for Fiscal Year 2025

In accordance with 19 CFR 24.22, CBP must determine annually whether the fees and limitations must be adjusted to reflect inflation. For Fiscal Year 2025, CBP is making this determination by comparing the average of the Consumer Price Index—All Urban Consumers, U.S. All items, 1982–1984 (CPI–U) for the current year (June 2023–May 2024) with the average of the CPI–U for the comparison year (June 2022–May 2023) to determine the change in inflation, if any. If there is an increase in the CPI–U of greater than one (1) percent, CBP must adjust the customs COBRA user fees and corresponding limitations using the methodology set forth in 19 CFR 24.22(k). Following the steps provided in paragraph (k)(2) of section 24.22, CBP has determined that the increase in the CPI–U between the most recent June to May twelve-month period (June 2023–May 2024) and the comparison year (June 2022–May 2023) is 3.35 [1] percent. As the increase in the CPI–U is greater than one (1) percent, the customs COBRA user fees and corresponding limitations must be adjusted for Fiscal Year 2025.

C. Determination of the Adjusted Fees and Limitations

Using the methodology set forth in section 24.22(k)(2) of the CBP regulations (19 CFR 24.22(k)), CBP has determined that the factor by which the base fees and limitations will be adjusted is 30.849 percent (base fees and limitations can be found in Appendices A and B to part 24 of title 19). In reaching this determination, CBP calculated the values for each variable found in paragraph (k) of 19 CFR 24.22 as follows:

[1] The figures provided in this notice may be rounded for publication purposes only. The calculations for the adjusted fees and limitations were made using unrounded figures, unless otherwise noted.

- The arithmetic average of the CPI–U for June 2023–May 2024, referred to as (A) in the CBP regulations, is 308.815;
- The arithmetic average of the CPI–U for Fiscal Year 2014, referred to as (B), is 236.009;
- The arithmetic average of the CPI–U for the comparison year (June 2022–May 2023), referred to as (C), is 298.952;
- The difference between the arithmetic averages of the CPI–U of the comparison year (June 2022–May 2023) and the current year (June 2023–May 2024), referred to as (D), is 9.863;
- This difference rounded to the nearest whole number, referred to as (E), is 10;
- The percentage change in the arithmetic averages of the CPI–U of the comparison year (June 2022–May 2023) and the current year (June 2023–May 2024), referred to as (F), is 3.35 percent;
- The difference in the arithmetic average of the CPI–U between the current year (June 2023–May 2024) and the base year (Fiscal Year 2014), referred to as (G), is 72.806; and
- Lastly, the percentage change in the CPI–U from the base year (Fiscal Year 2014) to the current year (June 2023–May 2024), referred to as (H), is 30.849 percent.

D. Announcement of New Fees and Limitations

The adjusted amounts of customs COBRA user fees and their corresponding limitations for Fiscal Year 2025, as adjusted by 30.849 percent, and set forth below, are required as of October 1, 2024.

Table 1 provides the fees and limitations found in 19 CFR 24.22 as adjusted for Fiscal Year 2025, and Table 2 provides the fees and limitations found in 19 CFR 24.23 as adjusted for Fiscal Year 2025.

TABLE 1—CUSTOMS COBRA USER FEES AND LIMITATIONS FOUND IN 19 CFR 24.22 AS ADJUSTED FOR FISCAL YEAR 2025

19 U.S.C. 58c	19 CFR 24.22	Customs COBRA user fee/ limitation	New fee/ limitation adjusted in accordance with the FAST Act
(a)(1)	(b)(1)(i)	Fee: Commercial Vessel Arrival Fee	$571.81
(b)(5)(A)	(b)(1)(ii)	Limitation: Calendar Year Maximum for Commercial Vessel Arrival Fees.	7,792.05
(a)(8)	(b)(2)(i)	Fee: Barges and Other Bulk Carriers Arrival Fee	143.93

19 U.S.C. 58c	19 CFR 24.22	Customs COBRA user fee/ limitation	New fee/ limitation adjusted in accordance with the FAST Act
(b)(6)	(b)(2)(ii)	Limitation: Calendar Year Maximum for Barges and Other Bulk Carriers Arrival Fees.	1,962.73
(a)(2)	(c)(1)	Fee: Commercial Truck Arrival Fee [2] [3]	7.20
(b)(2)	(c)(2) and (3) .	Limitation: Commercial Truck Calendar Year Prepayment Fee [4]	130.85
(a)(3)	(d)(1)	Fee: Railroad Car Arrival Fee	10.80
(b)(3)	(d)(2) and (3) .	Limitation: Railroad Car Calendar Year Prepayment Fee	130.85
(a)(4)	(e)(1) and (2) .	Fee and Limitation: Private Vessel or Private Aircraft First Arrival/Calendar Year Prepayment Fee.	35.98
(a)(6)	(f)	Fee: Dutiable Mail Fee	7.20
(a)(5)(A)	(g)(1)(i)	Fee: Commercial Vessel or Commercial Aircraft Passenger Arrival Fee	7.20
(a)(5)(B)	(g)(1)(ii)	Fee: Commercial Vessel Passenger Arrival Fee (from one of the territories and possessions of the United States).	2.53
(a)(7)	(h)	Fee: Customs Broker Permit User Fee	180.57

TABLE 2—CUSTOMS COBRA USER FEES AND LIMITATIONS FOUND IN 19 CFR 24.23 AS ADJUSTED FOR FISCAL YEAR 2025

[2] The Commercial Truck Arrival Fee is the CBP fee only; it does not include the fiscal year 2025 United States Department of Agriculture (USDA) Animal and Plant Health Inspection Service (APHIS) Agricultural and Quarantine Inspection (AQI) User Fee ($12.40) that is collected by CBP on behalf of USDA to make a total Single Crossing Fee of $19.60. *See* 7 CFR 354.3(c) and 19 CFR 24.22(c)(1). Once eighteen Single Crossing Fees have been paid and used for a vehicle identification number (VIN)/vehicle in a Decal and Transponder Online Procurement System (DTOPS) account within a calendar year, the payment required for the nineteenth (and subsequent) single-crossing is only the $12.40 AQI fee and no longer includes CBP's $7.20 Commercial Truck Arrival fee (for the remainder of that calendar year). For APHIS AQI User Fee information, see: *https://www.aphis.usda.gov/aqi/fees.*

[3] The Commercial Truck Arrival fee, as adjusted by the terms of 19 CFR 24.22(k), is evenly divided by 0.05, so no further adjustment is made. *See* 19 CFR 24.22(c)(1).

[4] The Commercial Truck Calendar Year Prepayment Fee is the CBP fee only; it does not include the fiscal year 2025 AQI Commercial Truck with Transponder Fee ($622.00) that is collected by CBP on behalf of APHIS to make the total Commercial Vehicle Transponder Annual User Fee of $752.85.

19 U.S.C. 58c	19 CFR 24.23	Customs COBRA user fee/ limitation	New fee/ limitation adjusted in accordance with the FAST Act
(b)(9)(A)(ii)	(b)(1)(i)(A)	Fee: Express Consignment Carrier/Centralized Hub Facility Fee, Per Individual Waybill/Bill of Lading Fee.	$1.31
(b)(9)(B)(i).....	(b)(4)(ii) [5]	Limitation: Minimum Express Consignment Carrier/ Centralized Hub Facility Fee [6] .	0.46
(b)(9)(B)(i).....	(b)(4)(ii) [7]	Limitation: Maximum Express Consignment Carrier/ Centralized Hub Facility Fee.	1.31
(a)(9)(B)(i); (b)(8)(A)(i).....	(b)(1)(i)(B) [8] ...	Limitation: Minimum Merchandise Processing Fee [9] ...	32.71
(a)(9)(B)(i); (b)(8)(A)(i).....	(b)(1)(i)(B) [10] .	Limitation: Maximum Merchandise Processing Fee [11] [12]	634.62
(b)(8)(A)(ii)	(b)(1)(ii)	Fee: Surcharge for Manual Entry or Release	3.93
(a)(10)(C)(i).....	(b)(2)(i).....	Fee: Informal Entry or Release; Automated and Not Prepared by CBP Personnel.	2.62
(a)(10)(C)(ii) ..	(b)(2)(ii)	Fee: Informal Entry or Release; Manual and Not Prepared by CBP Personnel.	7.85

[5] Appendix B of part 24 inadvertently included a reference to paragraph (b)(1)(i)(B)(2) of section 24.23. However, the reference should have been to paragraph (b)(4)(ii). CBP intends to publish a future document in the **Federal Register** to make several technical corrections to part 24 of title 19 of the CFR, including corrections to Appendix B of part 24. The technical corrections will also address the inadvertent errors specified in footnotes 7, 8, and 10 below.

[6] Although the minimum limitation is published, the fee charged is the fee required by 19 U.S.C. 58c(b)(9)(A)(ii).

[7] Appendix B of part 24 inadvertently included a reference to paragraph (b)(1)(i)(B)(2) of section 24.23. However, the reference should have been to paragraph (b)(4)(ii).

[8] Appendix B of part 24 inadvertently included a reference to paragraph (b)(1)(i)(B)(1) of section 24.23. However, the reference should have been to paragraph (b)(1)(i)(B).

[9] Only the limitation is increasing; the *ad valorem* rate of 0.3464 percent remains the same. *See* 82 FR 50523 (November 1, 2017).

[10] Appendix B of part 24 inadvertently included a reference to paragraph (b)(1)(i)(B)(1) of section 24.23. However, the reference should have been to paragraph (b)(1)(i)(B).

[11] Only the limitation is increasing; the *ad valorem* rate of 0.3464 percent remains the same. *See* 82 FR 50523 (November 1, 2017).

[12] For monthly pipeline entries, see *https://www.cbp.gov/trade/entry-summary/pipeline-monthly-entry-processing/pipeline-line-qa.*

19 U.S.C. 58c	19 CFR 24.23	Customs COBRA user fee/ limitation	New fee/ limitation adjusted in accordance with the FAST Act
(a)(10)(C)(iii) ..	(b)(2)(iii)	Fee: Informal Entry or Release; Manual; Prepared by CBP Personnel	11.78
(b)(9)(A)(ii)	(b)(4)	Fee: Express Consignment Carrier/Centralized Hub Facility Fee, Per Individual Waybill/Bill of Lading Fee.	1.31

Tables 1 and 2, setting forth the adjusted fees and limitations for Fiscal Year 2025, will also be maintained for the public's convenience on the CBP website at *www.cbp.gov.*

Troy A. Miller, Senior Official Performing the Duties of the Commissioner, having reviewed and approved this document, has delegated the authority to electronically sign this document to the Director (or Acting Director, if applicable) of the Regulations and Disclosure Law Division of CBP, for purposes of publication in the **Federal Register**.

ROBERT F. ALTNEU,
Director,
Regulations & Disclosure Law Division,
Regulations & Rulings, Office of Trade, U.S.
Customs and Border Protection.

DEPARTMENT OF THE TREASURY

19 CFR PART 12

CBP DEC. 24–12

RIN 1515–AE66

IMPOSITION OF IMPORT RESTRICTIONS ON ARCHAEOLOGICAL AND ETHNOLOGICAL MATERIAL OF TUNISIA

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

ACTION: Final rule.

SUMMARY: This document amends the U.S. Customs and Border Protection (CBP) regulations to reflect the imposition of import restrictions on certain archaeological and ethnological material from

the Republic of Tunisia (Tunisia). These restrictions are imposed pursuant to an agreement between the United States and Tunisia, entered into under the authority of the Convention on Cultural Property Implementation Act. This document amends the CBP regulations by adding Tunisia to the list of countries which have bilateral agreements with the United States imposing cultural property import restrictions and contains the Designated List, describing the archaeological and ethnological materials to which the restrictions apply.

DATES: Effective on July 22, 2024.

FOR FURTHER INFORMATION CONTACT: For legal aspects, W. Richmond Beevers, Chief, Cargo Security, Carriers and Restricted Merchandise Branch, Regulations and Rulings, Office of Trade, (202) 325–0084, *ot-otrrculturalproperty@cbp.dhs.gov*. For operational aspects, Julie L. Stoeber, Chief, 1USG Branch, Trade Policy and Programs, Office of Trade, (202) 945–7064, *1USGBranch@cbp.dhs.gov*.

SUPPLEMENTARY INFORMATION:

Background

The Convention on Cultural Property Implementation Act (Pub. L. 97–446, 19 U.S.C. 2601 *et seq.*) (CPIA), which implements the 1970 United Nations Educational, Scientific and Cultural Organization (UNESCO) Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property (823 U.N.T.S. 231 (1972)) (Convention), allows for the conclusion of an agreement between the United States and another party to the Convention to impose import restrictions on certain archaeological and ethnological material. Pursuant to the CPIA, the United States entered into a bilateral agreement with the Republic of Tunisia (Tunisia) to impose import restrictions on certain archaeological and ethnological material of Tunisia. This rule announces that the United States is now imposing import restrictions on certain archaeological and ethnological material of Tunisia through February 6, 2029. This period may be extended for additional periods, each extension not to exceed five years, if it is determined that the factors justifying the initial agreement still pertain and no cause for suspension of the agreement exists (19 U.S.C. 2602(e); § 12.104g(a) of title 19 of the Code of Federal Regulations (19 CFR 12.104g(a))).

Determinations

Under 19 U.S.C. 2602(a)(1), the United States must make certain determinations before entering into an agreement to impose import restrictions under 19 U.S.C. 2602(a)(2). On September 23, 2020, the Assistant Secretary for Educational and Cultural Affairs, United States Department of State, after consultation with and recommendation by the Cultural Property Advisory Committee, made the determinations required under the statute with respect to certain archaeological and ethnological material originating in Tunisia that is described in the Designated List set forth below in this document.

These determinations include the following: (1) that the cultural patrimony of Tunisia is in jeopardy from the pillage of archaeological material representing Tunisia's cultural heritage dating from approximately 200,000 B.C. to A.D. 1750, and ethnological material representing Tunisia's cultural heritage from the Ottoman and early Husseinite periods, ranging in date from approximately A.D. 1574 to 1881 (19 U.S.C. 2602(a)(1)(A)); (2) that the Tunisian government has taken measures consistent with the Convention to protect its cultural patrimony (19 U.S.C. 2602(a)(1)(B)); (3) that import restrictions imposed by the United States would be of substantial benefit in deterring a serious situation of pillage and remedies less drastic are not available (19 U.S.C. 2602(a)(1)(C)); and (4) that the application of import restrictions as set forth in this final rule is consistent with the general interests of the international community in the interchange of cultural property among nations for scientific, cultural, and educational purposes (19 U.S.C. 2602(a)(1)(D)). The Assistant Secretary also found that the material described in the determinations meets the statutory definition of "archaeological or ethnological material of the State Party" (19 U.S.C. 2601(2)).

The Agreement

On March 16, 2023, the Governments of the United States and Tunisia signed a bilateral agreement, "Memorandum of Understanding between the Government of the United States of America and the Government of the Republic of Tunisia Concerning the Imposition of Import Restrictions on Archaeological and Ethnological Material of Tunisia" (the Agreement), pursuant to the provisions of 19 U.S.C. 2602(a)(2). The Agreement entered into force on February 6, 2024, following the exchange of diplomatic notes, and enables the promulgation of import restrictions on certain categories of archaeological material ranging in date from approximately 200,000 B.C. to A.D. 1750, as well as certain categories of ethnological material from the Ottoman and early Husseinite periods, ranging in date from approxi-

mately A.D. 1574 to 1881. A list of the categories of archaeological and ethnological material subject to the import restrictions is set forth later in this document.

Restrictions and Amendment to the Regulations

In accordance with the Agreement, importation of material designated below is subject to the restrictions of 19 U.S.C. 2606 and 19 CFR 12.104g(a) and will be restricted from entry into the United States unless the conditions set forth in 19 U.S.C. 2606 and 19 CFR 12.104c are met. CBP is amending 19 CFR 12.104g(a) to indicate that these import restrictions have been imposed.

Import restrictions listed at 19 CFR 12.104g(a) are effective for no more than five years beginning on the date on which an agreement enters into force with respect to the United States. This period may be extended for additional periods of not more than five years if it is determined that the factors which justified the agreement still pertain and no cause for suspension of the agreement exists. Therefore, the import restrictions will expire on February 6, 2029, unless extended.

Designated List of Archaeological and Ethnological Material of Tunisia

The Agreement between the United States and Tunisia includes, but is not limited to, the categories of objects described in the Designated List set forth below. Importation of material on this list is restricted unless the material is accompanied by documentation certifying that the material left Tunisia legally and not in violation of the export laws of Tunisia.

The Designated List includes archaeological and ethnological material from Tunisia. The archaeological material in the Designated List includes, but is not limited to, objects made of stone, ceramic, metal, bone, ivory, shell and other organic materials, glass, faience, semi-precious stone, painting, plaster, wood, and textiles ranging in date from approximately 200,000 B.C. to A.D. 1750. The ethnological material in the Designated List includes, but is not limited to, architectural elements, manuscripts, and ceremonial, ritual, and funerary objects of the Islamic culture from the Ottoman and early Husseinite periods, ranging in date from approximately A.D. 1574 to 1881. This would exclude Jewish ceremonial or ritual objects. The Designated List is representative only. Any dates and dimensions are approximate.

Categories of Archaeological and Ethnological Material

I. Archaeological Material

A. Stone

B. Ceramic

C. Metal

D. Bone, Ivory, Shell, and Other Organic Materials

E. Glass, Faience, and Semi-Precious Stone

F. Painting and Plaster

G. Textiles, Basketry, and Rope

H. Wood

II. Ethnological Material

A. Stone

B. Metal

C. Ceramic and Clay

D. Wood

E. Bone, Ivory, and Shell

F. Glass and Semi-Precious Stone

G. Leather, Parchment, and Paper

H. Textiles

Approximate chronology of well-known periods and sites:

Paleolithic period (c. 200,000–6000 B.C.): Bir Oum Ali, Chotts, El Akarit, El Mekta, Gafsa, Khanguet el Mouhaad, Redayef, Sidi Zin

Neolithic period (c. 6000–1100 B.C.): Ain Khanfous, Dhraa Lassoued, Dougga, Djebibina, Ghomrassen, Jebel Ousselat

Phoenician/Punic period (c. 1100–300 B.C.): Arg el Ghazouani, Carthage, Hadrumetum, Kerkouane, Utica

Numidian period (c. 300–29 B.C.): Dougga, Chemtou (Simittus), Ellès (Ulules), Hammam Zouakra (Thigibba), Henchir Bourgou, Makthar (Mactaris)

Roman period (c. 29 B.C.–A.D. 500): Bulla Regia, Carthage, Chemtou, Dougga, El Jem, Kerkouane, Ksar Ghilane (Tisavar), Makthar, Neapolis, Sufetula, Uthina, Utica

Vandal period (c. A.D. 439–533): Carthage

Byzantine period (c. A.D. 500–647): Bulla Regia, Chemtou (Simittus), Kélibia

Islamic period (A.D. 647–1574): Djerba, Gabés, Hammamet, Kairouan, Gabés, Mahdia, Monastir, Raqqada, Sabra al-Mansuriya, Sfax, Sousse, Tozeur, Tunis

Ottoman/Husseinite period (A.D. 1574–1881): al-Kef, Bizerte, Ghar al-Melh, Jédeida, Kairouan, Medjez al-Bab, Qal'at al-Andalus, Soliman, Testour, Tébourba, Tunis (noting that import restrictions for this period apply to categories of archaeological material dating up to the middle of the Ottoman/Husseinite period in Tunisia, A.D. 1750).

I. Archaeological Material

Archaeological material includes categories of objects from the Stone Age (Paleolithic and Neolithic), Lybic, Phoenician, Punic, Roman, Vandal, Byzantine, Islamic, Ottoman, and early Husseinite periods and cultures, ranging in date from approximately 200,000 B.C. to A.D. 1750.

A. Stone

1. Architectural Elements—This category includes doors, door frames, window fittings, columns, capitals, bases, lintels, jambs, roofs, archways, friezes, pilasters, engaged columns, altars, prayer niches (*mihrabs*), screens, fountains, inlays, and blocks from walls, floors, and ceilings of buildings. Architectural elements may be plain, molded, or carved and are often decorated with motifs and inscriptions. Marble, limestone, sandstone, and gypsum are most commonly used, in addition to porphyry and granite.

2. Mosaics—Floor mosaics are made from stone cut into small bits (tesserae) or glass and laid into a plaster matrix. Wall and ceiling mosaics are made with a similar technique but may include tesserae of both stone and glass. Subjects can include landscapes; scenes of deities, humans, or animals; religious imagery; and activities, such as hunting or fishing. There may also be vegetative, floral, or geometric motifs and imitations of stone.

3. Architectural and Non-Architectural Relief Sculptures—Types include carved slabs with figural, vegetative, floral, geometric, or

other decorative motifs, carved relief vases, steles, palettes, and plaques. All types can sometimes be inscribed in various languages, plastered, or painted. Sculptures may be used for architectural decoration, including in religious, funerary (*e.g.,* grave markers), votive, or commemorative monuments. Marble, limestone, and sandstone are most commonly used.

4. Monuments—Types include votive statues, funerary or votive stelae, and bases and base revetments made of marble, limestone, and other kinds of stone. These may be painted, plastered, carved with relief sculpture, decorated with moldings, and/or carry dedicatory or funerary inscriptions in various languages.

5. Statuary—Types include large-scale representations of deities, humans, animals, or hybrid figures made of marble, limestone, or sandstone. The most common types of statuary are large-scale and free-standing statuary from approximately 1 m to 2.5 m (approximately 3 ft to 8 ft) in height and life-sized portrait busts (head and shoulders of an individual). Statuary figures may be painted.

6. Figurines—Figurines are small-scale representations of deities, humans, or animals made of limestone, calcite, marble, or sandstone.

7. Sepulchers—Types of burial containers include sarcophagi, caskets, reliquaries, and chest urns made of marble, limestone, or other kinds of stone. Sepulchers may be plain or have figural (including those typical of Punic/Phoenician deities such as Tanit and Astarte), geometric, or floral motifs painted on them. They may be carved in relief and/or have decorative moldings.

8. Vessels and Containers—These include bowls, cups, jars, jugs, lamps, flasks, and smaller funerary urns. Funerary urns can be egg-shaped vases with button-topped covers and may have sculpted portraits, painted geometric motifs, inscriptions, scroll-like handles, and/or be ribbed. Vessels and containers can be made of marble, limestone, calcite, or other stone.

9. Furniture—Types include thrones, tables, and beds, from funerary or domestic contexts. Furniture may be made from marble or other stone.

10. Tools and Weapons—Chipped stone types include blades, borers, scrapers, sickles, burins, notches, retouched flakes, cores, arrowheads, cleavers, knives, chisels, and microliths (small stone tools). Ground stone types include grinders (*e.g.,* mortars, pestles, millstones, whetstones, querns), choppers, spherical-shaped hand axes, hammers, mace heads, and weights. The most commonly used stones are flint, chert, obsidian, and other hard stones.

11. Jewelry—Types include seals, beads, finger rings, and other personal adornment made of marble, limestone, or various semi-precious stones, including rock crystal, amethyst, jasper, agate, steatite, and carnelian.

12. Seals and Stamps—These are small devices with at least one side engraved (in intaglio and relief) with a design for stamping or sealing. Stamps and seals can be in the shape of squares, disks, cones, cylinders, or animals.

13. Rock Art—Rock art can be painted and/or incised drawings on natural rock surfaces. Common motifs include humans, animals, geometric, and/or floral elements.

B. Ceramic

1. Architectural Elements—These are baked clay (terracotta) elements used to decorate buildings. Examples include acroteria, antefixes, painted and relief plaques, revetments, carved and molded bricks, knobs, plain or glazed roof tiles, and glazed tile wall ornaments and panels.

2. Figurines—These include clay (terracotta) statues and statuettes in the shape of deities, humans, and animals ranging in height from approximately 5 cm to 20 cm (2 in to 8 in). Ceramic figurines may be undecorated or decorated with paint, appliques, or inscribed lines.

3. Vessels and Containers—Types, forms, and decoration vary among archaeological styles and over time. Shapes include jars, jugs, bowls, pitchers, plates, basins, cups, flasks, storage and shipping amphorae, cooking pots (such as Roman *mortaria*), and large water jugs (*zirs*). Specific Punic, Phoenician, and Roman types include *hydriae, oinochoi, kylikes, albastra, aryballoi, pyxides, unguentaria, kantharoi, kylixes, askoi,* and *lekythoi*. Roman *terra sigillata* and other red gloss wares are common. Examples may be painted or unpainted, handmade or wheel-made, and may be decorated with burnishes, glazes, stamps, or carvings (such as incised *sgraffitto*). Ceramic vessels can depict imagery of humans, deities, animals, floral decorations, or inscriptions in multiple languages.

4. Lamps—Lamps can be handmade or molded, glazed or unglazed, and appear in "saucer," "slipper," or other forms; they typically will have rounded bodies with a hole on the top and in the nozzle, handles or lugs, and may be decorated with motifs, such as beading, human faces, and rosettes or other floral elements. Inscriptions may also be found on the body. Later period examples such as glazed mosque lamps may have straight or round, bulbous bodies with a flared top and several branches.

5. Objects of Daily Use—These include game pieces carved from ceramic sherds, loom weights, toys, *guttus,* incense burners, tobacco pipes, andirons, and ceramic sherds painted with text in Latin or Greek, called *ostraka*.

C. Metal

1. Statuary—These are large- and small-scale, including deities, human, and animal figures in bronze, iron, silver, or gold. Common types are large-scale, free-standing statuary ranging in height from approximately 1 m to 2.5 m (approximately 3 ft to 8 ft) and life-size busts (head and shoulders of an individual).

2. Reliefs—These include plaques, appliques, steles, and masks, often in bronze. Reliefs may include inscriptions in various languages.

3. Inscribed or Decorated Sheet Metal—These are engraved inscriptions and thin metal sheets with engraved or impressed designs often used as attachments to furniture or figures. They are primarily made of copper alloy, bronze, or lead.

4. Vessels and Containers—Forms include bowls, cups, plates, jars, jugs, strainers, cauldrons, and boxes, as well as vessels in the shape of an animal or part of an animal. This category also includes scroll and manuscript containers, reliquaries, and incense burners. These vessels and containers are made of bronze, silver, or gold, and may portray deities, humans, or animals, as well as floral motifs in relief. They may include an inscription.

5. Jewelry—Jewelry includes necklaces, chokers, pectorals, finger rings, beads, pendants, bells, belts, buckles, earrings, diadems, straight pins and fibulae, bracelets, anklets, girdles, wreaths and crowns, cosmetic accessories and tools, metal strigils (scrapers), crosses, and lamp holders. Jewelry may be made of iron, bronze, silver, or gold. Metal can be inlaid with items, such as colored stones and glass.

6. Seals and Sealings—Seals are small devices with at least one side engraved with a design for stamping or sealing. Types include finger rings, amulets, and seals with a shank. Seals can be made of lead, tin, copper, bronze, silver, and/ or gold. Sealings are lead strips, stamped in Arabic, that are used for closing bags of coins.

7. Tools—Types include hooks, weights, axes, scrapers, hammerheads, trowels, locks, keys, nails, hinges, tweezers, ingots, mirrors, thimbles, and fibulae (for pinning clothing); tools may be made of copper, bronze, or iron.

8. Weapons and Armor—This includes body armor, such as helmets, cuirasses, bracers, shin guards, and shields, and horse armor, often decorated with elaborate designs that are engraved, embossed, or perforated. This also includes both launching weapons (*e.g.,* spears, javelins, arrowheads) and hand-to-hand combat weapons (*e.g.,* swords, daggers, etc.) in copper, bronze, and iron.

9. Lamps—Lamps can be open saucer-type or closed, rounded bodies with a hole on the top and in the nozzle, handles, or lugs. They can include decorative designs, such as beading, human faces, animals or animal parts, and rosettes or other floral elements. This category includes handheld lamps, candelabras, braziers, sconces, chandeliers, and lamp stands.

10. Coins—This category includes coins of Numidian, Carthaginian (sometimes called Punic), Roman provincial, Vandal, Byzantine, Islamic, Norman, and Ottoman types that circulated primarily in Tunisia, ranging in date from the fifth century B.C. to A.D. 1750. Numidian, Roman provincial, and Vandal coins were made primarily in bronze, though some Numidian and Vandal types occur also in silver. Carthaginian types occur in electrum, a natural pale yellow alloy of gold and silver. Local Byzantine and later coin types were made in copper, bronze, silver, and gold. Coins may be square or round, have writing, and show imagery of animals, buildings, symbols, or royal figures.

D. Bone, Ivory, Shell, and Other Organic Materials

1. Small Statuary and Figurines— These include representations of deities, humans, or animals in bone or ivory. These range from approximately 10 cm to 1 m (4 in to 40 in).

2. Reliefs, Plaques, Steles, and Inlays—These are carved and sculpted and may have figurative, floral, and/or geometric motifs. Examples may also have inscriptions in various languages.

3. Jewelry—Types include amulets, pendants, combs, pins, spoons, bracelets, buckles, beads, and pectorals. Jewelry can be made of bone, ivory, and spondylus shell.

4. Seals and Stamps—These are small devices with at least one side engraved with a design for stamping or sealing. Seals and stamps can be in the shape of squares, disks, cones, cylinders, or animals.

5. Vessels and Luxury Objects—Ivory, bone, and shell were used either alone or as inlays in luxury objects, including furniture, chests and boxes, writing and painting equipment, musical instruments, games, cosmetic containers, and combs. Examples can include decorated vessels made of ostrich eggshell.

6. Tools—Tools include bone points and awls, burnishers, needles, spatulae, and fish hooks.

7. Manuscripts—Manuscripts can be written or painted on paper or specially prepared animal skins (*e.g.,* cattle, sheep, goat, camel skins) known as parchment. They may be single leaves, bound as a book or codex, or rolled into a scroll.

8. Human Remains—This includes skeletal remains from the human body, preserved in burials or other contexts.

E. Glass, Faience, and Semi-Precious Stone

1. Architectural Elements—These include glass inlay and tesserae pieces from floor and wall mosaics, mirrors, and windowpanes.

2. Vessels and Containers—These can take various shapes, such as jars, bottles, bowls, beakers, goblets, candle holders, perfume jars (*unguentaria*), urns, chalices, and flasks. Vessels and containers may have cut, incised, raised, enameled, molded, or painted decoration. Examples may be engraved and/or light blue, blue-green, green, or colorless, while those from later periods may include animal, floral, and/or geometric motifs.

3. Jewelry—Jewelry includes bracelets and rings (often twisted with colored glass); pendants; and beads in various shapes (*e.g.,* circular, globular), some with relief decoration, including multicolored "eye" beads.

4. Lamps—Lamps may have a straight or round, bulbous body. Some examples are in the form of a goblet with a flared top and engraved or molded decorations, while others are in a conical shape with blobbed decoration that were inset into metal candelabra. Lamps may have a single or several branches.

F. Painting and Plaster

1. Wall Painting—Wall painting can include figurative (*i.e.,* deities, humans, animals), floral, and/or geometric motifs, as well as funerary scenes. These are painted on stone, mud plaster, and lime plaster (wet—*buon fresco*—and dry—*secco fresco*), sometimes to imitate marble.

2. Stucco—Stucco is a fine plaster used for coating wall surfaces, or molding and carving into architectural decorations, such as reliefs, plaques, steles, and inlays.

G. Textiles, Basketry, and Rope

1. Textiles—These include linen, hemp, and silk cloth used for burial wrapping, shrouds, garments, banners, and sails. These also include linen and wool used for garments and hangings.

2. Basketry—Plant fibers were used to make baskets and containers in a variety of shapes and sizes, as well as sandals and mats.

3. Rope—Rope and string were used for a great variety of purposes, including binding, lifting water for irrigation, fishing nets, measuring, lamp wicks, and stringing beads for jewelry and garments.

H. Wood

Includes tablets with painted text, generally in Latin but also in Greek. Examples were made from cedar, pine, and other softwoods.

II. Ethnological Material

Ethnological material includes architectural elements, manuscripts, and ceremonial, ritual, and funerary objects of the Islamic culture from the Ottoman and early Husseinite periods, ranging in date from approximately A.D. 1574 to 1881. This would exclude Jewish ceremonial or ritual objects.

A. Stone

1. Architectural Elements—This category includes doors, door frames, window fittings, columns, capitals, plinths, bases, lintels, jambs, roofs, archways, friezes, pilasters, engaged columns, altars, prayer niches (*mihrabs*), screens, fountains, inlays, and blocks from walls, floors, and ceilings of buildings. Architectural elements may be plain, molded, or carved and are often decorated with motifs and inscriptions. Marble, limestone, and sandstone are most commonly used.

2. Architectural and Non-Architectural Relief Sculpture—This category includes slabs, plaques, steles, capitals, and plinths carved with religious, figural, floral, or geometric motifs or inscriptions in Arabic for ceremonial, ritual, and funerary use. Examples occur primarily in marble, limestone, and sandstone.

3. Memorial Stones and Tombstones—This category includes tombstones, grave markers, and cenotaphs. Examples occur primarily in marble and are engraved with Arabic script.

4. Vessels and Containers—This category includes ceremonial, ritual, and funerary stone lamps and containers.

B. Metal

1. Architectural Elements—This category includes doors, door fixtures, such as knockers, bolts, and hinges, chandeliers, screens, taps, spigots, fountains, and sheets. Copper, brass, lead, and alloys are most commonly used.

2. Architectural and Non-Architectural Relief Sculpture—This category includes appliques, plaques, and steles, primarily made of bronze and brass, for ceremonial, ritual, and funerary use. Examples often include religious, figural, floral, or geometric motifs. They may also have inscriptions in Arabic.

3. Lamps—This category includes handheld lamps, candelabras, braziers, sconces, chandeliers, and lamp stands for ceremonial, ritual, and funerary use.

4. Vessels and Containers—This category includes containers used for religious services, such as Koran (*Qur'an*) cases, amulet boxes, and incense burners. Brass, copper, silver, and gold are most commonly used. Containers may be plain, engraved, hammered, or otherwise decorated.

5. Musical Instruments—This category includes instruments used in Islamic/Sufi religious ceremonies or rituals, such as cymbals and trumpets.

C. Ceramic and Clay

1. Architectural Elements—This category includes carved and molded brick, and engraved and/or painted and glazed tile wall ornaments and panels, sometimes with Arabic script.

2. Lamps—This category includes glazed mosque lamps that may have straight or round, bulbous bodies with a flared top and several branches.

D. Wood

1. Architectural Elements—This category includes doors, door frames and fixtures, windows, window frames, panels, beams, balconies, stages, screens, prayer niches (*mihrabs*), minbars, and ceilings. Examples may be decorated with religious, geometric, or floral motifs or inscriptions, and may be either carved or painted.

2. Architectural and Non-Architectural Relief Sculpture—This category includes panels, roofs, beams, balconies, stages, panels, ceilings, and doors for ceremonial, ritual, and funerary use. Examples are carved, inlaid, or painted with decorations of religious, floral, or geometric motifs, or Arabic inscriptions.

3. Furniture—This category includes furniture, such as minbars, professorial chairs, divans, stools, and tables from Islamic ceremonial, ritual, or funerary contexts. Examples can be carved, inlaid, or painted and are made from various types of wood.

4. Vessels and Containers—This category includes containers used for religious purposes such as Koran (*Qur'an*) cases. Examples may be carved, inlaid, or painted with decorations in religious, floral, or geometric motifs, or Arabic script.

5. Writing Implements—This category includes printing blocks, writing tablets, and Islamic study tablets inscribed in Arabic and used for teaching the Koran (*Qur'an*).

6. Musical Instruments—This category includes instruments used in Islamic/Sufi religious ceremonies or rituals, such as frame drums (*banadir*).

7. Beads—This category includes Islamic prayer beads (*mas'baha*). Examples may be plain or decorated with carved designs.

E. Bone, Ivory, and Shell

1. Architectural Elements—This category includes inlays for architectural elements.

2. Ceremonial Paraphernalia—This category includes boxes, reliquaries (and their contents), plaques, pendants, candelabra, and stamp and seal rings.

F. Glass and Semi-Precious Stone

1. Architectural Elements—This category includes window panes, mosaic elements, inlays, and stained glass.

2. Vessels and Containers—This category includes glass and enamel mosque lamps and vessels used for Islamic religious services.

3. Beads—This category includes Islamic prayer beads (*mas'baha*) in glass or semi-precious stones.

G. Leather, Parchment, and Paper

1. Books and Manuscripts— Manuscripts can be written or painted on paper or specially prepared animal skins (*e.g.,* cattle, sheep, goat, camel skins) known as parchment. They occur as single leaves, bound with leather or wood as a book or codex, or rolled into a scroll. Types include the Koran (*Qur'an*) and other Islamic books and manuscripts, often written in black or brown ink, and sometimes embellished with painted colorful floral or geometric motifs.

2. Vessels and Containers—This category includes containers used for Islamic religious services, such as leather Koran (*Qur'an*) cases or pouches.

3. Musical Instruments—This category includes instruments used in Islamic/Sufi religious ceremonies or rituals, such as leather drums (*banadir*).

H. Textiles

This category includes hangings, shrine covers, and prayer rugs used in Islamic/Sufi religious ceremonies or rituals. Examples can be made from linen, silk, and/or wool.

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A Checklist of Islamic Coins (3rd ed.), 2011, S. Album, Stephen Album Rare Coins, Santa Rosa, CA.

Architecture of the Islamic West: North Africa and the Iberian Peninsula, 700–1800, 2020, J.M. Bloom, New Haven, Yale University Press.

Corpus nummorum Numidiae Mauretaniaeque, 1955, J. Mazard, et al., Arts et métiers graphiques, Paris.

De Carthage à Kairouan: 2000 ans d'art et d'histoire en Tunisie, 1982, Muhammad Fantar, Musée du Petit Palais de la Ville de Paris, Paris.

Ifriqiya: Thirteen Centuries of Art and Architecture in Tunisia, 2010, J. Binous, et al., Museum with No Frontiers Travel Books, Vienna.

Objets Kairouanais IXe au XIIIe siècle, 1948, G. Marçais and L. Poinssot, Direction des Antiquités et Arts, Tunis.

Roman Provincial Coinage, Vol. I, *From the Death of Caesar to Vitellius (BC 44–AD 69),* 1992, A. Burnett, M. Amandry, and P. P. Ripollès, The British Museum Press, London.

Inapplicability of Notice and Delayed Effective Date

This amendment involves a foreign affairs function of the United States and is, therefore, being made without notice or public procedure (5 U.S.C. 553(a)(1)). For the same reason, a delayed effective date is not required under 5 U.S.C. 553(d)(3).

Executive Orders 12866 and 13563

Executive Orders 12866 (Regulatory Planning and Review), as amended by Executive Order 14094 (Modernizing Regulatory Review), and 13563 (Improving Regulation and Regulatory Review) direct agencies to assess the costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). Executive Order 13563 emphasizes the importance of quantifying costs and benefits, reducing costs, harmonizing rules,

and promoting flexibility. CBP has determined that this document is not a regulation or rule subject to the provisions of Executive Orders 12866 and 13563 because it pertains to a foreign affairs function of the United States, as described above, and therefore is specifically exempted by section 3(d)(2) of Executive Order 12866 and, by extension, Executive Order 13563.

Regulatory Flexibility Act

The Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*), as amended by the Small Business Regulatory Enforcement Fairness Act of 1996, requires an agency to prepare and make available to the public a regulatory flexibility analysis that describes the effect of a proposed rule on small entities (*i.e.,* small businesses, small organizations, and small governmental jurisdictions) when the agency is required to publish a general notice of proposed rulemaking for a rule. Since a general notice of proposed rulemaking is not necessary for this rule, CBP is not required to prepare a regulatory flexibility analysis for this rule.

Signing Authority

This regulation is being issued in accordance with 19 CFR 0.1(a)(1) pertaining to the Secretary of the Treasury's authority (or that of the Secretary's delegate) to approve regulations related to customs revenue functions.

Troy A. Miller, the Senior Official Performing the Duties of the Commissioner, having reviewed and approved this document, has delegated the authority to electronically sign this document to the Director (or Acting Director, if applicable) of the Regulations and Disclosure Law Division for CBP, for purposes of publication in the **Federal Register**.

List of Subjects in 19 CFR Part 12

Cultural property, Customs duties and inspection, Imports, Prohibited merchandise, Reporting and recordkeeping requirements.

For the reasons set forth above, part 12 of title 19 of the Code of Federal Regulations (19 CFR part 12), is amended as set forth below:

PART 12—SPECIAL CLASSES OF MERCHANDISE

■ 1. The general authority citation for part 12 and the specific authority citation for § 12.104g continue to read as follows:

Authority: 5 U.S.C. 301; 19 U.S.C. 66, 1202 (General Note 3(i), Harmonized Tariff Schedule of the United States (HTSUS)), 1624.

* * * * *

Sections 12.104 through 12.104i also issued under 19 U.S.C. 2612;
* * * * *

■ 2. In § 12.104g, the table in paragraph (a) is amended by adding Tunisia to the list in appropriate alphabetical order as follows:

§ 12.104g Specific items or categories designated by agreements or emergency actions.

(a) * * *

State party	Cultural property	Decision No.
	* * * * * * *	
Tunisia	Archaeological material of Tunisia ranging in date from approximately 200,000 B.C. to A.D. 1750, and ethnological material of Tunisia ranging in date from approximately A.D. 1574 to 1881.	CBP Dec. 24–12.
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ROBERT F. ALTNEU,
Director,
Regulations & Disclosure Law Division, Regulations & Rulings, Office of Trade, U.S. Customs and Border Protection.

AVIVA R. ARON-DINE,
Acting Assistant Secretary of the Treasury for Tax Policy.

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

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

ACTION: Publication of the dates and draft agenda for the 74th session of the Harmonized System Committee of the World Customs Organization.

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

FOR FURTHER INFORMATION CONTACT: Claudia Garver, (claudia.k.garver@cbp.dhs.gov), Attorney-Advisor, Tom Beris (tom.p.beris@cbp.dhs.gov), Attorney-Advisor, Nataline Viray-Fung, (nataline.viray-fung@cbp.dhs.gov), Attorney-Advisor, Office of Trade,

Regulations and Rulings, U.S. Customs and Border Protection, or Daniel Shepherdson (daniel.shepherdson@usitc.gov), Senior Attorney-Advisor, Office of Tariff Affairs and Trade Agreements, U.S. International Trade Commission.

SUPPLEMENTARY INFORMATION:

BACKGROUND

The United States is a contracting party to the International Convention on the Harmonized Commodity Description and Coding System ("Harmonized System Convention"). The Harmonized Commodity Description and Coding System ("Harmonized System") is an international nomenclature system that forms the core of the U.S. tariff, the Harmonized Tariff Schedule of the United States.

Article 6 of the Harmonized System Convention establishes a Harmonized System Committee ("HSC"). The HSC is composed of representatives from each of the contracting parties to the Harmonized System Convention. The HSC's responsibilities include taking classification decisions on the interpretation of the Harmonized System. Those decisions may be memorialized in the form of published tariff classification opinions concerning the classification of an article under the Harmonized System or amendments to the Explanatory Notes to the Harmonized System. The HSC also considers amendments to the legal text of the Harmonized System. The HSC meets twice a year at the World Customs Organization in Brussels, Belgium. The 74th session of the HSC will take place Monday, September 16, 2024, through Friday, September 27, 2024.

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

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

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

Attachment

WORLD CUSTOMS ORGANIZATION
ORGANISATION MONDIALE DES DOUANES

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

HARMONIZED SYSTEM
COMMITTEE
-
74th Session
-

NC3218Ea

Brussels, 16 July 2024.

DRAFT AGENDA OF THE 74th SESSION OF THE HARMONIZED SYSTEM COMMITTEE

The HSC meeting will be conducted in-person from 16 September to 27 September 2024, with virtual report reading on 4 October 2024

I.	**ADOPTION OF THE AGENDA**	
	1. Draft Agenda	NC3218Ea
	2. Draft Timetable	NC3219Ba
II.	**REPORT BY THE SECRETARIAT**	
	1. Position regarding Contracting Parties to the HS Convention, HS Recommendations and related matters	NC3220
	2. Report on the last meetings of the Policy Commission (90th Session) and the Council (143rd/144th Sessions)	NC3221
	3. Approval of decisions taken by the Harmonized System Committee at its 73rd Session	NC3217Ea
	4. Capacity building activities of the Nomenclature and Classification Sub-Directorate	NC3222
	5. Co-operation with other international organizations	NC3223
	6. New information provided on the WCO Web site	NC3224
	7. Progress report on the use of working languages for HS-related matters	NC3225
	8. Other	
III.	**GENERAL QUESTIONS**	
	1. The Exploratory Study on a Possible Strategic Review of the HS - Final report	NC3226
	2. Possible changes of threshold values for the next Harmonized System review cycles	NC3227

	3. Possibility of ad hoc meetings in cases of emergency	NC3228
	4. Confidentiality requirements for the working documents	NC3229
	5. Draft corrigendum amendments to the Explanatory Notes	NC3230
IV.	**RECOMMENDATIONS**	
	1. Recommendation of the Customs Cooperation Council on the insertion in national statistical nomenclatures of subheadings to facilitate the collection and comparison of data on the international movement of certain substances controlled under the Rotterdam Convention" (Request by the Rotterdam Convention)	NC3231
V.	**REPORT OF THE HS REVIEW SUB-COMMITTEE**	
	1. Report of the 64th Session of the HS Review Sub-Committee	NR1748Ec NR1748EAB1c
	2. Matters for decision	NC3232
	3. Possible misalignment between the French and the English texts of subheading 3822.13	NC3233
	4. Possible amendment to heading 71.08	NC3234
	5. Possible amendment to heading 44.04 to clarify the classification of "pickets and stakes"	NC3235
VI.	**REPORT OF THE PRESESSIONAL WORKING PARTY**	
	1. Possible amendments to the Compendium of Classification Opinions consequential to the decisions taken by the Committee at its 73rd Session	NC3236
	Amendment to the Compendium of Classification Opinions to reflect the decision to classify a product called "sesame snacks" in heading 17.04 (subheading 1704.90).	PRESENTATION_ Annex_A
	Amendment to the Compendium of Classification Opinions to reflect the decision to classify Caramel popcorn in heading 17.04 (subheading 1704.90).	PRESENTATION_ Annex_B
	Amendment to the Compendium of Classification Opinions to reflect the decision to classify Brassicas vegetables, called "zha-cai" preserved in brine in heading 20.05 (subheading 2005.99)	PRESENTATION_ Annex_C
	Amendment to the Compendium of Classification Opinions to reflect the decision to classify edamame beans in heading 20.08 (subheading 2008.19)	PRESENTATION_ Annex_D
	Amendment to the Compendium of Classification Opinions to reflect the decision to classify a product called "tempeh" in heading 20.08 (subheading 2008.19).	PRESENTATION_ Annex_E

	Amendment to the Compendium of Classification Opinions to reflect the decision to classify a product called "ammonium nitrate presented as porous granules" in heading 36.02 (HS code 3602.00)	PRESENTATION_ Annex_F
	Amendment to the Compendium of Classification Opinions to reflect the decision to classify an article of apparel of laminated textile materials in heading 61.02 (subheading 6102.30)	PRESENTATION_ Annex_G
	Amendment to the Compendium of Classification Opinions to reflect the decision to classify a product called "Display cover glass" in heading 70.07 (subheading 7007.11)	PRESENTATION_ Annex_H
	Amendment to the Compendium of Classification Opinions to reflect the decision to classify "spray-dispenser" in heading 84.24 (subheading 8424.89)	PRESENTATION_ Annex_IJ
	Amendment to the Compendium of Classification Opinions to reflect the decision to classify reverse vending machines heading 84.79 (subheading 8479.89)	PRESENTATION_ Annex_K
	Amendment to the Compendium of Classification Opinions to reflect the decision to classify a product called " Touchscreen Connected Fitness Mirror" in heading 85.28 (subheading 8528.59)	PRESENTATION_ Annex_L
	Amendment to the Compendium of Classification Opinions to reflect the decision to classify two products called "RF Generators and RF Matching Networks" in heading 85.43 (subheading 8543.70)	PRESENTATION_ Annex_M
	Amendment to the Compendium of Classification Opinions to reflect the decision to classify a product called " Electric Scooter" in heading 95.03 (HS code 9503.00)	PRESENTATION_ Annex_N
	Amendment to the Compendium of Classification Opinions to reflect the decision to classify certain festive articles in heading 95.05 (subheading 9505.10)	PRESENTATION_ Annex_O
VII.	**REQUESTS FOR RE-EXAMINATION (RESERVATIONS)**	
	1. Re-examination of the classification of a product called "Remote Radio Unit" (Requests by Switzerland and India)	NC3237
	2. Re-examination of the classification of " (sugar confectionary)" (Request by India)	NC3238
	3. Re-examination of the classification of a product called "6-outlet grounded power strip" (Request by the Russian Federation)	NC3239
	4. Re-examination of the classification of a product called "Roasted shelled mung beans" (Request by Korea)	NC3240
	5. Re-examination of the classification of a product called "Powdered Cooked Chicken" (Request by the United States)	NC3241

	6.	Re-examination of the classification of a CPU cooling device (Requests by the United States and the European Union)	NC3242
VIII.	**FURTHER STUDIES**		
	1.	Possible amendment to the Explanatory Note to heading 56.03 with respect to the classification of some plastic products combined with textiles	NC3243
	2.	Classification of cell-cultured food products	NC3244
	3	Possible amendment to the Explanatory Notes to heading 22.02 (Request by Norway)	NC3245
	4.	Possible amendment to the Explanatory Notes to heading 44.07 to clarify the classification of the name "White Lauan"	NC3246
	5.	Possible amendment to Section (C) of the Explanatory Note to heading 84.11 to clarify the classification of turbo-shaft engines	NC3247
	6.	Possible amendments to the Explanatory Notes to distinguish the products of headings 31.02 and 36.02	NC3248
	7.	Classification of displays (Request by Switzerland)	NC3249
	8.	Possible amendment to the Explanatory Note to heading 23.09 (Request by the EU)	NC3250
	9.	Possible amendment to the Explanatory Notes to heading 95.05 clarifying the classification of festive decorations	NC3251
	10.	Classification of two products called respectively "Seltzer" and " citron and gingembre" (Request by Tunisia)	NC3252
	11.	Possible amendment to the Explanatory Notes to clarify the scope of subheadings 2106.10 and 2106.90	NC3253
	12.	Possible amendment to the Explanatory Notes to clarify the difference between scooters of heading 87 .11 and scooters of heading 95.03 (proposal by the EU)	NC3254
	13.	Classification of products called " ORANGE COMPOUND" and " MULTI-VITAMIN COMPOUND (Request by Korea)	NC3255
	14.	Possible amendments to the Nomenclature regarding the classification of smart products in relation to heading 85.17 (Proposal by the United States)	NC3256
	15.	Classification of "vehicle safety seat belts" (Request by the Russian Federation)	NC3257
	16.	Possible amendment to the Explanatory Notes to heading 85.24 (Proposal by the EU)	NC3258
	17.	Classification of air coolers (Proposal by the EU)	NC3259

	18. Classification of "asphalt material transfer vehicle" (Request by the Russian Federation)	NC3260
	19. Classification of certain products used for personal light therapy (Request by Moldova)	NC3261
	20. Possible amendment to the Nomenclature (HS 2028) to create a new subheading for " dried mangoes " in heading 08.04	NC3262
IX.	**NEW QUESTIONS**	
	1. Classification of a product called " Desensitizing Spray for Men (Request by Mauritius)NC3263	NC3263
	2. Classification of the product called " " semi-trailer (Request by Tunisia)	NC3264
	3. Classification of the product " " (Request by the Democratic Republic of the Congo)	NC3265
	4. Classification of blood pressure monitors for home use (Request by Switzerland)	NC3266
	5. Classification of the products referred to as (reversible sleeve style) and (convoluted style) (Request by Malaysia)	NC3267
	6. Classification of power strips and cable reels (Request by Switzerland)	NC3268
	7. Classification of the product called "self-propelled concrete mixer with self-loading function" (Request by the Russian Federation)	NC3269
	8. Re-examination of the classification opinion 8806.22/2 concerning the classification of unmanned aircraft (Request by the Secretariat)	NC3270
	9. Possible amendment to the Explanatory Notes to heading 87.16 (Proposal by the EU)	NC3271
	10. Possible amendment to the Explanatory Notes to heading 95.03 (Proposal by the EU)	NC3272
	11. Classification of animal feed containing coccidiostats (Request by Switzerland)	NC3273
X.	**ADDITIONAL LIST**	
XI.	**OTHER BUSINESS**	
	1. List of questions which might be examined at a future session	NC3274
XII.	**ELECTIONS**	
XIII.	**DATES OF NEXT SESSIONS**	

GRANT OF "LEVER-RULE" PROTECTION

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

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

SUMMARY: Pursuant to 19 CFR 133.2(f), this notice advises interested parties that CBP has granted "Lever-Rule" protection to Energy Beverages LLC's federally registered and recorded "BANG" (U.S. Trademark Registration No. 3,545,129/ CBP Recordation No. TMK 21–00862), "B & DESIGN" (U.S. Trademark Registration No. 4,985,030 / CBP Recordation No. TMK 21- 00853), and the "B & DESIGN" (U.S. Trademark Registration No. 4,990,091/ CBP Recordation No. TMK 21–00856) trademarks applied to certain gray market Bang Energy Beverages listed in the chart below. Notice of the receipt of an application for "Lever-Rule" protection was published in the April 3, 2024, issue of the *Customs Bulletin*.

FOR FURTHER INFORMATION CONTACT: Suzanne Schultz, Intellectual Property Enforcement Branch, Regulations and Rulings, (202) 325–1989.

SUPPLEMENTARY INFORMATION:

BACKGROUND

Pursuant to 19 CFR 133.2(f), this notice advises interested parties that CBP has granted "Lever-Rule" protection for Bang Energy Beverages, intended for sale outside the United States from the following countries in the flavors and sizes listed in the chart below: Australia, Austria, Estonia, Latvia, and Lithuania, Canada, Chile, Denmark, Finland, Germany, Greece, Netherlands, Belgium, Norway, South Africa, Sweden, Switzerland, and the United Kingdom that bear the "BANG" (U.S. Trademark Registration No. 3,545,129/ CBP Recordation No. TMK 21–00862), "B & DESIGN" (U.S. Trademark Registration No. 4,985,030 / CBP Recordation No. TMK 21–00853), and the "B & DESIGN" (U.S. Trademark Registration No. 4,990,091/ CBP Recordation No. TMK 21–00856) trademarks.

In accordance with *Lever Bros. Co. v. United States*, 981 F.2d 1330 (D.C. Cir. 1993), CBP has determined that the above-referenced gray market Bang Energy Beverages differ physically and materially from Bang Energy Beverages authorized for sale in the United Sates with respect to the following product characteristics: product formulations, labeling that is not in English nor relevant to U.S. consumers and different caffeine warnings, a 13-digit product code instead of a 12-

digit product code, contact information for foreign jurisdictions, and volume only provided in metric units.

ENFORCEMENT

Importation of Bang Energy Beverages intended for sale from the following countries in the sizes and flavors listed in the chart below: Estonia, Latvia, and Lithuania, Canada, Chile, Denmark, Finland, Germany, Greece, Netherlands, Belgium, Norway, South Africa, Sweden, Switzerland, and the United Kingdom, is restricted, unless the labeling requirements of 19 CFR § 133.23(b) are satisfied.

Dated: July 22, 2024

ALAINA L VAN HORN

Relevant Bang Energy Beverages

Exhibit	Region	Sizes / Flavors
Exhibit A	Australia	500 mL Bangster Berry, Blue Razz, Candy Apple Crisp, Cotton Candy, Frosé Rosé, Mango Bango, Miami Cola, Rainbow Unicorn, Sour Heads, Star Blast, Whole Lotta Piña Colada
Exhibit B	Austria	500mL: Bangster Berry, Candy Apple Crisp, Peach Mango
Exhibit C	Estonia, Latvia, and Lithuania	500mL: Bangster Berry, Black Cherry Vanilla, Candy Apply Crisp, Delish Strawberry Kiss, Rainbow Unicorn, Wyldin' Watermelon
Exhibit D	Canada	473mL: Bangster Berry, Birthday Cake Bash, Black Cherry Vanilla, Blue Razz, Cherry Blade Lemonade, Delish Strawberry Kiss, Frosé Rosé, Peach Mango, Rainbow Unicorn, Sour Heads
Exhibit E	Chile	473mL: Blue Razz, Candy Apple Crisp, Mango Bango, Sour Heads, Swirly Pop, Wyldin' Watermelon
Exhibit F	Denmark	500mL: Bangster Berry, Birthday Cake Bash, Candy Apple Crisp, Frosé Rosé, Mango Bango, Peach Mango, Rainbow Unicorn, Swirly Pop, Whole Lotta Chocolata, Wyldin' Watermelon
Exhibit G	Finland	500mL: Bangster Berry, Candy Apple Crisp, Birthday Cake Bash, Cherry Blade Lemonade, Delish Strawberry Kiss, Frosé Rosé, Krazy Key Lime Pie, Mango Bango, Miami Cola, Raging Raspberry Hibiscus, Rainbow Unicorn, Sour Heads, Whole Lotta Chocolata, Whole Lotta Piña Colada, Wyldin' Watermelon
Exhibit H	Germany	500mL: Blue Razz, Candy Apple Crisp, Lemon Drop, Peach Mango, Rainbow Unicorn, Star Blast, Wyldin' Watermelon
Exhibit I	Greece	500mL: Bangster Berry, Birthday Cake Bash, Black Cherry Vanilla, Candy Apple Crisp, Delish Strawberry Kiss, Frosé Rosé, Krazy Key Lime Pie, Lemon Drop, Peach Mango, Rainbow Unicorn, Wyldin' Watermelon
Exhibit J	Chile	473mL: Blue Razz, Candy Apple Crisp, Mango Bango, Sour Heads, Swirly Pop, Wyldin' Watermelon
Exhibit K	Netherlands (Dutch)	250 mL: Bangster Berry, Candy Apple Crisp, Frosé Rosé, Lemon Drop, Peach Mango, Rainbow Unicorn, Whole Lotta Piña Colada 500 mL: Bangster Berry, Candy Apple Crisp, Frosé Rosé, Lemon Drop, Peach Mango, Rainbow Unicorn, Whole Lotta Piña Colada
Exhibit L	Belgium	250 mL: Bangster Berry, Candy Apple Crisp, Frosé Rosé, Lemon Drop, Peach Mango, Rainbow Unicorn, Whole Lotta Piña Colada 500 mL: Bangster Berry, Candy Apple Crisp, Frosé Rosé, Lemon Drop, Peach Mango, Rainbow Unicorn, Whole Lotta Piña Colada

Exhibit	Region	Sizes / Flavors
Exhibit M	Norway	500mL: Bangster Berry, Candy Apple Crisp, Frosé Rosé, Mango Bango, Peach Mango, Rainbow Unicorn
Exhibit N	South Africa	500mL: Frosé Rosé, Mango Bango, Rainbow Unicorn, Star Blast, Swirly Pop, Wyldin' Watermelon
Exhibit O	Sweden	500mL: Bangster Berry, Birthday Cake Bash, Candy Apple Crisp, Frosé Rosé, Krazy Key Lime Pie, Mango Bango, Peach Mango, Rainbow Unicorn, Wyldin' Watermelon
Exhibit P	Switzerland	500mL: Black Cherry Vanilla, Peach Mango, Rainbow Unicorn
Exhibit Q	United Kingdom	500mL: Bangster Berry, Candy Apple Crisp, Peach Mango, Rainbow Unicorn, Wyldin' Watermelon

PROPOSED REVOCATION OF ONE RULING LETTER AND PROPOSED REVOCATION OF TREATMENT RELATING TO THE TARIFF CLASSIFICATION OF CHILD SIZED PORTABLE TOILETS FROM CHINA

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

ACTION: Notice of proposed revocation of one ruling letter and proposed revocation of treatment relating to the tariff classification of child sized portable toilets from China.

SUMMARY: Pursuant to section 625(c), Tariff Act of 1930 (19 U.S.C. § 1625(c)), as amended by section 623 of title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that U.S. Customs and Border Protection (CBP) intends to revoke one ruling letter concerning tariff classification of child sized portable toilets from China 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 September 7, 2024.

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

FOR FURTHER INFORMATION CONTACT: Nicholas Horne, Chemicals, Petroleum, Metals and Miscellaneous Classification Branch, Regulations and Rulings, Office of Trade, at (202) 325–7941.

SUPPLEMENTARY INFORMATION:

BACKGROUND

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

Pursuant to 19 U.S.C. § 1625(c)(1), this notice advises interested parties that CBP is proposing to revoke ruling letter pertaining to the tariff classification of child sized portable toilets from China. Although in this notice, CBP is specifically referring to New York Ruling Letter ("NY") N319574, dated June 2, 2021 (Attachment A), this notice also covers any rulings on this merchandise which may exist, but have not been specifically identified. CBP has undertaken reasonable efforts to search existing databases for rulings in addition to the one identified. No further rulings have been found. Any party who has received an interpretive ruling or decision (i.e., a ruling letter, internal advice memorandum or decision, or protest review decision) on the merchandise subject to this notice should advise CBP during the comment period.

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

In NY N319574, CBP classified child sized portable toilets from China in heading 3922, HTSUS, specifically in subheading 3922.20.00, HTSUS, which provides for "Baths, shower baths, sinks, washbasins, bidets, lavatory pans, seats and covers, flushing cisterns and similar sanitary ware, of plastics: Lavatory seats and covers." CBP has reviewed N319574 and has determined the ruling letter to

be in error. It is now CBP's position that child sized portable toilets from China are properly classified, in heading 3922, HTSUS, specifically in subheading 3922.90.00, HTSUS, which provides for "Baths, shower baths, sinks, washbasins, bidets, lavatory pans, seats and covers, flushing cisterns and similar sanitary ware, of plastics: Other."

Pursuant to 19 U.S.C. § 1625(c)(1), CBP is proposing to revoke N319574 and to revoke or modify any other ruling not specifically identified to reflect the analysis contained in the proposed Headquarters Ruling Letter ("HQ") H336925, set forth as Attachment B to this notice. Additionally, pursuant to 19 U.S.C. § 1625(c)(2), CBP is proposing to revoke any treatment previously accorded by CBP to substantially identical transactions.

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

YULIYA A. GULIS,
Director
Commercial and Trade Facilitation Division

Attachments

ATTACHMENT A

N319574

June 2, 2021
CLA-2–39:OT:RR:NC:N1:137
CATEGORY: Classification
TARIFF NO.: 3922.20.0000, 9903.88.15

AMANDA LEVITT
SANDLER, TRAVIS & ROSENBERG, P.A.
675 THIRD AVENUE, SUITE 1805–06
NEW YORK, NEW YORK 10017

RE: The tariff classification of plastic child toilet seats from China

DEAR MS. LEVITT:

In your letter dated May 20, 2021 you requested a tariff classification ruling on behalf of your client, Jool Products, LLC.

The first item under consideration is referred to as Potty Chair (Item No. P-Chair). The Potty Chair consists of a portable toilet seat, composed entirely of plastic components, intended for use by children. It includes a hollow plastic base shaped like a toilet bowl onto which the user will sit. There is also a separate plastic pan that slides in and out of the base to allow for easy cleanup. Finally, there is a plastic back to provide support to the child when the Potty Chair is in use. The sole use of the Potty chair is as a portable toilet.

The second item under consideration is referred to as Real Feel Potty (Item No. RFeel-A). The Real Feel Potty is composed entirely of plastic. It is designed to emulate a real toilet. It has a plastic base shaped like a toilet. There is also a separate plastic pan that will slide in and out of the base for cleaning. This toilet includes a removable plastic cover that is shaped like a toilet seat and can be used independent of the base on a regular toilet once the toddler is old enough to sit on a regular toilet. To enhance the realistic aspect of this toilet, there is also a handle that can be pulled down to make a flush sound. The sole use of the Real Feel Potty is as a portable toilet.

The applicable subheading for the portable toilet seats will be 3922.20.0000, Harmonized Tariff Schedule of the United States (HTSUS), which provides for baths, shower baths, sinks, washbasins, bidets, lavatory pans, seats and covers, flushing cisterns and similar sanitary ware, of plastics. The general rate of duty will be 6.3 percent ad valorem.

Pursuant to U.S. Note 20 to Subchapter III, Chapter 99, HTSUS, products of China classified under subheading 3922.20.0000, HTSUS, unless specifically excluded, are subject to an additional 7.5 percent ad valorem rate of duty. At the time of importation, you must report the Chapter 99 subheading, i.e., 9903.88.15, in addition to subheading 3922.20.0000, 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 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 Christina Allen at julie.c.allen@cbp.dhs.gov.

Sincerely,

STEVEN A. MACK
Director
National Commodity Specialist Division

ATTACHMENT B

HQ H336925
OT:RR:CTF:CPMMA H336925 NAH
CATEGORY: Classification
TARIFF NO.: 3922.90; 9903.88.03

MS. AMANDA LEVITT
SANDLER, TRAVIS & ROSENBERG, P.A.
675 THIRD AVENUE, SUITE 1805–06
NEW YORK, NEW YORK 10017

RE: Revocation of NY N319574; Tariff classification of child-sized portable toilets from China.

DEAR MS. LEVITT,

This letter is in reference to New York Ruling Letter (NY) N319574, issued to your client, Jool Products, LLC, on June 2, 2021, concerning the tariff classification of child-size portable toilets under the Harmonized Tariff Schedule of the United States (HTSUS). In NY N319574, the U.S. Customs and Border Protection (CBP) classified the child-sized portable toilets under subheading 3922.20, HTSUS, as "[b]aths, shower baths, sinks, washbasins, bidets, lavatory pans, seats and covers, flushing cisterns and similar sanitary ware, of plastics: Lavatory seats and covers." After reviewing NY N319574, CBP has determined that the classification therein is incorrect. For the reasons set forth below, CBP hereby revokes NY N319574.

FACTS:

The child-sized portable toilets were described in NY N319574 as follows:

> The first item under consideration is referred to as Potty Chair (Item No. P-Chair). The Potty Chair consists of a portable toilet seat, composed entirely of plastic components, intended for use by children. It includes a hollow plastic base shaped like a toilet bowl onto which the user will sit. There is also a separate plastic pan that slides in and out of the base to allow for easy cleanup. Finally, there is a plastic back to provide support to the child when the Potty Chair is in use. The sole use of the Potty chair is as a portable toilet.
>
> The second item under consideration is referred to as Real Feel Potty (Item No. RFeel-A). The Real Feel Potty is composed entirely of plastic. It is designed to emulate a real toilet. It has a plastic base shaped like a toilet. There is also a separate plastic pan that will slide in and out of the base for cleaning. This toilet includes a removable plastic cover that is shaped like a toilet seat and can be used independent of the base on a regular toilet once the toddler is old enough to sit on a regular toilet. To enhance the realistic aspect of this toilet, there is also a handle that can be pulled down to make a flush sound. The sole use of the Real Feel Potty is as a portable toilet.

ISSUE:

Whether the subject child-sized portable toilets are classified under subheading 3922.20, HTSUS, as lavatory seats and covers of plastics; or subheading 3922.90, HTSUS, as other sanitary ware of plastics.

LAW AND ANALYSIS:

The classification of goods under the HTSUS is governed by the General Rules of Interpretation (GRI). GRI 1 provides that classification shall be determined according to the terms of the headings of the tariff schedule and any relative section or chapter notes. In the event that the goods cannot be classified solely on the basis of GRI 1, and if the headings and legal notes do not otherwise require, the remaining GRIs 2 through 6 may then be applied in order. 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 2024 HTSUS headings under consideration are as follows:

3922	Baths, shower baths, sinks, washbasins, bidets, lavatory pans, seats and covers, flushing cisterns and similar sanitary ware, of plastics:	
3922.20.00		Lavatory seats and covers.
3922.90.00		Other.

* * * * *

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

EN 39.22 states in pertinent part:

> This heading covers fittings designed to be permanently fixed in place, in houses, etc., normally by connection to the water or sewage systems. It also covers other sanitary ware of similar dimensions and uses, such as portable bidets, baby baths and camping toilets.
>
> Flushing cisterns of plastics remain classified in this heading, whether or not equipped with their mechanisms.
>
> * * * * *

Heading 3922, HTSUS, which provides for "[b]aths, shower baths, sinks, washbasins, bidets, lavatory pans, seats and covers, flushing cisterns and similar sanitary ware, of plastics," is an *eo nomine* provision. Subheading 3922.20, HTSUS, explicitly states that the heading concerns "[l]avatory seats and covers." In Headquarters Ruling Letter (HQ) H266057, dated February 27, 2018, CBP did not specifically explore the nuances of subheading 3922.20, HTSUS, but held that the plastic lavatory seats and covers for commercial passenger aircraft encapsulate the type of merchandise correctly classified under subheading 3922.20, HTSUS. [1] In HQ H266057, the merchandise was

[1] The decision in HQ H266057 specifically dissected whether the lavatory seat and cover at issue were parts of aircraft under headings 3922 or 8802, HTSUS. The analysis focused on the two-part test described in *Pomeroy Collection, Ltd., v. United States*, 783 F. Supp. 2d 1257 (Ct. Int'l Trade 2011), for determining whether an article is a "part." That legal analysis is not relevant here.

not a complete toilet but merely the seat and lid that could be attached to the toilet bowl incorporated into an aircraft. As explained in HQ H266057, toilet seats and covers provide comfort for the user while using a toilet, while the lid can act as an additional seat when the toilet is not in use. Together, the seat and lid cover the toilet bowl, which is an immodest object. Finally, in certain circumstances, seats and covers perform some limited sanitary role containing splashes and smells. However, as highlighted in HQ H266057, seats and covers are not the entirety of a toilet and, generally, a seat and cover can be interchanged with another seat and cover on the same toilet. Lavatory seats and covers are unique and separate merchandise from toilets, and the HTSUS classifies them accordingly.

Turning to the "Potty Chair" and "Real Feel Potty" at issue, the merchandise was classified under subheading 3922.20, HTSUS, as "[l]avatory seats and covers" in NY N319574. All versions of the "Potty Chair" and "Real Feel Potty" include a receptacle for waste, storage compartment, and other details intended to emulate a toilet, such as integrated speakers to produce flushing noises, seats and lids, and support backs. None of the additional components or the detachability of the seat changes the reality that the products are miniature replica toilets and designed to help a child become familiar with the ritual of relieving themselves into a toilet. The "Potty Chair" is explicitly a portable miniature toilet or a child-size portable toilet. The seat in the "Real Feel Potty" is removable and designed to be placed on a full-size toilet to transition a child from using a child-sized portable toilet that is disconnected from plumbing to a true toilet that is connected to plumbing. This capability does not alter the fact that the seat is initially attached to the waste receptacle, and all other integrated components, such as the speakers that make a flushing sound, center around making the function of the waste receptacle more "real" for a child. The "Potty Chair" and "Real Feel Potty" are child-size portable toilets and not merely lavatory seats and covers, and thus they are excluded from subheading 3922.20, HTSUS.

The child-sized portable toilets in NY N319574 operate very similarly to the soft seat toilet trainer and step stool in NYL83440, dated April 18, 2005, and the potty bench in NY M83046, dated May 16, 2006, which were classified under subheading 3922.90, HTSUS, as other sanitaryware of plastics. In NY L83440, the article was a potty chair used for toilet training small children, which consisted of a flip lid, a removable soft seat potty topper with a detachable deflector, and a large pot/waste receptacle. The removable topper could also be placed on top of a standard size toilet seat. In NY M83046, the merchandise therein was a training potty featuring two enclosed side storage spaces for organizing potty training supplies. Similar to the subject "Potty Chair" and "Real Feel Potty," the articles in NY L83440 and NY M83046 are miniature training toilets for children that are defined by their similarity to real toilets but maintain the movability and ease of cleaning of lavatory pans. As such, the correct classification of the subject child-size portable toilets is under subheading 3922.90, HTSUS, as other sanitary ware of plastics.

HOLDING:

By application of GRIs 1 and 6, the subject child-size portable toilets, "Potty Chair" and "Real Feel Potty," are classified in heading 3922, HTSUS, specifically in subheading 3922.90.00, HTSUS, as "Baths, shower baths, sinks,

washbasins, bidets, lavatory pans, seats and covers, flushing cisterns and similar sanitary ware, of plastics: Other." The 2024 column one, general rate of duty is 6.3 percent *ad valorem*.

Pursuant to U.S. Note 20 to Subchapter III, Chapter 99, HTSUS, products of China classified under subheading 3922.90, 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 3922.90, HTSUS, listed above.

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/.

EFFECT ON OTHER RULINGS:

NY N319574, dated June 2, 2021, is hereby revoked.

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

Sincerely,

YULIYA A. GULIS,
Director
Commercial and Trade Facilitation Division

PROPOSED REVOCATION OF ONE RULING LETTER AND PROPOSED REVOCATION OF TREATMENT RELATING TO THE TARIFF CLASSIFICATION OF FORGED TITANIUM BILLETS

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

ACTION: Notice of proposed revocation of one ruling letter, and proposed revocation of treatment relating to the tariff classification of forged titanium billets.

SUMMARY: Pursuant to section 625(c), Tariff Act of 1930 (19 U.S.C. § 1625(c)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that U.S. Customs and Border Protection (CBP) intends to revoke Headquarters Ruling Letter (HQ) H027436, dated April 16, 2009, concerning the tariff classification of forged titanium billets 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 September 7, 2024.

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

FOR FURTHER INFORMATION CONTACT: Claudia Garver, Chemicals, Petroleum, Metals and Miscellaneous Classification Branch, Regulations and Rulings, Office of Trade, at (202) 325–0024.

SUPPLEMENTARY INFORMATION:

BACKGROUND

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

Pursuant to 19 U.S.C. § 1625(c)(1), this notice advises interested parties that CBP is proposing to revoke one ruling letter pertaining to the tariff classification of forged titanium billets. Although in this notice, CBP is specifically referring to Headquarters Ruling Letter (HQ) H027436, dated April 16, 2009 (Attachment A), this notice also covers any rulings on this merchandise which may exist, but have not been specifically identified. CBP has undertaken reasonable efforts to search existing databases for rulings in addition to the one identified. No further rulings have been found. Any party who has received an interpretive ruling or decision (i.e., a ruling letter, internal advice memorandum or decision, or protest review decision) on the merchandise subject to this notice should advise CBP during the comment period.

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

In HQ H027436, CBP classified forged titanium billets in subheading 8108.20.00, HTSUS, which provides for "Titanium and articles thereof, including waste and scrap: Unwrought titanium." CBP has reviewed HQ H027436 and has determined the ruling letter to be in error. It is now CBP's position that the forged titanium billets are

classified in subheading 8108.90.60, HTSUS, which provides for "Titanium and articles thereof, including waste and scrap: Other: Other."

Pursuant to 19 U.S.C. § 1625(c)(1), CBP is proposing to revoke HQ H027436 and to revoke or modify any other ruling not specifically identified to reflect the analysis contained in the proposed HQ H317528, set forth as Attachment B to this notice. Additionally, pursuant to 19 U.S.C. § 1625(c)(2), CBP is proposing to revoke any treatment previously accorded by CBP to substantially identical transactions.

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

YULIYA A. GULIS,
Director
Commercial and Trade Facilitation Division

Attachments

ATTACHMENT A

HQ H027436

April 16, 2009
CLA-2 OT:RR:CTF:TCM H027436 HkP
CATEGORY: Classification
TARIFF NO.: 8108.20

MR. PAUL ABERLY
THE ABERLY GROUP
7934 NORTH 54TH PLACE
PARADISE VALLEY, AZ 85253

RE: Revocation of HQ 966570; forged titanium billets; Additional U.S. Note 1 to Section XV

DEAR MR. ABERLY:

This is in reference to Headquarters Ruling Letter ("HQ") 966570, issued to you on November 7, 2003, in which the tariff classification of forged titanium billets was determined under the Harmonized Tariff Schedule of the United States ("HTSUS"). Through HQ 966570, U.S. Customs and Border Protection ("CBP") revoked New York Ruling Letter ("NY") A84786, dated July 12, 1996, and classified the titanium billets under subheading 8108.90.60, HTSUS, as "other" titanium and articles thereof. We have reconsidered HQ 966570 and determined that the tariff classification of the articles described therein is not correct. For the reasons set forth below, we hereby revoke HQ 966570.

Pursuant to section 625(c), Tariff Act of 1930 (19 U.S.C. §1625(c)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act, Pub. L. 103–182, 107 Stat. 2057, 2186 (1993), notice of the proposed revocation was published on February 5, 2009, in the *Customs Bulletin*, Volume 43, No. 7. One importer contacted CBP in response to the notice regarding the proposed revocation's impact on a ruling issued to the importer by CBP but did not submit comments on the proposed revocations.

FACTS:

The merchandise at issue was described in NY A84786 and HQ 966570 as being imported in billet form and thereafter to be melted down for use in the manufacture of recreational equipment. The chemical analysis of the product was stated to be 90 percent titanium, 6 percent aluminum, and 4 percent vanadium, by weight. The product was not further described.

In HQ 966570, CBP stated, in relevant part, the following:

> According to Section XV, Additional U.S. Note 1, HTSUS, the term "*unwrought*" includes billets, among other similar manufactured primary forms of metal, but does not cover rolled or forged products, among others. Technical sources on titanium production we have consulted indicate that titanium ore is first chlorinated, then reacted with either magnesium or sodium to yield metallic titanium sponge. The sponge is crushed and pressed, then melted in a vacuum arc furnace. The melted sponge solidifies under the vacuum conditions of the furnace to form a solid titanium ingot which is then forged into either slabs or billets. Additionally, the term **billet** is defined as a semifinished section that is hot rolled from a metal ingot..., (2) a solid semifinished round or square product that has

> been hot worked by forging, rolling, or extrusion. *Metals Handbook*, Desk Edition, 2nd (1998), published by the American Society for Metals. As it appears that the titanium billets at issue here are produced by hot rolling or forging, they are not unwrought products for tariff purposes, and cannot be classified as unwrought titanium, in subheading 8108.20.00, HTSUS.

These statements no longer reflect our view on the classification of the forged titanium billets described in HQ 966570.

LAW AND ANALYSIS:

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

GRI 6 provides that the classification of goods in the subheading of a heading shall be determined according to the terms of those subheadings on the understanding that only subheadings at the same level are comparable.

The HTSUS provisions under consideration are as follows:

8108	Titanium and articles thereof, including waste and scrap:	
8108.20	Unwrought titanium; powders	
	* * *	
8108.20.0091	Other	
8108.90	Other:	
	* * *	
8108.90.60	Other	

Additional U.S. Note 1 to Section XV, HTSUS, in which chapter 81 is located, provides:

> For the purposes of this section, the term "*unwrought*" refers to metal, whether or not refined, in the form of ingots, blocks, lumps, billets, cakes, slabs, pigs, cathodes, anodes, briquettes, cubes, sticks, grains, sponge, pellets, flattened pellets, rounds, rondelles, shot and similar manufactured primary forms, but does not cover rolled, forged, drawn or extruded products, tubular products or cast or sintered forms which have been machined or processed otherwise than by simple trimming, scalping or descaling.

In construing the provisions of this Note, the Court of International Trade has found that:

> The definition of unwrought contained in Additional U.S. Note 2 [now Note 1] connotes a stage in a manufacturing process which eventually results in a different ultimate product. The Court concludes that the phrase "manufactured primary forms" refers to forms that have undergone some processing but must undergo further processing before they appear in an eventual final product. This definition provides a unifying characteristic for the otherwise disparate enumerated forms.

Anval Nyby Powder AB v United States, 20 Ct. Int'l Trade 608, 616; 927 F. Supp. 463, 471 (citations omitted) (1996). Based on this interpretation by the court, it is evident that the language of Additional U.S. Note 2 to Section XV, HTSUS, also reflects the common and commercial meaning of the term "unwrought." Furthermore, it is clear from the statements of the court that the term "unwrought" is in no way tied to a particular manufacturing process (such as hot rolling or forging). Rather, it refers to a product at an intermediate stage of a manufacturing process.

Other sources support this interpretation of "unwrought". *International Standard ISO 3134/2, Light metals and their alloys – Terms and definitions – Part 2: Unwrought products* explains that the term "unwrought product" is a "[g]eneral term for products obtained by smelting or refining or casting processes, for example, ingots for rolling, ingots for extruding, ingots for forging and ingots for remelting." *Id.* at 2.1. *The Oxford English Dictionary* defines the term "unwrought" in relevant part, as follows: "2. Not formed or fashioned by being worked on; *esp.* of materials (as fabrics, stone, or metals): Still in a crude, raw, rude, or natural state; not worked into a finished condition."

Based on the above meanings of "unwrought", we find that subheading 8108.20, HTSUS, provides for, without limitation, titanium that has not been worked into a finished condition. Accordingly, we find that the titanium billets are classified under subheading 8108.20, HTSUS, as "unwrought titanium" because they have not been worked into a finished condition.

HOLDING:

By application of GRI 1 through the provisions of GRI 6, the titanium billets are correctly classified under heading 8108, HTSUS. They are specifically provided for in subheading 8108.20, HTSUS, which provides for: "Titanium and articles thereof, including waste and scrap: Unwrought titanium; powders." The 2008 column one, general rate of duty is 15%.

EFFECT ON OTHER RULINGS:

HQ 966570, dated November 7, 2003, is hereby revoked.

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

Sincerely,

MYLES B. HARMON,
Director
Commercial and Trade Facilitation Division

ATTACHMENT B

HQ H317528
OT:RR:CTF:CPMMA H317528 CKG
CATEGORY: Classification
TARIFF NO.: 8108.90.60

MR. PAUL ABERLY
THE ABERLY GROUP
7934 NORTH 54TH PLACE
PARADISE VALLEY, AZ 85253

RE: Revocation of HQ H027436; forged titanium billets; Additional U.S. Note 1 to Section XV

DEAR MR. ABERLY:

This is in reference to Headquarters Ruling Letter ("HQ") H027436, issued to you on April 16, 2009, in which the tariff classification of forged titanium billets was determined under the Harmonized Tariff Schedule of the United States ("HTSUS"). Through HQ H027436, U.S. Customs and Border Protection ("CBP") revoked HQ 966570, dated November 7, 2003, which in turn revoked New York Ruling Letter ("NY") A84786, dated July 12, 1996. In HQ 966570, CBP classified the titanium billets under subheading 8108.90.60, HTSUS, as "other" titanium and articles thereof, and in HQ H027436, CBP reclassified the subject merchandise under subheading 8108.20, HTSUS, as unwrought titanium, as originally decided in NY A84786. We have reconsidered HQ H027436 and determined that the tariff classification of the articles described therein is incorrect. For the reasons set forth below, we hereby revoke HQ H027436.

FACTS:

The merchandise at issue was described in HQ H027436, revoking NY A84786 and HQ 966570, as being imported in billet form and thereafter to be melted down for use in the manufacture of recreational equipment. The chemical analysis of the product was stated to be 90 percent titanium, 6 percent aluminum, and 4 percent vanadium, by weight. The product was not further described.

ISSUE:

Whether the forged titanium billets should be classified under subheading 8108.20, HTSUS, as "Unwrought titanium" or under subheading 8108.90.60, HTSUS, as "Other."

LAW AND ANALYSIS:

Classification under the HTSUS is made in accordance with the General Rules of Interpretation (GRIs). GRI 1 provides that the classification of goods shall be determined according to the terms of the headings of the tariff schedule and any relative section or chapter notes. In the event that the goods cannot be classified solely on the basis of GRI 1, and if the headings and legal notes do not otherwise require, the remaining GRIs, 2 through 6, may then be applied in order. GRI 6 provides that the classification of goods in the subheading of a heading shall be determined according to the terms of those subheadings on the understanding that only subheadings at the same level are comparable.

The 2024 HTSUS provisions under consideration are as follows:

8108	Titanium and articles thereof, including waste and scrap:	
8108.20	Unwrought titanium; powders	
8108.20.0091		Other .....
8108.90	Other:	
8108.90.60		Other ....

Additional U.S. Note 1 to Section XV, HTSUS, in which Chapter 81 is located, provides:

> For the purposes of this section, the term "*unwrought*" refers to metal, whether or not refined, in the form of ingots, blocks, lumps, billets, cakes, slabs, pigs, cathodes, anodes, briquettes, cubes, sticks, grains, sponge, pellets, flattened pellets, rounds, rondelles, shot and similar manufactured primary forms, *but does not cover rolled, forged, drawn or extruded products*, tubular products or cast or sintered forms which have been machined or processed otherwise than by simple trimming, scalping or descaling. (Italicized emphasis added.)

In construing the provisions of this Note, the Court of International Trade has found that:

> The definition of unwrought contained in Additional U.S. Note 2 [now Note 1] connotes a stage in a manufacturing process which eventually results in a different ultimate product. The Court concludes that the phrase "manufactured primary forms" refers to forms that have undergone some processing but must undergo further processing before they appear in an eventual final product. This definition provides a unifying characteristic for the otherwise disparate enumerated forms.

Anval Nyby Powder AB v. United States, 20 Ct. Int'l Trade 608, 616; 927 F. Supp. 463, 471 (citations omitted) (1996).

In HQ H027436, CBP concluded that:

> [I]t is clear from the statements of the court that the term "unwrought" is in no way tied to a particular manufacturing process (such as hot rolling or forging). Rather, it refers to a product at an intermediate stage of a manufacturing proces.... Based on the above meanings of "unwrought", we find that subheading 8108.20, HTSUS, provides for, *without limitation*, titanium that has not been worked into a finished condition. Accordingly, we find that the titanium billets are classified under subheading 8108.20, HTSUS, as "unwrought titanium" because they have not been worked into a finished condition. (Italicized emphasis added.)

HQ H027436 no longer reflects the views of CBP concerning the classification of the subject forged titanium billets, or the legal definition of "unwrought" pursuant to Additional U.S. Note 1 to Section XV, HTSUS.

As noted in HQ H027436, the Court in *Anval* concluded that the phrase "manufactured primary forms" refers to forms that have undergone some processing but must undergo further processing before they appear in an eventual final product. However, the Court did not address whether the exclusion in Additional Note 1 of "*rolled, forged, drawn or extruded products*" also limited the scope of the term "unwrought" for tariff purposes. This exclusion was simply not pertinent to the classification of the merchandise at issue before the court, which was neither rolled nor forged nor drawn nor

extruded. Rather, the merchandise before the court had been produced via an "inert gas atomization process" - i.e., the cobalt alloy was melted in a furnace, then forced out through a nozzle into a stream of either nitrogen or argon, which turned the metal into liquid droplets. When the droplets cooled down, they solidified into powder. This process does not fall under any of the production processes listed in Additional U.S. Note 1 to Section XV, HTSUS, and therefore the court did not opine on the limitations imposed by this exclusion on the scope of unwrought products.

Because the Court did not preclude the application of the exclusion in Additional U.S. Note 1 to Section XV, HTSUS, the *Anval* decision and analysis are consistent with the obvious interpretation of the Note - i.e., that forged products are wrought, not unwrought, regardless of their stage of production. The proper interpretation of the term "unwrought" must therefore consider both the definition provided by the Court in *Anval* and the express terms of Additional U.S. Note 1 to Section XV, HTSUS. Thus, unwrought products (manufactured primary forms) are characterized both by the stage of processing AND by the specific production processes applied to produce them. Specifically, manufactured primary forms must be in an intermediate stage of production, not yet in final form, and manufactured primary forms cannot be forged, rolled, drawn or extruded, or include tubular products or cast or sintered forms which have been machined or processed by any means other than simple trimming, scalping or descaling.

Therefore, HQ H027436 erred both in declaring that the *Anval* Court decision should be interpreted to mean that "subheading 8108.20, HTSUS, provides for, *without limitation,* titanium that has not been worked into a finished condition", and in finding that forged titanium billets can be classified as unwrought products of subheading 8108.20, HTSUS, contrary to the clear terms of Additional U.S. Note 1 to Section XV, HTSUS, *supra*.

Accordingly, we find that the titanium billets are classified under subheading 8108.90, HTSUS, as other articles of titanium.

HOLDING:

By application of GRI 1 through the provisions of GRI 6, the titanium billets are correctly classified under heading 8108, HTSUS. They are specifically provided for in subheading 8108.90.60, HTSUS, which provides for "Titanium and articles thereof, including waste and scrap: Other: Other." The 2024 column one, general rate of duty is 15%.

EFFECT ON OTHER RULINGS:

HQ H027436, dated April 16, 2009, is hereby revoked.

Sincerely,

ANDREW LANGREICH FOR

YULIYA A. GULIS,
Director
Commercial and Trade Facilitation Division

AIR DECLARATION ZONE TEST

AGENCY: U.S. Customs and Border Protection; DHS.

ACTION: General notice.

SUMMARY: This document announces that U.S. Customs and Border Protection (CBP) will conduct a Declaration Zone test at air terminal facilities at participating air ports of entry (POEs) to fulfill a regulatory declaration requirement and allow for streamlined processing. Current CBP regulations require each traveler at air POEs to provide an oral or written declaration of all articles brought into the United States, to a CBP officer (CBPO). The test will provide arriving travelers with an alternative method to meet this requirement by allowing a demonstrative initial declaration. During the test, CBP will establish two queues for travelers entering the country to choose from: Items to Declare and No Items to Declare. Known as "Declaration Zones," these queues will allow travelers entering the country through participating air POEs to make their initial declaration simply by choosing which queue to enter. This notice describes the test, and also sets forth requirements for participating in the test, the duration of the test, and how CBP will evaluate the test. This notice also invites public comment on any aspect of the test.

DATES: The test will begin no earlier than August 19, 2024 and will run for approximately two years. The start date will be in accordance with the air POE's ability to implement the declaration zones. Comments concerning this notice and all aspects of the announced test may be submitted at any time during the test period to the address set forth below.

ADDRESSES: Written comments concerning program, policy, and technical issues may be submitted at any time during the test period via email to *BiometricAir@cbp.dhs.gov*. Please use "Comment on Declaration Zone Test" in the subject line of the email.

FOR FURTHER INFORMATION CONTACT: Natascha Gutermuth, Program Manager, Biometrics Program Office, Office of Field Operations, U.S. Customs and Border Protection, (202) 417–0096, or email at: *Natascha.A.Gutermuth@cbp.dhs.gov*.

SUPPLEMENTARY INFORMATION:

Background

Current U.S. Customs and Border Protection (CBP) regulations require each traveler to provide an oral or written declaration of all

articles brought into the United States, to a CBP officer (CBPO). *See* part 148, subpart B of title 19 of the Code of Federal Regulations (19 CFR part 148, subpart B). There are currently three types of Federal Inspection Services (FIS) air port of entry (POE) air terminal facilities: standard, modified egress, and baggage first. At standard air terminal facilities, a traveler is processed by a CBPO at primary inspection to determine whether the traveler may enter the United States. Once cleared for entry, the traveler then proceeds to the baggage area to collect any luggage and subsequently proceeds through the egress area to the facility exit where a CBPO takes an oral declaration from the traveler or collects a written declaration through CBP Form 6059–B if the traveler completes one. *See* 19 CFR 148.12, 148.13. The CBPO then determines whether the declaration requires the payment of a duty or if further examination is necessary. If either is required, the CBPO refers the traveler to secondary inspection. Otherwise, the traveler may then exit the air terminal facility.

At modified egress air terminal facilities, a traveler is processed by a CBPO at primary inspection to determine whether the traveler may enter the United States. Concurrently, the CBPO takes an oral declaration from the traveler or collects a written declaration through CBP Form 6059–B if the traveler completes one. The CBPO then determines whether the declaration requires the payment of a duty or if further examination is necessary. If either is required, the CBPO refers the traveler to secondary inspection. Once cleared for entry, the traveler proceeds to the baggage area to collect any luggage. The traveler may then exit the air terminal facility without being stopped, unless a roving CBPO engages with the traveler.

At baggage first air terminal facilities, the traveler collects any luggage prior to being processed at primary inspection, where a CBPO then determines whether the traveler may enter the United States. If the traveler is cleared for entry, the CBPO also takes an oral declaration from the traveler or collects a written declaration through CBP Form 6059–B if the traveler completes one. The CBPO then determines whether the declaration requires the payment of a duty or if further examination is necessary. If either is required, the CBPO refers the traveler to secondary inspection. Otherwise, the traveler may then exit the air terminal facility, unless a roving CBPO engages with the traveler.

At all three types of air terminal facilities described above, CBPOs also perform roving enforcement operations within the baggage area and egress area. At any point prior to exiting the air terminal facility, a traveler may be questioned by a CBPO and referred for secondary

inspection. Travelers referred to secondary inspection may be directed to complete CBP Form 6059–B, if not already completed.

As air travel returns to, and exceeds, pre-pandemic levels, innovative methods of processing are necessary to ensure the safe and streamlined movement of travelers. Declaration zones, whereby travelers provide an initial declaration via selection of a queue, are an established concept in many countries and are being tested in several U.S. sea POEs. *See* 86 FR 48436 (Aug. 30, 2021) (announcing a Declaration Zone test at certain cruise terminal facilities); 88 FR 71372 (Oct. 16, 2023) (announcing the extension and expansion of the 2021 test). Declaration zones facilitate the processing of travelers by separating those who need to go directly to a CBPO for additional processing from those who do not. With declaration zones, travelers provide an initial declaration by selecting one of two clearly marked queues, either that they have items to declare or no items to declare. This selection acts as travelers' initial declaration simply through the queue that they choose. This addition of a physical, demonstrative form of declaration would allow CBPOs to shift focus from conducting some of the administrative tasks they do currently, such as taking oral declarations from all applicable travelers and instead focus on conducting roving enforcement operations. Roving CBPOs would be able to use their observation skills, as well as their knowledge of trends and smuggling techniques, to actively monitor and select individuals for inspection. As is the case currently, travelers would still be subject to questions upon inspection, and as the travelers move through the Federal Inspection Station (FIS), as appropriate.

The Air Declaration Zone Test

CBP will conduct an Air Declaration Zone Test under 19 CFR 101.9 to fulfill the declaration requirement, while also allowing for streamlined processing. Current CBP regulations require each traveler to provide an oral or written declaration of all articles brought into the United States, to a CBPO. *See* 19 CFR part 148, subpart B. The test will provide arriving travelers with an alternative method to meet this requirement by allowing a demonstrative initial declaration through the use of declaration zones at air terminal facilities at certain air POEs. The test does not change any other aspect of the processing of arriving travelers. Travelers will continue to have the option of making an oral or written declaration.

Description and Procedures

Within an air terminal facility, two distinct customs declaration zone queues will be established after travelers collect their

luggage: one for *No Items to Declare* and another for *Items to Declare*. The location of the queues, either at the entrance to the egress area or prior to processing in primary inspection, will depend on the air terminal facility. At all air terminal facilities, signage will be posted to clearly label the queues. The physical act of selecting the *No Items to Declare* queue or the *Items to Declare* queue in and of itself will constitute an initial demonstrative declaration. CBPOs and CBP Agricultural Specialists will conduct roving enforcement operations within the baggage area and egress area to ensure traveler compliance.

No Items To Declare Queue

Travelers who determine that they have nothing to declare will enter the *No Items to Declare* queue. Depending on the location of the queue in the air terminal facility, the traveler will either proceed to primary inspection or proceed through the egress area to facility exit. CBPOs will conduct roving operations in the *No Items to Declare* zone to affirm traveler compliance. When the queue is located at the entrance of the egress area, CBPOs will also receive oral declarations and make referrals to secondary inspection as necessary; travelers who are not questioned by CBPOs conducting roving operations proceed to the exit.

Items To Declare Queue

Travelers with items to declare will enter the *Items to Declare* queue and will present before a CBPO to make an oral declaration. The CBPO will make a determination if duty is owed by the traveler or if additional inspection is warranted. The CBPO will then direct the traveler accordingly.

Referral to Secondary Inspection

If a traveler is referred to secondary inspection at any point, CBPOs will follow standard procedures, including collecting oral and/or written declarations during the referral and inspection. CBPOs will follow current agency policy on declaration amendment opportunities.

Eligibility and Participation Requirements

This test allowing a demonstrative declaration to be an acceptable declaration method will begin at one air POE, Dallas-Fort Worth, Texas. CBP may choose to expand this test to other air POEs during the two-year test period. Any such expansion will be announced on the CBP website, *https://www.cbp.gov*.

CBP will provide directional signage for use in the implementation of the declaration zones. Port management will coordinate with the airport authority and terminal managers for the printing and posting of the directional signage and for establishing the corresponding queues. The signage is ancillary to the statutory signage currently posted within air terminal facilities and the FIS area. These directional signs will facilitate the declaration zone process and help travelers understand the expectation when entering a specific queue.

CBP will also work with each airline at eligible POEs to develop educational materials to provide to travelers regarding U.S. Customs declaration responsibilities and how travelers should navigate the declaration zones.

Authorization for the Test

The test described in this notice is authorized pursuant to 19 CFR 101.9(a), which allows the Commissioner of CBP to impose requirements different from those specified in the CBP Regulations for purposes of conducting a test program or procedure designed to evaluate the effectiveness of new operational procedures regarding the processing of passengers. This test is authorized pursuant to this regulation as it is designed to evaluate whether allowing a demonstrative initial declaration is a feasible way to fulfill the declaration requirement and allow for streamlined processing.

Waiver of Certain Regulatory Requirements

CBP regulations require each traveler to provide an oral or written declaration of all articles brought into the United States, to a CBP officer. *See* 19 CFR 148.12, 148.13. The test will provide arriving travelers with an alternative method to meet this requirement by allowing a demonstrative initial declaration. All other requirements of 19 CFR part 148, subpart B, regarding declarations, including those provided by 19 CFR 148.18, regarding failure to declare, and 19 CFR 148.19, regarding false or fraudulent statements, will still apply.

Duration of Test

This test will run for approximately two years, beginning no earlier than August 19, 2024. While the test is ongoing, CBP will evaluate the results and determine whether the test will be extended or otherwise modified. CBP reserves the right to discontinue this test at any time in CBP's sole discretion. CBP will announce any modifications to the duration of the test by notice in the **Federal Register**.

Evaluation of Declaration Zone Test

CBP will use the results of this test to assess the operational feasibility of allowing an initial demonstrative declaration to be an acceptable method of declaration at air POEs. CBP will evaluate this test based on a number of criteria, including:

- Evaluation of airline customer satisfaction surveys gathering feedback on the debarkation process; and
- Comparison of year-over-year enforcement statistics for each test period to ensure no impact to duty collection or to the frequency of enforcement activities.

Paperwork Reduction Act

The Paperwork Reduction Act (PRA) of 1995 (44 U.S.C. 3507(d)) requires that CBP consider the impact of paperwork and other information collection burdens imposed on the public. As there is no new collection of information required in this document, the provisions of the PRA are inapplicable.

Signing Authority

Troy A. Miller, the Senior Official Performing the Duties of the Commissioner, having reviewed and approved this document, has delegated the authority to electronically sign this document to the Director (or Acting Director, if applicable) of the Regulations and Disclosure Law Division for CBP, for purposes of publication in the **Federal Register**.

ROBERT F. ALTNEU,
Director, Regulations & Disclosure Law Division, Regulations & Rulings,
Office of Trade, U.S. Customs and Border Protection.

AGENCY INFORMATION COLLECTION ACTIVITIES; Extension; Documents Required Aboard Private Aircraft

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

ACTION: 60-Day notice and request for comments.

SUMMARY: The Department of Homeland Security, U.S. Customs and Border Protection (CBP) will be submitting the following information collection request to the Office of Management and Budget

(OMB) for review and approval in accordance with the Paperwork Reduction Act of 1995 (PRA). The information collection is published in the **Federal Register** to obtain comments from the public and affected agencies.

DATES: Comments are encouraged and must be submitted (no later than September 23, 2024) to be assured of consideration.

ADDRESSES: Written comments and/or suggestions regarding the item(s) contained in this notice must include the OMB Control Number 1651–0058 in the subject line and the agency name. Please submit written comments and/or suggestions in English. Please use the following method to submit comments:

Email. Submit comments to: *CBP_ PRA@cbp.dhs.gov.*

FOR FURTHER INFORMATION CONTACT: Requests for additional PRA information should be directed to Seth Renkema, Chief, Economic Impact Analysis Branch, U.S. Customs and Border Protection, Office of Trade, Regulations and Rulings, 90 K Street NE, 10th Floor, Washington, DC 20229–1177, Telephone number 202–325–0056 or via email *CBP_PRA@cbp.dhs.gov.* Please note that the contact information provided here is solely for questions regarding this notice. Individuals seeking information about other CBP programs should contact the CBP National Customer Service Center at 877–227–5511, (TTY) 1–800–877–8339, or CBP website at *https://www.cbp.gov/*.

SUPPLEMENTARY INFORMATION: CBP invites the general public and other Federal agencies to comment on the proposed and/or continuing information collections pursuant to the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*). This process is conducted in accordance with 5 CFR 1320.8. Written comments and suggestions from the public and affected agencies should address one or more of the following four points: (1) whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (2) the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used; (3) suggestions to enhance the quality, utility, and clarity of the information to be collected; and (4) suggestions to minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or

other forms of information technology, *e.g.,* permitting electronic submission of responses. The comments that are submitted will be summarized and included in the request for approval. All comments will become a matter of public record.

Overview of This Information Collection

Title: Documents Required Aboard Private Aircraft.

OMB Number: 1651–0058.

Current Actions: CBP proposes to extend the expiration date of this information collection without a change to the burden hours or information collected.

Type of Review: Extension (without change).

Affected Public: Individuals.

Abstract: In accordance with 19 CFR 122.27(c), a commander of a private aircraft arriving in the U.S. must present several documents to CBP officers for inspection. These documents include: (1) a pilot certificate/license; (2) a medical certificate; and (3) a certificate of registration. CBP officers use the information on these documents as part of the inspection process for private aircraft arriving from a foreign country. This presentation of information is authorized by 19 U.S.C. 1433, as amended by Public Law 99–570.

Type of Information Collection: Documents abroad a private aircraft.

Estimated Number of Respondents: 120,000.

Estimated Number of Annual Responses per Respondent: 1.

Estimated Number of Total Annual Responses: 120,000.

Estimated Time per Response: .0166.

Estimated Total Annual Burden Hours: 1,992.

Dated: July 19, 2024.

SETH D. RENKEMA,
Branch Chief, Economic Impact Analysis Branch,
U.S. Customs and Border Protection.

AGENCY INFORMATION COLLECTION ACTIVITIES; Extension; Entry of Articles for Exhibition

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

ACTION: 60-Day notice and request for comments.

SUMMARY: The Department of Homeland Security, U.S. Customs and Border Protection (CBP) will be submitting the following information collection request to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act of 1995 (PRA). The information collection is published in the **Federal Register** to obtain comments from the public and affected agencies.

DATES: Comments are encouraged and must be submitted (no later than September 23, 2024) to be assured of consideration.

ADDRESSES: Written comments and/or suggestions regarding the item(s) contained in this notice must include the OMB Control Number 1651–0037 in the subject line and the agency name. Please submit written comments and/or suggestions in English. Please use the following method to submit comments:

Email. Submit comments to: *CBP_PRA@cbp.dhs.gov.*

FOR FURTHER INFORMATION CONTACT: Requests for additional PRA information should be directed to Seth Renkema, Chief, Economic Impact Analysis Branch, U.S. Customs and Border Protection, Office of Trade, Regulations and Rulings, 90 K Street NE, 10th Floor, Washington, DC 20229–1177, Telephone number 202–325–0056 or via email *CBP_PRA@cbp.dhs.gov.* Please note that the contact information provided here is solely for questions regarding this notice. Individuals seeking information about other CBP programs should contact the CBP National Customer Service Center at 877–227–5511, (TTY) 1–800–877–8339, or CBP website at *https://www.cbp.gov/*.

SUPPLEMENTARY INFORMATION: CBP invites the general public and other Federal agencies to comment on the proposed and/or continuing information collections pursuant to the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*). This process is conducted in accordance with 5 CFR 1320.8. Written comments and suggestions from the public and affected agencies should address one or more of the following four points: (1) whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (2) the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used; (3) suggestions to enhance the quality, utility, and clarity of the information to be collected; and (4) suggestions to minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or

other forms of information technology, *e.g.,* permitting electronic submission of responses. The comments that are submitted will be summarized and included in the request for approval. All comments will become a matter of public record.

Overview of This Information Collection

Title: Entry of Articles for Exhibition.

OMB Number: 1651–0037.

Current Actions: CBP proposes to extend the expiration date of this information collection with no change to the burden hours or to the information collected.

Type of Review: Extension (without change).

Affected Public: Businesses.

Abstract: Goods entered for the purpose of exhibit at fairs, or for use in constructing, installing, or maintaining foreign exhibits at a fair may be free of duty under 19 U.S.C. 1752. In order to substantiate that goods qualify for duty-free treatment, the consignee of the merchandise must provide information to CBP about the imported goods, which is specified in 19 CFR 147.11(c). Without the required information CBP will not be able to determine if the goods qualify for duty free treatment. A trade fair entry allows for duty-free entry of imported articles intended for exhibitions or for articles that will be used in the construction, installation or maintenance of foreign exhibits at trade fairs. These importations do not require the payment of any taxes or fees except for the Harbor Maintenance Fee (HMF). Trade Fair entries are not exempt from Harbor Maintenance Fee (HMF) pursuant to 19 CFR 24.24(c). "The collection of information is made upon arrival at the port of the fair on a special form of entry, 19 CFR 147.11(c)."
Type of Information Collection: Articles for Exhibition.

Estimated Number of Respondents: 50.

Estimated Number of Annual Responses per Respondent: 50.

Estimated Number of Total Annual Responses: 2,500.

Estimated Time per Response: 20 minutes.

Estimated Total Annual Burden Hours: 833.

Dated: July 19, 2024.

SETH D RENKEMA,
Branch Chief, Economic Impact Analysis Branch,
U.S. Customs and Border Protection.

Slip Op. 24–79

GIORGIO FOODS, INC., Plaintiff, v. UNITED STATES, Defendant, and PROCHAMP B.V., Defendant-Intervenor.

Before: M. Miller Baker, Judge
Court No. 23–00133

[The court sustains Commerce's final determination in part and remands for further proceedings.]

Dated: July 17, 2024

John M. Herrmann, *Paul C. Rosenthal*, and *Joshua R. Morey*, Kelley Drye & Warren LLP, Washington, DC, on the briefs for Plaintiff.

Brian M. Boynton, Principal Deputy Assistant Attorney General; *Patricia M. McCarthy*, Director; *Tara K. Hogan*, Assistant Director; and *Daniel Bertoni*, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, Washington, DC, on the brief for Defendant. Of counsel for Defendant was *Alexander Fried*, Attorney, Office of the Chief Counsel for Trade Enforcement & Compliance, U.S. Department of Commerce, Washington, DC.

Lizbeth R. Levinson, *Brittney R. Powell*, and *Alexander D. Keyser*, Fox Rothschild LLP, Washington, DC, on the brief for Defendant-Intervenor.

OPINION

Baker, **Judge:**

In this case, a domestic producer challenges the Department of Commerce's finding that a Dutch competitor did not dump mushrooms in the U.S. market. For the reasons explained below, the court sustains that determination in part and remands for reconsideration in part.

I

In an antidumping investigation, Commerce must determine whether imported goods are sold in the United States at "less than fair value." 19 U.S.C. § 1677b(a). The Tariff Act of 1930, as amended, directs the Department to measure "fair value" by making a "fair comparison" between the "export price or constructed export price and normal value." *Id.*

"Normal value" is at issue here. In most antidumping duty cases, that term refers to, in relevant part, "the price at which the foreign like product is first sold . . . *for consumption* in the exporting country." *Id.* § 1677b(a)(1)(B)(i) (emphasis added). In other words, the agency

must calculate the sales price to consumers in the home market. *See Smith-Corona Grp. v. United States*, 713 F.2d 1568, 1573 (Fed. Cir. 1983) (explaining that "[t]he home market sales method is preferred" for ascertaining normal value).

When there are no home-market sales or if such transactions amount to less than five percent of the product's purchases in the United States, 19 U.S.C. § 1677b(a)(1)(C)(i)–(ii), Commerce uses an alternative method to determine normal value. In those circumstances, the Department will examine "the price at which the foreign like product is . . . sold (or offered for sale) *for consumption*" in a third country, *id.* § 1677b(a)(1)(B)(ii) (emphasis added), subject to various conditions, *see id.* § 1677b(a)(1)(B)(ii)(I)–(III).[1]

The statute does not speak to what happens if more than one country satisfies those conditions. A regulation provides that in such cases, Commerce "generally will select the third country based on" certain "criteria." 19 C.F.R. § 351.404(e). The Department weighs product similarity, *id.* § 351.404(e)(1), sales volume, *id.* § 351.404(e)(2), and "[s]uch other factors as . . . appropriate," *id.* § 351.404(e)(3).[2]

As with other aspects of its investigation, in determining a suitable third-country comparison market, Commerce has no subpoena power. To "deter[] . . . non-compliance" with agency data requests, the statute authorizes the Department to impose a "built-in [tariff] increase" in certain circumstances. *F.lli De Cecco Di Filippo Fara S. Martino S.p.A. v. United States*, 216 F.3d 1027, 1032 (Fed. Cir. 2000). When either "necessary information is not available on the record," 19

[1] If Commerce finds that no third country provides an appropriate comparison market, it may determine normal value using "constructed value." *See id*. § 1677b(a)(4); *see also* 19 C.F.R. § 351.405.

[2] The CIT has previously construed 19 C.F.R. § 351.404(e) as having "a descending hierarchy of criteria from which Commerce must select the appropriate third country comparison market." *Viraj Forgings, Ltd. v. United States*, 350 F. Supp. 2d 1316, 1324 (CIT 2004). The court respectfully disagrees. That the regulation merely contains a "seriatim," *id.*, list of relevant considerations does not imply any ranking. To the contrary, the prefatory language—"generally will select based on"—suggests a balancing of factors rather than any hierarchy.

Indeed, the CIT's earlier decision in the same litigation recognized that the regulation directs the agency to weigh the enumerated benchmarks: "The comments to the 1997 regulations in *Antidumping Duties; Countervailing Duties*, 62 Fed.Reg. 27,296, 27,358 (May 19, 1997), explain that '. . . not all of the three criteria [in 19 C.F.R. § 351.404(e)] need be present in order to justify the selection of a particular market, and . . . *no single criterion is dispositive*.'" *Viraj Forgings, Ltd. v. United States*, 283 F. Supp. 2d 1335,1344–45 (CIT 2003) (emphasis in original). Thus, "Commerce is not required to choose the appropriate comparison market *solely* because the goods are identical, any more than it is required to choose the appropriate comparison market *solely* because the market is the largest available." *Id.* at 1345 (emphasis in original). As this case illustrates, the Department might reasonably conclude in certain circumstances that substantially greater sales volume (or some other relevant consideration) may outweigh marginal differences in product similarity.

U.S.C. § 1677e(a)(1), or an interested party withholds requested information, fails to provide it by the applicable deadline or in the form and manner requested, significantly impedes the proceeding, or provides information that cannot be verified, *id.* § 1677e(a)(2), the agency "shall, subject to [19 U.S.C. § 1677m(d)], use the facts otherwise available" to make its determination, *id.* § 1677e(a). In short, if any one of these specified conditions exists, and as qualified by § 1677m(d),[3] the agency must look beyond the information provided by the respondent. Only *if* Commerce does so, and if it also finds that the interested party failed to cooperate to the best of its ability, may the Department opt to apply an adverse inference in selecting from the facts otherwise available. *Id.* § 1677e(b)(1)(A).[4]

II

At the request of Giorgio Foods, Inc., a domestic producer, Commerce opened an antidumping investigation into mushrooms[5] imported from the Netherlands. Appx10555–10559. The Department selected Prochamp B.V., one of that country's two largest exporters to the United States, as a mandatory respondent. Appx1691.

As relevant here, the agency's questionnaire asked Prochamp to disclose six product characteristics, one of which was net drained weight. Appx10899–10902. It also instructed the company to report its home-market and foreign sales. Appx10754–10756. If the former were less than five percent of its U.S. transactions, the company was to contact the Department within 14 days. Appx10755.

Almost three weeks after that deadline, Prochamp informed Commerce that its home-market sales were below that five percent threshold and submitted data for what it said were its largest third-country markets—in alphabetical order, France, Germany, and Israel. Appx1735. The company urged the Department to select Germany as the comparison market. Appx1707.

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[3] This provision requires notice and an opportunity to cure in certain circumstances. *See* 19 U.S.C. § 1677m(d).

[4] Litigants and the agency often blur together this two-step process of applying facts otherwise available with an adverse inference by using the shorthand "adverse facts available" or "AFA." *See, e.g.*, *Hung Vuong Corp. v. United States*, 483 F. Supp. 3d 1321, 1336–39 (CIT 2020).

[5] Adopting agency bureaucratese, the parties refer to mushrooms as "CPMs," jargon not generally known by the trade bar, much less educated lay readers. The court again reminds litigants that plain English is easier to read—and thus more persuasive, presumably the intended goal—than "obscure acronyms . . . *made up for a particular case* . . . ." *Del. Riverkeeper Network v. FERC*, 753 F.3d 1304, 1321 (D.C. Cir. 2014) (Silberman, J., concurring) (emphasis added); *cf. AsymaDesign, LLC v. CBL & Assocs. Mgmt., Inc.*, 103 F.4th 1257, 1261 (7th Cir. 2024) (Easterbrook, J.) ("Judges are long-term consumers of lengthy texts. To present an argument to such people, counsel must make the words easy to read and remember.").

Giorgio argued that France was the most appropriate comparison market because Prochamp's exports to that country most closely resembled those sold in the U.S. The American company also maintained that its Dutch competitor's reporting of German sales was unreliable. Appx2610–2614.

Early in its investigation, Commerce chose Germany. Appx1000. In doing so, it explained that its "practice is to consider all of the criteria under 19 CFR 351.404(e) when determining the appropriateness of a third-country comparison market." Appx1002. "If all other factors are equal," the Department will "select the largest third-country market by volume." *Id*.

Regarding the regulation's first factor, product similarity, Commerce found that the mushrooms exported to all three candidate countries were identical as to three of the six relevant physical characteristics and very similar with respect to two others. Appx1003–1004. As for the remaining attribute, "the products sold in France are the *most similar* to [those] sold in the United States in terms of net drained weight." Appx1003 (emphasis added).[6] But weighing all six criteria, "the record reflects that the products sold in each of the third-country markets all appear to be very similar" to the mushrooms sold in the U.S. Appx1004.

As to the regulation's second factor, sales volume, Commerce determined that Prochamp sold a "[[significantly larger]] overall quantity"[7] of mushrooms in "the German market" than in France or Israel. *Id*. Balancing the first two regulatory criteria, the Department found that the "slight difference in product weights" favoring France did not offset the greater German sales. *Id*.

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[6] Commerce inexplicably treated identical information as confidential on the next page of its memorandum. *See* Appx1004 ("[W]e find that Prochamp's sales to France have the [[most similar product weights]] to match with U.S. sales.") (double-bracketed words redacted in original). The court fails to see how such a relative comparison qualifies as "business proprietary information" under the relevant agency regulation. *See* 19 C.F.R. § 351.105(c). And even if this comparison otherwise so qualified, the Department waived the protection by disclosing it on the preceding page. *Cf. Jiangsu Alcha Aluminum Co. v. United States*, Ct. No. 22–00290, Slip Op. 24–77, at 6 n.3, 2024 WL 3372922, at *2 n.3 (CIT July 11, 2024) (noting that parties can "waive[] any confidentiality claim by referring to [assertedly business proprietary information] in their public briefs and in open court") (citing Fed. Cir. R. 25.1(c)). This opinion therefore does not treat the agency's comparison of product similarity as confidential.

[7] Commerce redacted the double-bracketed words from its public decision, but the court declines to do so because a mere comparison does not qualify as business proprietary information. *See* note 6. Moreover, "[t]he public's right of access to judicial records is a fundamental element of the rule of law." *Binh Hoa Le v. Exeter Fin. Corp.*, 990 F.3d 410, 417 (5th Cir. 2021) (quoting *In re Leopold*, 964 F.3d 1121, 1123 (D.C. Cir. 2020)). It does not matter that the parties agreed to seal information ineligible for such protection from disclosure because "courts are duty-bound to protect public access to judicial proceedings and records." *Id.* As with product similarity, this opinion does not treat the Department's comparison of relative sales volume as confidential.

Finally, the Department rejected Giorgio's objections to Prochamp's German sales data, which were preponderantly based on sales to a single multinational retailer. The American company complained that its Dutch competitor wrongly proffered product label language (German) and the customer's corporate address (the same) as support for evidence of sales *to consumers* in Germany.[8] Appx1005. Dismissing those concerns, Commerce found no indication that mushrooms sold to the retailer were not in turn resold to German consumers. *Id*.[9]

At verification, however, the Department concluded that Prochamp's sales to a multinational German retailer did not necessarily translate into *consumer* purchases in that country. Appx10073–10074. In particular, the agency found that the mushrooms were delivered to the retailer's warehouse *outside* of Germany, Appx10071–10072, and "[t]he documentation confirmed that" Germany and one *other* Deutsch-speaking country "are the likely countries of consumption but did not offer information to disambiguate the two," Appx10073. But Commerce assessed that, despite a few discrepancies, its review "did not generally conflict with Prochamp's assertion that the identification of German language label products sold to German [retailer] customers was the best possible way to identify products likely to be" purchased by consumers in that country. Appx10073.

In its final determination, Commerce found that "the record continue[d] to support [its] selection of Germany as the appropriate third country market . . . ." Appx1081; *see also* Appx1082 ("[W]e do not find that the record as further developed compels reconsideration of our finding that the products sold in Germany are sufficiently comparable to the products sold in the United States . . . , and Germany provides the most robust data when compared to the French and Israeli markets.").[10]

Regarding product similarity, the Department found that the difference in weight—one of the six relevant attributes—between Prochamp's French and German exports (with the former more closely resembling the company's U.S. sales) was not "determinative." Appx1082. That difference did "not conflict with the conclusion that

[8] Outside of Deutschland, German is an official language of Austria, Belgium, Liechtenstein, Luxembourg, and Switzerland. *See* https://worldpopulationreview.com/country-rankings/german-speaking-countries.

[9] Commerce also found that Germany had the "most similar channel of distribution and customer type when compared to the French and Israeli markets," Appx1004–1005, "which further support[ed]" the agency's choice, Appx1004.

[10] Before doing so, the agency took a swipe at Giorgio's persistence in challenging the selection of Germany, asserting that "reconsideration would [not] be administrable at the final stage of this investigation even if Commerce were to agree that the basis for this initial determination was unsupported." Appx1081.

the record reflects that the products sold in each of the third-country markets for this characteristic all appear to be very similar" to the mushrooms sold to American customers. *Id*.

As to whether Prochamp's German sales exceeded those in France and Israel, the Department acknowledged that the company's database only showed sales to a multinational retailer that could just as easily have been "distributed to other German-speaking countries for final consumption." Appx1064. Thus, the actual number of sales to consumers in Germany was unknowable. Even so, the company cooperated with the investigation and could not provide any more specific information about the end destination of mushrooms sold to the retailer. *Id*. And there was no evidence that "suggested German consumption was unlikely or more likely in a non-German market." Appx1064. As a result, "the German market . . . offer[ed] the largest and most robust database from which to determine [normal value]." Appx1082.[11]

Finally, Commerce declined Giorgio's request to apply facts otherwise available with an adverse inference as to Prochamp's reporting of financial information and third-country sales. As to the former, the Department found that Dutch law exempted the company—a member of a corporate family—from preparing standalone statements. Appx1051. Consequently, the agency could not "fault Prochamp for not providing a document that it does not have, nor was it obligated to have." *Id*. Similarly, Commerce refused to criticize the company for not providing internal financial statements, reasoning that they were not created using generally accepted accounting principles and in any event were consistent with the parent's statements. *Id*.

As to third-country sales, Commerce found that there were a few discrepancies in Prochamp's reporting, but the company corrected them and cooperated with all supplemental information requests. Appx1059. Regarding the tardiness in notifying the agency that the company's home-market sales fell below the statutory threshold, the Department explained that it was excusable because the company may not yet have "resolve[d] the issue" of such sales. Appx1060. In any event, the failure to make that notification did not impede the investigation. *Id*.

For the foregoing and other reasons, Commerce ultimately assigned Prochamp a dumping rate of zero. Appx1272.

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[11] The Department also acknowledged that the record as further developed "did not support" its earlier conclusion that Prochamp's sales channels and customer type in Germany buttressed the selection of that country. Appx1082; *see also* note 9. All the same, "this additional finding was . . . not determinative, and merely provided additional corroboration for the selection of Germany." Appx1082. The revised record did not suggest "that another proposed third country market [was] more similar than Germany with respect to sales channel[s] and type of customer." *Id*.

III

Invoking jurisdiction conferred by 28 U.S.C. § 1581(c), *see* ECF 10, ¶ 2, Giorgio brought this suit under 19 U.S.C. §§ 1516a(a)(2)(A)(i)(II) and (a)(2)(B)(i) to challenge Commerce's final determination, *see id.* Prochamp intervened to support the government. ECF 17. Giorgio then moved for judgment on the agency record (ECF 25); the government (ECF 28) and Prochamp (ECF 34) opposed, and Giorgio replied (ECF 37). The court decides the motion on the papers.

In § 1516a(a)(2) actions such as this, "[t]he court shall hold unlawful any determination, finding, or conclusion found . . . to be unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B)(i). That is, the question is not whether the court would have reached the same decision on the same record—rather, it is whether the administrative record as a whole permits Commerce's conclusion.

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

Nippon Steel Corp. v. United States, 337 F.3d 1373, 1379 (Fed. Cir. 2003) (cleaned up); *see also SSIH Equip. S.A. v. U.S. Int'l Trade Comm'n*, 718 F.2d 365, 382 (Fed. Cir. 1983) (if the Department makes a choice between "two fairly conflicting views," the court may not substitute its judgment even if its view would have been different "had the matter been before it *de novo*") (quoting *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951)).

IV

Giorgio accuses Commerce of two administrative law sins, one of commission and the other of omission. First, the company argues that the Department's selection of Germany as the comparison market is not supported by substantial evidence. ECF 25, at 2–3. Second, it asserts that the agency's refusal to apply facts otherwise available with an adverse inference to Prochamp suffers from the same defect. *Id.* The court addresses each charge in turn.

A

In challenging Commerce's choice of Germany, Giorgio first attacks the Department's stated reluctance (*see* Appx1081) to revisit that finding in its final determination. *See* ECF 25, at 35–41. But the

agency went ahead—even if grudgingly, *see* note 10—and *did* reconsider that conclusion on the merits. *See* Appx1081–1082. Thus, the company's quarrel is with its own strawman.

Giorgio next assails Commerce's initial finding that the "slight difference in product weights" that supported using France as the comparison market did not "outweigh[] the significantly larger overall quantity" of such mushrooms "sold to the German market." Appx1004. *See* ECF 25, at 44–47. The American company asserts that the agency's conclusion that the difference in product weights was slight is "clearly erroneous," *id.* at 46, and "no reasonable mind could reach the Department's conclusion" that Prochamp's German sales "outweighed [the] differences in product characteristics," *id*. at 46–47.

Giorgio's argument fails. To begin with, the company reads the agency's decision out of context. Commerce found

> that Prochamp's sales to France have the most similar product weights to match with U.S. sales. Nevertheless, the record reflects that the products sold in each of the third-country markets *all appear to be very similar* to the [merchandise under consideration]. Thus, we do not find that the slight difference in product weights outweighs the significantly larger overall quantity of [merchandise under consideration] sold to the German market.

Appx1004 (emphasis added). The second sentence is key. Given that the Department found that five of the six relevant characteristics were identical or nearly so, Appx1003–1004, it apparently (and reasonably) concluded that *on balance* the products sold in all three markets were very similar. *Cf. Commc'ns Workers of Am. Local 4123 ex rel. Former Emps. of AT&T Servs., Inc. v. U.S. Sec'y of Labor*, 518 F. Supp. 3d 1342, 1351 (CIT 2021) (stating that a court "will uphold a decision of less than ideal clarity if the agency's path may reasonably be discerned") (quoting *Bowman Transp., Inc. v. Ark.-Best Freight Sys., Inc.*, 419 U.S. 281, 286 (1974)).

Giorgio also asks the court to second-guess Commerce's balancing of product likeness with sales volume. Given that weight was only one of six relevant product characteristics, the Department reasonably determined that the significantly larger volume of German sales—assuming for the moment the reliability of that data—more than offset the *overall* slight difference in product similarity that pointed toward using France as a comparison market.[12] That the court might

[12] Giorgio further attacks Commerce's decision to stick with Germany as the comparison market by essentially rehashing its critique of the agency's initial choice. *See* ECF 25, at 47–49. Those attacks fail for the same reason.

reach a different conclusion were it weighing the evidence de novo does not permit it to substitute its own judgment for the agency's.[13]

Giorgio's final swing at Commerce's choice of comparison market is that even if the Department otherwise properly weighed the competing considerations of product similarity and sales volume, inconclusive German data compromised that balancing. ECF 25, at 54–56. As described above, most of Prochamp's ostensible "German" sales were to a multinational retailer, which received them at a warehouse outside of that country. Appx10071–10072. From there, the agency found that the mushrooms "likely" made their way to retail outlets in Deutschland and one other country, but it was impossible to determine the relative apportionment between the two. Appx10073. It's thus unknown the extent to which mushrooms sold to that retailer were in turn resold *in Germany* for consumption. *Cf.* 19 U.S.C. § 1677b(a)(1)(B)(ii) (requiring the Department to examine "the price at which the foreign like product is . . . sold (or offered for sale) *for consumption*" in the third country) (emphasis added).[14]

The government admits that Prochamp's "German" sales data are inconclusive, ECF 28, at 56–58, but appears to contend—echoing the Dutch company—that because the retailer was German-based, "it was reasonable to consider it a German sale." *Id.* at 57. Moreover, "there was no other information that would have allowed for more accurate identification of sales likely consumed in Germany." *Id.* at 58 (citing Appx10074). And insofar as Prochamp's German sales records are unreliable because of the absence of any basis on which to apportion the retailer's resales in Germany and another country, the government adds, its French sales data are plagued by the same issue. *Id.*[15]

Houston, we have a problem: "Congress has not authorized the [Department] to exercise its [Tariff Act] powers based on speculation, conjecture, divination, or anything short of factual findings based on substantial evidence." *Fla. Gas Transmission Co. v. FERC*, 604 F.3d 636, 641 (D.C. Cir. 2010); *see also OSI Pharms., LLC v. Apotex Inc.*, 939 F.3d 1375, 1382 (Fed. Cir. 2019) ("'Mere speculation' is not sub-

[13] Giorgio also claims the record does not support the Department's characterization of Prochamp's sales channels and customers in its initial choice of Germany. ECF 25,at 50–54. As described above, the agency agreed with the company, *see* note 11, but explained that mistake was at most corroborative rather than determinative. *Id.* As Commerce's balancing of product similarity versus sales volume was plainly dispositive, this asserted error was at most harmless.

[14] What matters is not where a product is ultimately consumed, but the country in which the product is "sold or offered for sale for consumption." 19 U.S.C. § 1677b(a)(1)(B)(ii).

[15] For its part, Prochamp is conspicuously silent on the issue of the reliability of its "German" sales data.

stantial evidence.") (citing *Intell. Ventures I LLC v. Motorola Mobility LLC*, 870 F.3d 1320, 1331 (Fed. Cir. 2017)). Here, Commerce simply assumed that a multinational retailer that received Prochamp's mushrooms outside of Germany ultimately resold *all* of them in that country. Not only is that assumption mere speculation, it contradicts the Department's finding that the retailer "likely" resold the mushrooms in Germany *and* another country. Appx10073.

The inconsistency matters because Commerce's choice of comparison market rested entirely on its conclusion that Prochamp's "*significantly* larger overall quantity" of sales in Germany for consumption "outweigh[ed]" the "slight difference" in product similarity that otherwise pointed toward using France. Appx1004 (emphasis added). But on this record, we don't know the actual number of German sales. What we do know is that it must have been lower than what the retailer purchased because some of those mushrooms were "likely" sold to consumers in another country. Absent any better explanation, the Department could not reasonably conclude that the Dutch company's exports to Germany were "significantly" larger than those to France.[16] The court must return this issue to the agency for reconsideration.

B

1

Giorgio challenges Commerce's refusal to apply facts otherwise available in choosing a comparison market. *See* 19 U.S.C. § 1677e(a). The American company maintains that Prochamp impeded the investigation by failing to timely notify the Department that its home-market sales volume did not meet the statutory threshold. ECF 25, at 60–61. In response, the agency explained that regardless of whether it timely receives that notification, the process is the same—it issues a questionnaire about potential third countries and must wait for a response. *Id.* Giorgio's argument, essentially, is that Commerce could have sought Prochamp's third-country data sooner if the Dutch company had identified its home market as non-viable within 14 days. *Id.* at 61. But given the Department's finding that the delay made no difference, the determination that it did not *significantly* hinder the proceeding is supported by substantial evidence.

[16] Insofar as Prochamp's French sales data are equally unreliable, as the government contends, *see* ECF 28, at 55, it should go without saying that it's impossible to validate inconclusive evidence by comparing it to equally inconclusive evidence. If the Department is unable to reasonably determine Prochamp's sales volumes in the comparison-market candidate countries, nothing in the regulation requires the agency to rely on that criterion. *See* 19 C.F.R. § 351.404(e); *see also* note 2.

Giorgio further argues that Prochamp significantly impeded the investigation by providing inaccurate information concerning product characteristics, sales volume, sales channels, and customer types. *Id.* at 61–63. Once again, the critical word in the statute is "significantly." *See* 19 U.S.C. § 1677e(a)(2)(C). Even if the Dutch company otherwise obstructed the investigation through the actions described by its American competitor—something that Commerce did not find—the court must uphold the agency's determination so long as substantial evidence supports the conclusion that such alleged impediments were not "significant." The Department explained at length why Prochamp's "handful" of reporting errors did not interfere with the proceeding. Appx1059; *see also* Appx1059–1065. The record here more than supports that subjective determination.

Finally, Giorgio's assertion that Prochamp withheld necessary information by "completely ignor[ing] a lengthy set of instructions regarding . . . each of the potential comparison markets," ECF 25, at 64 (citing Appx4859–4860), fails because it mischaracterizes what the questionnaire sought. Commerce asked the company to "provide the following breakdown *of all sales reported to Germany*" in a particular chart and then specified what to include. Appx4859 (emphasis added). It requested similar data for sales where the German label "*also* included" a language other than German. Appx2765 (emphasis added); Appx4860. The agency's finding that the company provided what was requested, Appx1060–1061, is amply supported by substantial evidence.

2

Giorgio also objects to the Department's failure to apply facts otherwise available as to financial reporting. The American company challenges the agency's findings that Dutch law exempted Prochamp from preparing standalone statements and that the latter's internal statements were not responsive to the agency's requests.

Before Commerce, Giorgio submitted a PricewaterhouseCoopers report as "proof" that Dutch law requires Prochamp to prepare financial statements for adoption by shareholders, even if they need not be filed with government authorities. Appx5265–5266, Appx11465. In response, the Department issued a supplemental questionnaire, to which Prochamp responded by providing a screenshot from its parent company's financial statements' citation of Dutch law and then quoting the cited provisions. Appx5923–5926.

Commerce found that the record supported Prochamp's characterization of Dutch law as imposing only "minimal requirements" as to

internal financial statements. Appx1050. The Department was unwilling to fault the company "for not providing a document that it does not have, nor was it obligated to have," *id.*, and determined that it could not characterize Prochamp as "not acting to the best of [its] ability" by not maintaining statements Dutch law did not require, *id*. The agency also concluded that the company had consistently explained why it did not maintain standalone financial statements and proved why it was not required to do so. *Id.*

Giorgio now contends that "the record unequivocally demonstrates that Prochamp and its affiliates *were* required to maintain these types of financial documents." ECF 25, at 66 (emphasis in original) (citing Appx11459–11465, Appx11492, and Appx7772–7773). The first two sets of cited record pages are all part of the PricewaterhouseCoopers report. The company makes no effort to explain why the Department, and the court, should find that report more compelling than the quotations from Dutch law provided in Prochamp's questionnaire response—quotations that Giorgio, in turn, ignores. The final two cited pages, Appx7772–7773, are an auditor's letter that directly supports Commerce's characterization of Prochamp's internal statements.

In short, conflicting evidence on the record pointed in two directions as to the adequacy of Prochamp's financial reporting. The Department reasonably weighed that evidence, and as such the court must sustain the agency's finding.

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As described above, substantial evidence supports Commerce's determination not to use facts otherwise available as to its market-comparison choice and Prochamp's financial reporting. Consequently, the court need not consider Giorgio's argument that the Department abused its discretion in not applying an adverse inference. *See* 19 U.S.C. § 1677e(b)(1)(A).

* * *

The court sustains Commerce's final determination in part and otherwise remands for further proceedings consistent with this opinion.

Dated: July 17, 2024
New York, NY

/s/ M. Miller Baker
JUDGE

Slip Op. 24–80

ELYSIUM TILES, INC., AND ELYSIUM TILE FLORIDA, INC., Plaintiffs, v. UNITED STATES, Defendant, and THE COALITION FOR FAIR TRADE IN CERAMIC TILE, Defendant-Intervenor.

Before: Jane A. Restani, Judge
Court No. 23–00041

[Remanding Commerce's Final Scope Ruling regarding whether a product is covered by antidumping duty and countervailing duty orders on ceramic tile from the People's Republic of China.]

Dated: July 18, 2024

David J. Craven, Craven Trade Law LLC, of Chicago, IL, argued for plaintiffs Elysium Tiles, Inc. and Elysium Tile Florida, Inc.

Christopher A. Berridge, Trial Attorney, Commercial Litigation Branch, U.S. Department of Justice, of Washington, DC, argued for the defendant. With him on the brief were *Brian M. Boynton*, Principal Deputy Assistant Attorney General, *Patricia M. McCarthy*, Director, and *L. Misha Preheim*, Assistant Director. Of counsel on the brief was *Vania Y. Wang*, Office of Chief Counsel for Trade Enforcement & Compliance, U.S. Department of Commerce, of Washington, DC.

David M. Spooner, Barnes & Thornburg, LLP, of Washington, DC, argued for defendant-intervenor The Coalition for Fair Trade in Ceramic Tile. With him on the brief was *Nicholas A. Galbraith*.

OPINION AND ORDER

Restani, Judge:

This action is a challenge to the final scope ruling of the United States Department of Commerce ("Commerce") regarding composite tile imported by Elysium Tiles, Inc. and Elysium Florida Tile, Inc. (collectively, "Elysium"). The final scope ruling found that Elysium's compsite tile is included in the antidumping duty ("AD") and countervailing duty ("CVD") orders on ceramic tile from the People's Republic of China (collectively, the "Orders"). *Final Scope Ruling on Elysium's Composite Tile*, P.R. 40 (Jan. 25, 2023) ("*Scope Ruling*"). The composite tile in question consists of a base layer of porcelain tile, a layer of epoxy, and a thin top layer of marble. *Id.* at 4. Commerce ruled that the marble layer is a "decorative feature," and is thus within the scope of the Orders. *Id.* at 8. Elysium assert the marble layer is more than mere decoration, and that the composite tile is therefore not within the scope of the Orders. The United States ("Government") and the Coalition for Fair Trade in Ceramic Tile (the "Coalition") ask that the court sustain Commerce's scope ruling.

Additionally, Elysium challenge Commerce's actions after an *ex parte* meeting between Commerce and a domestic tile producer, Florida Tile, Inc ("Florida Tile"). Elysium contend both that the meet-

ing was improper, and that the summary memorandum, placed on the record in compliance with 19 U.S.C. § 1677f, was inadequate. For the following reasons, the court remands Commerce's final scope ruling as unsupported by substantial evidence and not in accordance with law.

BACKGROUND

I. Antidumping and Countervailing Duty Orders

On June 1, 2020, Commerce issued antidumping and countervailing duty orders on ceramic tile from the People's Republic of China. *Ceramic Tile From the People's Republic of China: Antidumping Duty Order*, 85 Fed. Reg. 33,089 (Dep't Commerce June 1, 2020); *Ceramic Tile From the People's Republic of China: Countervailing Duty Order*, 85 Fed. Reg. 33,119 (Dep't Commerce June 1, 2020) (collectively, the "Orders"). Commerce defined the scope of the Orders, in relevant part, as follows:

> The merchandise covered by [these Orders] is ceramic flooring tile, wall tile, paving tile, hearth tile, porcelain tile, mosaic tile, flags, finishing tile, and the like (hereinafter ceramic tile). Ceramic tiles are articles containing a mixture of minerals including clay (generally hydrous silicates of alumina or magnesium) that are fired so the raw materials are fused to produce a finished good that is less than 3.2 cm in actual thickness. All ceramic tile is subject to the scope regardless of end use, surface area, and weight, regardless of whether the tile is glazed or unglazed, regardless of the water absorption coefficient by weight, regardless of the extent of vitrification, and regardless of whether or not the tile is on a backing. Subject merchandise includes ceramic tile with decorative features that may in spots exceed 3.2 cm in thickness and includes ceramic tile "slabs" or "panels" (tiles that are larger than 1 meter^2 (11 ft.^{2})).
>
> Subject merchandise includes ceramic tile that undergoes minor processing in a third country prior to importation into the United States. Similarly, subject merchandise includes ceramic tile produced that undergoes minor processing after importation into the United States. Such minor processing includes, but is not limited to, one or more of the following: Beveling, cutting, trimming, staining, painting, polishing, finishing, additional firing, or any other processing that would otherwise not remove the merchandise from the scope of [these Orders] if performed in the country of manufacture of the in-scope product.

> Subject merchandise is currently classified in the Harmonized Tariff Schedule of the United States (HTSUS) under the following subheadings of heading 6907: 6907.21.1005, 6907.21.1011, 6907.21.1051, 6907.21.2000, 6907.21.3000, 6907.21.4000, 6907.21.9011, 6907.21.9051, 6907.22.1005, 6907.22.1011, 6907.22.1051, 6907.22.2000, 6907.22.3000, 6907.22.4000, 6907.22.9011, 6907.22.9051, 6907.23.1005, 6907.23.1011, 6907.23.1051, 6907.23.2000, 6907.23.3000, 6907.23.4000, 6907.23.9011, 6907.23.9051, 6907.30.1005, 6907.30.1011, 6907.30.1051, 6907.30.2000, 6907.30.3000, 6907.30.4000, 6907.30.9011, 6907.30.9051, 6907.40.1005, 6907.40.1011, 6907.40.1051, 6907.40.2000, 6907.40.3000, 6907.40.4000, 6907.40.9011, and 6907.40.9051. Subject merchandise may also enter under subheadings of headings 6914 and 6905: 6914.10.8000, 6914.90.8000, 6905.10.0000, and 6905.90.0050. The HTSUS subheadings are provided for convenience and customs purposes only. The written description of the scope of [these Orders] is dispositive.

Ceramic Tile From the People's Republic of China, 85 Fed. Reg. 33,089, 33,117 (Dep't Commerce June 1, 2020) ("*Scope Order Appendix*").

II. Description of Merchandise

Drawing from the scope ruling application submitted by Elysium, Commerce proceeded with the following description of the merchandise:

> The product at issue is composite tile made of multiple layers of material. The base layer is made from porcelain, a vitrified ceramic. The middle layer consists of an aviation grade epoxy which is used to permanently bond the base layer to the top layer. The top layer consists of marble. The tile is approximately 12 to 15 mm thick. The tile is produced in six sizes – 300 by 300 mm, 300 by 600 mm, 600 by 600 mm, 800 by 400 mm, 800 by 800 mm, and 1200 by 600 mm.

Scope Ruling at 4.

III. Scope Inquiry Proceedings

Elysium initially filed a scope application on April 11, 2022. *Scope Ruling Application*, C.R. 1, P.R. 1 (Apr. 11, 2022). Commerce rejected the application on May 12, 2022, because it determined that the

Coalition, a party entitled to service, was not properly served. *Denial of Scope Application*, P.R. 5 (May 12, 2022). On May 24, 2022, Elysium refiled its scope application with an explanation regarding service. *Request to Reconsider and Scope Application*, C.R. 2, P.R. 8 (May 24, 2022); *Request to Reconsider and Scope Application* at Attachment II, C.R. 2, P.R. 8 (May 24, 2022) ("*Scope Ruling Application*"). On June 2, 2022, Commerce initiated its scope inquiry to determine whether Elysium's composite tile is covered by the Orders. *Initiation of Scope Inquiry*, P.R. 15 (June 2, 2022).

On September 20, 2022, Commerce officials conducted an *ex parte* visit to the production facilities of Florida Tile, a member of the Coalition. *Florida Tile Visit Memorandum*, P.R. 26 (Sept. 26, 2022) ("*Ex Parte Memo*"). On September 26, 2022, Commerce placed a memorandum documenting the September 20, 2022, visit on the record of the instant proceedings. *Id.* The memorandum listed the date and location of the visit, an extremely sparse list of events, and a list of participants in the meeting. *Id.* at 1–2. On October 11, 2022, Elysium filed an objection to the September 20, 2022, *ex parte* visit and requested an *ex parte* meeting with Commerce. *Objection to Meeting, Request for Further Detail and Request for Meeting* at 1–3, P.R. 32 (Oct. 11, 2022). Commerce did not reply to the objection or grant an *ex parte* meeting to Elysium.

On January 25, 2023, Commerce issued a final scope ruling, determining that the composite tile imported by Elysium is within the scope of the Orders. *Scope Ruling* at 1. This action followed.

JURISDICTION & STANDARD OF REVIEW

The court has jurisdiction pursuant to 28 U.S.C. § 1581(c) (2018) and 19 U.S.C. § 1516a(a)(2)(B)(vi) (2018). Section 1516a(a)(2)(B)(vi) provides for judicial review of a determination of "whether a particular type of merchandise is within the class or kind of merchandise described in an . . . antidumping or countervailing duty order." 19 U.S.C. § 1516a(a)(2)(B)(vi). In conducting its review, the court must set aside any determination, finding, or conclusion found "to be unsupported by substantial evidence on the record, or otherwise not in accordance with law." *Id.* § 1516a(b)(1)(B)(i).

DISCUSSION

I. *Commerce's Ex Parte Communication Memorandum was Inadequate*

Elysium primarily argues that the *ex parte* memorandum failed to "provide an adequate summary of matters discussed."[1] Pl. Elysium Br. in Supp. of its Rule 56.2 Mot. for J. on the Agency R. at 7, ECF No. 26 (Aug. 31, 2023) ("Elysium Br."). Elysium assert that there was "no meaningful opportunity to address the facts presented" in the meeting due to the inadequate memorandum, and that the *ex parte* meeting "allowed petitioner to provide 'secret' information and argument about the purported production process," giving an "impression of favoritism." *Id.* at 22–23, 26. Elysium ultimately claim that Commerce's scope ruling process was "compromised" because of the "decision to hold an improper *ex parte* meeting," along with the insufficiency of the memorandum provided. *Id.* at 24–25.

The government argues that Commerce "adequately summarized" the visit and complied with 19 U.S.C. § 1677f(a)(3). Def. United States Br. in Supp. of its Rule 56.2 Mot. for J. on the Agency R. at 13, ECF No. 35 (Dec. 13, 2023) ("Gov. Br."). The government contends that the memorandum was filed because Florida Tile is a member of the Coalition, and that 19 U.S.C. § 1677f(a)(3) required documentation be placed on the record. Gov. Br. at 13. The government asserts that the "simplest" explanation for the lack of information is that there was no information relating to the proceeding presented or discussed, and that "had factual information or arguments been exchanged, Elysium would have been informed of this exchange in the summary . . . and would have had a chance to respond." *Id.* at 14.

19 U.S.C. § 1677f(a)(3) (2018) governs *ex parte* meetings, and lists requirements for additions to the record following such meetings. It states, in relevant part:

> (3) Ex parte meetings.
>
> The administering authority and the Commission shall maintain a record of any ex parte meeting between—
>
> (A) interested parties or other persons providing factual information in connection with a proceeding, and

[1] Elysium argue that Commerce's denial of a requested *ex parte* meeting with Elysium following the September 20 visit with Florida Tile was improper. Elysium Br. at 24. Elysium fails to adequately support this assertion with any precedent, regulation, or statute requiring such a meeting, and the relevant statute makes no reference to such a requirement. *See id.* at 24; 19 U.S.C. 1677f(a)(3).

> (B) the person charged with making the determination, or any person charged with making a final recommendation to that person in connection with that proceeding,
> *if information relating to that proceeding was presented or discussed* at such meeting. The record of such an ex parte meeting shall include the identity of the persons present at the meeting, the date, time, and place of the meeting, and a summary of the matters discussed or submitted . . . .

19 U.S.C. § 1677f(a)(3) (emphasis added).

As written, this statute requires a summary of the meeting *only if* information relating to the proceeding was presented or discussed. *See id.* The statute does not, however, explicitly describe the depth or breadth required of a summary. *See id.* The court has previously held that such summaries do not need to be a "complete and fulsome discussion." *Valeo N. Am., Inc. v. United States*, 610 F. Supp. 3d 1322, 1342–43 (CIT 2022). In the context of Enforce and Protect Act ("EAPA") investigations, however, the court has held that summaries of confidential information should contain "enough context and [] provide sufficient summaries to determine what type of information was redacted" and is thus unavailable to an opposing party. *CEK Grp. LLC v. United States*, 633 F. Supp. 3d 1369, 1377 (CIT 2023). At a minimum, where information is redacted or otherwise unavailable to the parties, a summary of the matters discussed or submitted must be included in order to allow rebuttal by the opposing party. *See Royal Brush Mfg. v. United States*, 75 F.4th 1250, 1262 (Fed. Cir. 2023) (referring generally to the right to rebuttal when officials have "received new and material information by means of *ex parte* communications"). "[P]arties are entitled to know when and how information was conveyed; they should not have to rely on subtle judgments by Commerce . . . about whether factual information is important . . . or is even useful to the agency or to the parties." *Nippon Steel Corp. v. United States*, 24 CIT 1158, 1165, 118 F. Supp. 2d 1366, 1373 (2000). A substantive summary will therefore provide sufficient context as to the type of information conveyed in order to allow an opposing party to decide if there is something to rebut.

After visiting Florida Tile's production facilities, Commerce placed a memorandum summarizing the visit on the record. *Ex Parte Memo*. The memorandum states, in its entirety:

> On September 20, 2022, Department of Commerce officials visited the Lawrenceburg, Kentucky production facilities of Florida Tile, Inc. (Florida Tile), a member of the petitioning party in the above-referenced proceedings. Our visit included a tour of

> Florida Tile's operations and a question and answer session with Florida Tile employees. A list of participants is contained in the Attachment.

Ex Parte Memo at 1. A list of participants was also attached. *Id.* at 2.

This summary is plainly insufficient. A scope determination may examine, among other factors, how an item is produced. *See* 19 C.F.R. § 351.225 (2024). Information about how the domestic industry produces ceramic tile, as well as information on the variety of products produced by the domestic industry, is information for Commerce to consider in determining whether Elysium's product falls within scope. *See, e.g.*, *Ceramic Tile from the People's Republic of China: Scope Decision Memorandum for the Final Determinations* at 4, A-570–108, C-570–109 (March 30, 2020) ("*Scope Decision Memorandum*") (placed on the record by Elysium in C.R. 4, P.R. 10 on May 24, 2022) (finding that a product was intended to be in scope because a similar product was made by domestic producers). During the tour of the production facility, Commerce presumably learned what type of processing Florida Tile conducts and gained hands on experience with that type of processing and whether it appeared to be "minor."[2]

Further, the summary does not even state whether it was Commerce or Florida Tile asking or answering questions. *See Ex Parte Memo*. Both could be problematic, but it is certainly difficult for Elysium to properly address either without knowing which occurred. In the case where Commerce asked questions, it could have gained insight into processes relevant to the scope determination. In the alternative, answering questions from employees provides Commerce with an opportunity to gain additional perspectives on issues such as processing. While it is not necessary to include a transcript of the session, a substantive summary would indicate at least the the types of questions asked, as well as the role the parties played in the question and answer session.

The government's assertion that the memorandum was only included because interested parties met is unpersuasive. A memorandum is required "if information relating to the proceeding was presented or discussed." 19 U.S.C. § 1677f(a)(3). If there were no information relating to the proceeding presented or discussed at the September 20 meeting, then Commerce should either not have

[2] As discussed later, the definition of "minor processing" is a critical component to this scope determination. *See infra* pp. 13–18.

included a purported summary of the meeting in the record,[3] or reported that no information was exchanged in its memorandum, in accordance with the plain statutory requirements. *See id.* Accordingly, absent an indication otherwise, the court presumes that information was exchanged, meaning that a substantive summary of the *ex parte* meeting must be provided.

The government contends that Elysium must demonstrate material prejudice, because "procedural irregularities by an administrative agency are not per se prejudicial." Gov. Br. at 12 (quoting *Timken Co. v. Regan*, 4 CIT 174, 179, 552 F. Supp. 47, 52 (1982)). The government contends that Elysium's arguments are mere speculation and are otherwise unsupported by the record. *Id.* at 12. It further asserts that a traditional "harmless error" analysis should be applied. *Id.* at 12; *see also Suntec Indus. Co. v. United States*, 857 F.3d 1363, 1368–72 (Fed. Cir. 2017) (stating that a person seeking relief "has the burden of showing prejudice caused by the error"). Harmless error analysis, however, is inapplicable in this situation, as procedural due process violations arising from *ex parte* communications are "not subject to the harmless error test" when new and material information is introduced. *Id.* (quoting *Stone v. F.D.I.C.*, 179 F.3d 1368, 1377 (Fed. Cir. 1999)). The government seems to ask Elysium to perform the impossible task of showing that they were prejudiced by material information that Elysium cannot determine exists. Elysium does not need to demonstrate how it was prejudiced in this situation; the insufficiency of the memorandum requires remediation before the matter may be addressed by the plaintiff and reviewed by the court.

II. *Commerce's Ruling is Not Supported by Substantial Evidence*

Elysium argue that the porcelain base and marble layer are each "raw materials" used to create the composite tile, with the porcelain serving as the backing for the marble. Elysium Br. at 28. Thus, Elysium contend, the composite tile is not within the scope because (1) the marble layer creates a functionally different product as compared to the porcelain backing alone; (2) firing the "raw materials" would destroy the tile; and (3) major processes occur to obtain the marble layer. *Id.* at 3–4.

Under Elysium's view of the composite tile, the tile is clearly out of scope. If the scope language is unambiguous, then "the plain meaning

[3] The court notes, however, that parties should not have to rely on subtle judgments by Commerce as to what information is important. *Nippon Steel Corp.*, 24 CIT at 1165, 118 F. Supp. 2d at 1373. Here, the tour alone could provide information in need of rebuttal. *See supra* at pp. 8.

of the language governs." *OMG, Inc. v. United States*, 972 F.3d 1358, 1363 (Fed. Cir. 2020) (citation omitted). Here, the scope language defines "[c]eramic tiles [as] articles containing a mixture of minerals . . . that are fired so the raw materials are fused to produce a finished good." *Scope Order Appendix*. Assuming arguendo that the raw materials are the porcelain, epoxy, and marble layer as Elysium describes, firing them would destroy the epoxy and fail to produce a "finished good." Elysium Br. at 4.

This is not, however, the government's interpretation. Instead, the government argues raw materials go into making the porcelain, which is fired, and then the marble serves as a decoration. Gov. Br. at 6. Under the scope language, ceramic tile may have decorative features, and undergo "minor processing in a third country" such as "painting, polishing, finishing, . . . or any other processing that would otherwise not remove the merchandise from the scope of the Orders if performed in the country of manufacture of the in-scope product."[4] *Scope Order Appendix*. The government asserts that the porcelain tile itself is the "finished good" described by the language of the scope, and that the marble is a decorative feature that was added via minor processing. *See* Gov. Br. at 6. This theory is not supported by the plain language of the scope, and as set out below, Commerce failed to support its theory with (k)(1) sources or (k)(2) factors.

A. Legal Standard

When questions arise as to whether a particular product is covered by the scope of an AD or CVD order, Commerce will initiate and conduct a scope inquiry and issue a scope ruling to determine whether or not the product is covered. 19 C.F.R. § 351.225(a) (2022).[5] The first step in the inquiry is consideration of the language of the Orders. *See Shenyang Yuanda Aluminum Indus. Eng'g Co. v. United States*, 776 F.3d 1351, 1356 (Fed. Cir. 2015) ("Scope language is the 'cornerstone' of any scope determination."). If the scope language is unambiguous, then "the plain meaning of the language governs." *OMG, Inc.*, 972 F.3d at 1363.

If the scope language is ambiguous, as is likely here, Commerce may utilize the primary interpretive sources listed under paragraph (k)(1) of section 351.225 ("(k)(1) sources") to help it determine the

[4] Although written somewhat convolutedly the court concludes this language is intended to convey that wherever such minor processing is performed it does not affect scope and the parties do not appear to dispute this.

[5] Commerce recently revised its scope regulations, and the changes took effect April 24, 2024. *See Regulations Improving and Strengthening the Enforcement of Trade Remedies Through the Administration of the Antidumping and Countervailing Duty Laws*, 89 Fed. Reg. 20766 (Dep't Commerce Mar. 25, 2024). The court cites to the prior regulations that were in effect when Elysium submitted its complete scope application.

meaning of the language of the scope. 19 C.F.R. § 351.225(k); *see Meridian Prods., LLC v. United States*, 851 F.3d 1375, 1381–82 (Fed. Cir. 2017). The (k)(1) sources include the descriptions of the merchandise considered by Commerce and the International Trade Commission ("ITC") when crafting the scope, as well as previous determinations made by Commerce and the ITC. *See* 19 C.F.R. § 351.225(k)(1)(i).[6] If Commerce "determines that the sources under paragraph (k)(1) of this section are not dispositive," Commerce will then consider the factors under paragraph (k)(2) of the section ("(k)(2) factors"). 19 C.F.R. § 351.225(k)(2)(i). The (k)(2) factors include (A) the physical characteristics of the product; (B) the expectations of the ultimate user; (C) the ultimate use of the product; (D) the channels of trade in which the product is sold; and (E) the manner in which the product is advertised and displayed.[7] *Id.* Finally, "[i]f merchandise contains or consists of two or more components and the product at issue in the scope inquiry is a component of that merchandise as a whole," Commerce may adopt the analysis described under paragraph (k)(3) of this section ("(k)(3) analysis"). *Id.* § 351.225(k)(3). The (k)(3) analysis goes on to consider factors such as whether the "component product would otherwise be covered by the scope," whether the "component product's inclusion . . . results in its exclusion from the scope," and if not, factors such as the "practicability of separating" the components, the value, and the ultimate function. *Id.*

Put simply, the (k)(1) sources assist Commerce in interpreting the scope language, the (k)(2) factors assist Commerce in determining if the language describes the product at issue, and the (k)(3) analysis assists Commerce in considering situations where in-scope components are combined with out-of-scope components. All of Commerce's analysis, however, must be done in such a way that the scope is not changed, and that the order is not interpreted in a manner contrary to its terms. *Eckstrom Indus., Inc. v. United States*, 254 F.3d 1068, 1072 (Fed. Cir. 2001).

Here, Commerce stated that the (k)(1) sources were determinative, and that consideration of the (k)(2) factors was not necessary. *Scope Ruling* at 7. Yet, Commerce only referenced two (k)(1) sources. *Id.* at 8–9. Instead, Commerce relied upon information about the purpose, function, and physical characterics of the product, all of which are

[6] Although they are not determinative when conflicting with the primary interpretive sources listed by § 351.225(k)(1), Commerce may also look to secondary interpretive sources such as any other determinations of the Secretary or the Commission not identified above, Customs rulings or determinations, industry usage, dictionaries, and any other relevant record evidence. 19 C.F.R. § 351.225(k)(1)(ii).

[7] While interpreting a previous version of this regulation, the Federal Circuit has referred to sources that contain information about these factors as "(k)(2) sources." *Sunpreme Inc. v. United States*, 946 F.3d 1300, 1306 (Fed. Cir. 2020).

(k)(2) factors. *Id.* at 8; *see, e.g.*, *Saha Thai Steel Pipe Pub. Co. v. United States*, 101 F.4th 1310, 1329–31 (Fed. Cir. 2024) (referring to physical characteristics only when necessary for direct comparison to a characteristic described in the (k)(1) source). For the purposes of this opinion, the court assumes arguendo that Commerce found it necessary to consider (k)(2) factors.

B. The Parties' Focus on the Word "Decorative" is Misplaced

Elysium argue that the marble is more than "mere" decoration as the marble provides the "physical characteristics of natural stone" to the product. Elysium Br. at 34–35. The government contends that the marble is decorative, as regardless of any physical characteristics, the marble layer is indended "to look pretty or attractive" and partially serves a decorative function. Gov. Br. at 19–20 (citation omitted).

The scope language here does not contain clear exclusionary language. Additionally, it uses general terms further rendered unclear by nonexclusive examples. Some phrases are clearly misstated. For example, the scope "includes ceramic tile with decorative features that may in spots exceed 3.2 cm in thickness . . . ." *Scope Order Appendix*. At oral argument, all parties agreed with the court that this clause can *not* be understood to mean that subject merchandise includes decorative features of 3.2 cm or more themselves, but rather that if the ceramic tile is made greater than 3.2 cm in thickness by certain decoration, the tile is still in scope. For example, if a ceramic tile is 3.1 cm in thickness, and then receives a 2 mm thick coat of paint, it would still be in scope despite the decoration causing the final product to have a thickness of 3.3 cm. *See also supra* n.4.

Clearly the phrase "decorative features" was meant only as an example of something that could affect the thickness of the final product without impacting the dimensional limitation in the the scope description. This reading is confirmed by the lack of evidence on the record defining "decorative feature." Had the scope language been intended to target decoration with ceramic backing, there would be evidence of this before the ITC or Commerce and the (k)(1) sources would support such an interpretation. In absence of such evidence, the court must conclude that because the product does not exceed 3.2

cm, whether or not the marble is a decorative feature is irrelevant to the scope.[8]

This interpretation is confirmed by the structure of the scope description. The first paragraph clearly defines all ceramic tiles as "articles containing a mixture of minerals including clay . . . that are fired so the raw materials are fused to produce a finished good that is less than 3.2 cm in actual thickness." *Scope Order Appendix*. The first paragraph then goes on to clarify that differences in end use, surface area, weight, glaze, water absorption coefficient, and vitrification are irrelevant. *Id.* The second paragraph allows for minor processing to occur without taking the product out of scope, and provides a non-exhaustive list of examples of such minor processing. *Id.* The third paragraph provides non-determinative guidelines that specify which subheadings of the Harmonized Tariff Schedule of the United States these products are presumed to fall under. *Id.*

The "decorative features" line is part of the first paragraph, clarifying, as explained, that decorative features cannot be used to render a product out of scope because of the thickness added by a decorative feature.[9] *See id.* Such language does not expand the scope to include all instances where the ceramic tile is used as a backing for decoration, or other additions.

Finally, record evidence, which Commerce failed to reference in its ruling, confirms this interpretation. In the *Scope Decision Memorandum*, Commerce considered whether handmade tile was excluded from the scope of the Orders. *Scope Decision Memorandum* at 9. In its consideration, Commerce focused on the technique being used to apply the decoration, rather than the decoration itself. *Id.* at 10–11. Specifically, Commerce determined that the relevant question was not *what* decoration was being added, but *how* the decoration was added.[10] *Id.* Similarly, here, the determinative question is not whether the marble layer is decoration, but rather whether the pro-

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[8] Elysium made several arguments to show that the marble was not merely decoration. *See* Elysium Br. at 35. Yet, these definitions of decorative would result in items likely contemplated by the orders being excluded from the scope. For example, a company could paint ceramic with gold, thereby dramatically increasing the price. Further, the gold-painted tile would feel like gold, share some physical properties with gold, and be purchased as a replacement for gold flooring. Yet, the product would be painted ceramic tile—a product explicitly described by the scope language. Accordingly, the court rejects Elysium's arguments regarding decoration.

[9] Commerce specifically relied upon this line in the *Scope Decision Memorandum* to find that cracked glass decoration did not take a product out of scope despite it causing the product's thickness to exceed 3.2 cm in spots. *Scope Decision Memorandum* at 11.

[10] In this instance, Commerce determined that painting a tile by hand rather than through an automated process did not take a product out of the scope. *Scope Decision Memorandum* at 11.

cess of applying the layer is so intensive that it goes beyond "minor processing" to the degree that it brings the product out of scope.

C. The Evidence Does Not Indicate that the Gluing and Splitting of the Marble Slab is "Minor Processing"

Elysium argue that gluing two porcelain tiles to a marble slice, creating a "biscuit," and then slicing the marble in the middle to form two composite tiles, is not a "minor" operation. Elysium Br. at 31. The government asserts that so long as each process is minor, there is no limit to the number of minor processes that would remove Elysium's composite tile from the scope. Gov. Br. at 17–18.

There is no evidence on the record defining "minor processing" beyond the examples given in the scope description. *See Scope Order Appendix*. The scope description does specify, however, that "one or more" of the listed examples may occur without bringing the product out of scope. *Id.* Accordingly, the court concludes that the scope includes products that have undergone any number of minor processes, so long as the minor processes do not change the product so significantly that it cannot be considered to be the product intended to be described in the first paragraph of the scope description.[11] *See id.* Next, as indicated, the scope includes a non-exhaustive list of types of minor processing such as: "[b]eveling, cutting, trimming, staining, painting, polishing, finishing, [and] additional firing." *Scope Order Appendix*. Thus, the court concludes that the scope includes these enumerated processes, as well as processes of a similar nature.

Turning to the product at hand, Elysium's process starts with the sandwiching of two porcelain tiles around a 6 mm thick marble layer, creating a "biscuit" glued together with an epoxy. Elysium Br. at 14–18. Then, the biscuit is split in half, resulting in two composite tiles with a 3 mm marble top layer. *See id.* at 18. This process requires specialized equipment, and must be conducted at a facility designed for the creation of composite tile. *Id.* at 31–34.

Elysium's processes as described are neither enumerated in the scope description, nor are they so similar to the enumerated processes such that they can be easily considered to be "minor processing." Although the number of steps is not determinative, the complexity of

[11] In the Coalition's case brief during Commerce's investigation, it referred to products clearly outside of the scope such as "ceramic tile that is already incorporated into furniture; trivets; tile coasters; ceramic tile parts of stoves or fireplaces; . . . and ceramic baking stones and hotplates." *Scope Case Brief of the Coalition for Fair Trade in Ceramic Tile* at 13, A-570–108, C-570–109 (October 14, 2019) (placed on the record by Elysium in C.R. 4, P.R. 10 on May 24, 2022). Although record evidence does not define the process of creating these products, some of them, such as tile coasters, are presumably created through a series of minor processes such as cutting and trimming tile into the appropriate size and shape.

Elysium's processes exceeds the complexity of the processes described in the scope language. Record evidence indicates that the minor processes described by the scope language can occur "on the job site." *Ceramic Tile Products from the People's Republic of China, Petition for Antidumping and Countervailing Duties* at 12, Inv. Nos. 701-TA-621 and 731-TA-1447 (April 10, 2019) (ITC Petition) (placed on the record by Elysium in C.R. 4, P.R. 10 on May 24, 2022). There is no evidence cited to the court, however, to indicate that the processes Elysium uses can be performed anywhere other than at a specialized facility. Without some evidence that Commerce or the ITC contemplated processes of this complexity as nonetheless "minor," the court is unconvinced Elysium's process can be so considered.

D. Finally, Commerce's Consideration of Key Evidence was Unreasonable

The government asserts that Commerce properly found the composite tiles to be substantially similar to ceramic tiles. *See* Gov. Br. at 6. Elysium contend that the composite tile is differentiated as it "possesses key physical qualities of the marble" and its value comes from the use of real marble rather than simply the look of marble. Elysium Br. at 28, 35.

In its ruling, Commerce places significant reliance on the fact that the composite tile is used for the same purpose, functions in the same way, and shares key physical characteristics with ceramic tile. *Scope Ruling* at 8. Yet, these purposes, functions, and characteristics are shared, to some extent, by all flooring options. To highlight the difference between ceramic and composite tile, Elysium points to a table it submitted comparing ceramic, marble, and composite tile. *Scope Ruling Application* at 5–6. The table plainly shows the composite tile is a middle ground between ceramic and solid marble tile on all fronts. *See, e.g.*, *Scope Ruling Application* at 5–6 ("Water Absorption. Ceramic Tile: Non-Porous and Non-Absorbent. Traditional Marble: Marble is porous and subject to staining. Composite Marble Tile: The base is non-porous and non-absorbent, while the top surface is absorbent."). Yet, Commerce relied on this table to show that composite tile is like ceramic tile and therefore should be found to be within scope. *Scope Ruling* at 8. The problem with this interpretation is that table equally supports the opposite conclusion that the composite tile is like

marble tile rather than ceramic tile. A single piece of evidence cannot support one conclusion if it is equally authoritative in its support of an opposite conclusion.[12]

The table plainly indicates that composite tile exists as an ambiguous middle ground between ceramic and marble tile. There are no calculations or values to indicate that the composite tile is more like marble, or more like ceramic. The table is ambiguous, and does not support Commerce's interpretation that it indicates the composite tile is essentially ceramic tile with marble decoration. Commerce's use of the table as evidence that the composite tile is within scope is plainly unreasonable.

CONCLUSION

To support its ruling, Commerce must either show under a (k)(1) analysis that the scope language contemplates products such as marble composite tile, or that under the (k)(2) factors the marble composite tile truly is considered a form of ceramic tile in purpose, function, advertising, and use.[13] Commerce failed to do so here and therefore its ruling is not supported by substantial evidence.[14] Further, the lack of a substantive summary of the *ex parte* meeting allegedly held "in connection" with the proceedings renders the determination not in accordance with the law.

For the foregoing reasons, the court remands to Commerce for a determination consistent with this opinion. The remand determination shall be issued within 90 days hereof. Comments may be filed 30 days thereafter and any response 15 days thereafter.

Dated: July 18, 2024
New York, New York

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

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[12] Although the evidence as a whole can support two inconsistent conclusions under the substantial evidence standard, it is limited by what "reasonable minds might accept as adequate to support a conclusion." *Fleming v. Escort Inc.*, 774 F.3d 1371, 1375 (Fed. Cir. 2014) (citation omitted). Reasonable minds may accept inconsistent conclusions from evidence as a whole, but not from a single piece of evidence that provides equal support for each conclusion.

[13] Elysium argue that the "finished good" contemplated by the orders is the composite tile, not the porcelain backing that Commerce considered in its scope ruling. Elysium Br. at 28. The court need not address this argument as assuming arguendo that Commerce is right, its ruling is still not supported by substantial evidence. Nevertheless, based on the plain language of the scope, the court is unconvinced that these Orders consider porcelain tile, when used as a backing for another product, to be a "finished good."

[14] On remand, Commerce should consider all issues relating to minor processing and the nature of the product at hand, whether addressed here or or not. Further, Elysium waived or did not exhaust a claim for (k)(3) consideration, but if Commerce finds it relevant it should consider it.

Slip Op. 24–81

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

Before: Timothy M. Reif, Judge
Court No. 22–00349

[Granting defendant-intervenor's motion to dismiss.]

Dated: July 22, 2024

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

Frank H. Morgan, Attorney-Advisor, Office of the General Counsel, U.S. International Trade Commission, of Washington, D.C., argued for defendant U.S. International Trade Commission. With him on the brief were *Andrea C. Casson*, Assistant General Counsel for Litigation, and *Michael K. Haldenstein*, Attorney-Advisor.

Jeffrey D. Gerrish, Schagrin Associates, of Washington, D.C., argued for defendant-intervenors. With him on the brief were *Roger B. Schagrin* and *Saad Y. Chalchal*, Schagrin Associates, of Washington, D.C., for defendant-intervenors Steel Dynamics, Inc. and SSAB Enterprises, LLC, *Alan H. Price*, *Christopher B. Weld*, and *Theodore P. Brackemyre*, Wiley Rein LLP, of Washington, D.C., for defendant-intervenor Nucor Corporation, and *Stephen P. Vaughn*, *Neal Reynolds*, and *Barbara Medrado*, King & Spalding LLP, of Washington, D.C., for defendant-intervenor Cleveland-Cliffs Inc.

OPINION

Reif, Judge:

Before the court is defendant-intervenors' motion to dismiss plaintiff's complaint. Def.-Intervenors' Mot. to Dismiss ("Def.-Intervenors Br."), ECF No. 53. Plaintiff Ereğli Demir ve Çelik Fabrikaları T.A.Ş. ("plaintiff" or "Erdemir") invokes this Court's subject matter jurisdiction under 28 U.S.C. § 1581(i)(1)(B) and (D), alleging that plaintiff has been "adversely affected or aggrieved" by the decision of the U.S. International Trade Commission (the "Commission") to deny plaintiff's request for a reconsideration proceeding.[1] Am. Compl. ¶ 3, ECF No. 14. Plaintiff states that the Commission's decision relates to "tariffs, duties, fees, or other taxes on the importation of merchandise for reasons other than the raising of revenue," and the "administra-

[1] The Commission filed a statement in support of defendant-intervenors' motion to dismiss, in which the Commission agreed with the position of defendant-intervenors that this case should be dismissed. Statement in Support of Def.-Intervenors' Mot. to Dismiss, ECF No. 54. According to the Commission at oral argument, defendant-intervenors "had said everything that needed to be said and the Commission as an institution wanted to support that view but not separately file a motion." Oral Arg. Tr. at 34:6–9, ECF No. 71. The court considers it unusual — to say the least — that a government agency against which an action has been filed has declined to file its own motion to dismiss.

tion and enforcement" of those duties. *Id.* (citing U.S.C. § 1581(i)(1)(B) and (D)). *Id.* Defendant-intervenors respond that (1) this court lacks subject matter jurisdiction over plaintiff's claims under § 1581(i) and (2) even if the court did have jurisdiction, plaintiff has failed to state a claim upon which relief can be granted. Def.-Intervenors Br. at 3–4.

The court concludes that it lacks subject matter jurisdiction over the instant action. An adequate remedy was available to plaintiff to challenge the final determination of the Commission. Plaintiff did not avail itself of that remedy. Now, plaintiff would have the court act to expand the scope of the court's residual jurisdiction to fashion a remedy that the law does not provide. The court declines, as it must, to do so.

BACKGROUND

I. The final determination of the Department of Commerce of sales at less than fair value and the Commission's final affirmative determination of material injury

In August and September 2015, the United States Department of Commerce ("Commerce") initiated and the Commission instituted investigations in response to petitions filed on behalf of the domestic industry requesting the imposition of antidumping and countervailing duties on imports of hot-rolled steel flat products from various countries (including Turkey). *Certain Hot-Rolled Steel Flat Products from Australia, Brazil, Japan, Korea, the Netherlands, Turkey, and the United Kingdom; Institution of Antidumping and Countervailing Duty Investigations and Scheduling of Preliminary Phase Investigations*, 80 Fed. Reg. 50,028 (ITC Aug. 18, 2015); *Certain Hot-Rolled Steel Flat Products from Australia, Brazil, Japan, the Republic of Korea, the Netherlands, the Republic of Turkey, and the United Kingdom: Initiation of Less-Than-Fair-Value Investigations*, 80 Fed. Reg. 54,261 (Dep't of Commerce Sept. 9, 2015); *Certain Hot-Rolled Steel Flat Products from Brazil, the Republic of Korea, and Turkey: Initiation of Countervailing Duty Investigations*, 80 Fed. Reg. 54,267 (Dep't of Commerce Sept. 9, 2015).

On October 1, 2015, the Commission made an affirmative preliminary determination that there was a reasonable indication that an industry in the United States was materially injured due to imports of hot-rolled steel flat products from the subject countries. *Certain Hot-Rolled Steel Flat Products from Australia, Brazil, Japan, Korea, the Netherlands, Turkey, and the United Kingdom*, USITC Pub. No. 4570, Inv. Nos. 701-TA-545–547 and 731-TA-1291–1297 (Oct. 2015), at 3.

The Commission preliminarily determined also that the volume of imports of hot-rolled steel from Turkey was above the three percent threshold for exclusion from the investigation on grounds of negligibility.[2] *Id.* at 13.

On August 12, 2016, Commerce published its affirmative final countervailing duty determination for Turkey. *Countervailing Duty Investigation of Certain Hot-Rolled Steel Flat Products from the Republic of Turkey: Final Affirmative Determination*, 81 Fed. Reg. 53,433 (Dep't of Commerce Aug. 12, 2016).

Commerce found that Çolakoğlu Dis Ticaret A.Ş. ("Colakoglu") — another Turkish producer of hot-rolled steel — received a de minimis level of countervailable subsidies. *Id.* at 53,434. However, Commerce made an affirmative determination because it calculated a 6.01 percent net countervailable subsidy rate for Erdemir. *Id.* All remaining Turkish producers and exporters were assigned Erdemir's 6.01 percent CVD rate. *Id.* Also on August 12, 2016, Commerce published its affirmative final determination of sales at less than fair value for Turkey. *Certain Hot-Rolled Steel Flat Products from the Republic of Turkey: Final Determination of Sales at Less Than Fair Value* ("*Final Determination of Sales at Less Than Fair Value*"), 81 Fed. Reg. 53,428 (Dep't of Commerce Aug. 12, 2016). Commerce determined that Colakoglu was selling hot-rolled steel in the United States for less than fair value and calculated a weighted-average dumping margin of 7.15 percent. *Id.* at 53,429.

On September 29, 2016, the Commission published its affirmative final determinations that an industry in the United States was materially injured due to imports of hot-rolled steel flat products from the subject countries.[3] *Certain Hot-Rolled Steel Flat Products from Australia, Brazil, Japan, Korea, the Netherlands, Turkey, and the United Kingdom*, 81 Fed. Reg. 66,996 (ITC Sept. 29, 2016). As to Turkey, the Commission explained that "imports from Turkey that

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[2] 19 U.S.C. § 1677(24)(A)(i) defines "negligible imports" as "imports from a country of merchandise corresponding to a domestic like product identified by the Commission" that "account for less than 3 percent of the volume of all such merchandise imported into the United States in the most recent 12-month period for which data are available that precedes" the filing of a petition under § 1673a(b) or the initiation of an investigation under § 1673a(a).

[3] When evaluating whether the domestic industry is materially injured by reason of imports sold at less than fair value, the Commission is required to consider "the volume of imports of the subject merchandise," "the effect of imports of that merchandise on prices in the United States for domestic like products," and "the impact of imports of such merchandise on domestic producers of domestic like products." 19 U.S.C. § 1677(7)(B)(i)(I)-(III). Under § 1677(7)(C)(iii)(V), in examining the impact on the affected domestic industry, "the Commission shall evaluate all relevant economic factors . . . including, but not limited to . . . the magnitude of the margin of dumping."

are subject to the antidumping duty investigation are different from those subject to the countervailing duty investigation" because Colakoglu's final net countervailable subsidy rate was de minimis. *Certain Hot-Rolled Steel Flat Products from Australia, Brazil, Japan, Korea, the Netherlands, Turkey, and the United Kingdom* ("*Final Determination of Material Injury*"), USITC Pub. 4638, Inv. Nos. 701-TA-545–547 and 731-TA-1291–1297 (Sept. 2016), at 13.

Colakoglu's imports were excluded from the Commission's injury analysis in the CVD investigation because "Colakoglu received a de minimis subsidy margin." *Id.* As a result of the exclusion of Colakoglu's imports, the volume of imports from Turkey subject to the CVD investigation fell below the negligibility threshold.[4] *Id.* Because subsidized imports from Turkey were negligible, the Commission "terminate[d] the countervailing duty investigation on hot-rolled steel from Turkey." *Id.* at 14; *see also* 19 U.S.C. § 1677(24)(A)(i).[5]

However, because Commerce determined that Colakoglu's imports were sold at less than fair value, *Final Determination of Sales at Less Than Fair Value*, 81 Fed. Reg. at 53,429, Colakoglu's imports were included in the Commission's negligibility analysis for purposes of its antidumping duty determination. *See Final Determination of Material Injury*, USITC Pub. 4638 at 13. The Commission determined that the volume of imports subject to the AD investigation exceeded the negligibility threshold. *Id.*

As a result, the Commission's final determination of material injury applied only to dumped imports from Turkey — not to subsidized imports from Turkey. *Id.* at 3. The Commission analyzed subject imports on a cumulated basis, meaning that the Commission cumulated dumped imports from Turkey with subject imports from Australia, Brazil, Japan, Korea, the Netherlands and the United Kingdom found by Commerce to be dumped or subsidized. *Id.* at 17–21. The Commission determined that an industry in the United States was materially injured by reason of the cumulated subject imports. *Id.* at 21, 39–47, 52.

October 3, 2016, Commerce published the final AD order on imports of hot-rolled steel flat products from Turkey. *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 Austra-*

[4] Plaintiff states in its complaint that Colakoglu is the "largest shipper" of hot-rolled steel from Turkey. Am. Compl. at 1.

[5] 19 U.S.C. § 1673d(b)(1) requires that "[i]f the Commission determines that imports of the subject merchandise are negligible, the investigation shall be terminated."

lia, the Republic of Korea, and the Republic of Turkey and Antidumping Duty Orders, 81 Fed. Reg. 67,962 (Dep't of Commerce Oct. 3, 2016).

Commerce calculated revised dumping margins of 6.77 percent for Colakoglu, 4.15 percent for Erdemir and 6.41 percent for all other producers or exporters. *Id.* at 67,965.

II. Colakoglu and Erdemir challenged Commerce's final determination

Colakoglu and Erdemir appealed Commerce's final determination of sales at less than fair value. On April 13, 2020, this Court entered judgment sustaining Commerce's third remand redetermination. *Ereğli Demir ve Çelik Fabrikaları T.A.Ş. v. United States*, 44 CIT __, 435 F. Supp. 3d 1378 (2020)*; see also Ereğli Demir ve Çelik Fabrikaları T.A.Ş. v. United States*, 43 CIT __, 415 F. Supp. 3d 1216 (2019); *Ereğli Demir ve Çelik Fabrikaları T.A.Ş. v. United States*, 42 CIT __, 357 F. Supp. 3d 1325 (2018); *Ereğli Demir ve Çelik Fabrikaları T.A.Ş. v. United States*, 42 CIT __, 308 F. Supp. 3d 1297 (2018).[6]

On May 15, 2020, Commerce published an amended final determination with recalculated weighted-average dumping margins. *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. 29,399 (Dep't of Commerce May 15, 2020). Those margins were zero percent for Colakoglu, 2.73 percent for Erdemir and 2.73 percent for all other producers or exporters. *Id.* at 29,400.

Commerce partially revoked the AD order to exclude merchandise produced and exported by Colakoglu because Colakoglu's dumping margin was reduced to zero.[7] *Id.* at 29,400 ("Commerce is hereby excluding merchandise produced and exported by [Colakoglu] from the Order.").

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[6] Nucor Corporation, one of the six domestic producers that filed petitions in the hot-rolled steel investigations, appealed the Commission's negligibility determination in the CVD investigation. *Nucor Corp. v. United States*, 42 CIT __, __, 296 F. Supp. 3d 1276, 1294 (2018). On February 28, 2018, this Court affirmed the Commission's negligibility determination. *Id.*

[7] Both the United States and domestic producers appealed the judgment of the USCIT. On December 18, 2020, the United States voluntarily dismissed its appeal. *Ereğli Demir ve Çelik Fabrikaları T.A.Ş. v. United States*, No. 20–1999, Mandate Order (Fed. Cir. Dec. 18, 2020). Then, on June 4, 2021, domestic producers voluntarily dismissed their appeal. *Ereğli Demir ve Çelik Fabrikaları T.A.Ş. v. United States*, 20–2003, Mandate Order (Fed. Cir. June 4, 2021), docketed in Ct. No. 16–00218, ECF No. 161 (Ct. Int'l Trade June 4, 2021).

Therefore, Colakoglu was successful in its appeal of Commerce's final determination of sales at less than fair value. However, none of the Turkish respondents challenged the Commission's final material injury determination concerning dumped imports from Turkey.

III. Plaintiff requested that the Commission institute reconsideration proceedings or a changed circumstances review

After Commerce excluded Colakoglu from the AD order on hot-rolled steel from Turkey — and with appeals of the USCIT judgment still pending before the U.S. Court of Appeals for the Federal Circuit ("Federal Circuit") — Erdemir in letters filed in May and July 2020 requested reconsideration of the Commission's original material injury determination.[8] Am. Compl. ¶¶ 21–23; Def.-Intervenors Br. at 9–10.

On September 1, 2021, Commerce initiated and the Commission instituted the first sunset review of the AD and CVD orders on hot-rolled steel flat products from multiple countries. *Initiation of Five-Year (Sunset) Reviews*, 86 Fed. Reg. 48,983 (Dep't of Commerce Sept. 1, 2021); *Hot-Rolled Steel Flat Products from Australia, Brazil, Japan, Korea, the Netherlands, Russia, Turkey, and the United Kingdom; Institution of Five-Year Reviews*, 86 Fed. Reg. 49,057 (ITC Sept. 1, 2021); *see also* 19 U.S.C. § 1675(c).

Then, on September 10, 2021, after the United States and domestic producers had voluntarily dismissed their appeals of the judgment of the USCIT in the challenges to the Commerce determination, Erdemir requested that the Commission institute a changed circumstances review to revisit its affirmative final determination of material injury in the original investigation. Am. Compl. ¶ 26; *Hot-Rolled Steel Flat Products from Turkey; Request for Comments Regarding the Institution of a Section 751(b) Review Concerning the Commission's Affirmative Determination* ("*Request for Comments*"), 86 Fed. Reg. 68,512, 68,513 (ITC Dec. 2, 2021). Erdemir argued that "Commerce's recalculation of Colakoglu's antidumping duty margin to zero percent and its exclusion from the antidumping duty order as a result of judicial review constitute significantly changed circumstances from those in existence at the time of the original investigation because the facts underlying the Commission's negligibility determination completely changed." *Request for Comments*, 86 Fed. Reg. at 68,513.

[8] The court does not quote directly from these letters as it would have preferred because the Commission did not include the documents in the administrative record filed by the Commission. *See* Index of the Administrative Record and Documents Furnished Pursuant to USCIT Rule 73.2(b) at 3–4, ECF No. 35 (stating that the parties "have stipulated that at this time the Commission will file fewer documents" than required to be filed by the Rules).

IV. The Commission conducted a full sunset review and denied plaintiff's request for reconsideration or a changed circumstances review

On December 6, 2021, the Commission determined to conduct full sunset reviews of the hot-rolled steel orders.[9] *Notice of Commission Determination To Conduct Full Five-Year Reviews; Hot-Rolled Steel Flat Products from Australia, Brazil, Japan, Korea, the Netherlands, Russia, Turkey, and the United Kingdom* ("*Notice of Full Five-Year Reviews*"), 87 Fed. Reg. 3,123 (ITC Jan. 20, 2022). In those reviews, plaintiff maintained that the Commission should conduct a changed circumstances review or reconsideration proceeding so that the Commission could correct its negligibility analysis in light of the exclusion of Colakoglu from Commerce's AD order. *Hot-Rolled Steel from Australia, Brazil, Japan, Netherlands, Russia, South Korea, Turkey, and the United Kingdom* ("*Sunset Review Determination*"), USITC Pub. No. 5380, Inv. Nos. 701-TA-545–546 and 731-TA-1291–1297 (Review), and 731-TA-808 (Fourth Review) (Nov. 2022), at 26 n.132. Plaintiff argued also that the Commission should reverse its original negligibility determination involving dumped imports from Turkey in the sunset reviews. *Id.*

Then, on November 29, 2022, the Commission "declined to institute a [changed circumstances review] . . . or grant reconsideration" as requested by plaintiff in light of the exclusion of Colakoglu from the AD order. *Hot-Rolled Steel Flat Products from Turkey; 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* ("*Denial of Request for CCR and Reconsideration*"), 87 Fed. Reg. 73,331 (ITC Nov. 29, 2022). The Commission determined that a changed circumstances review "would be duplicative of the full five-year review" and "does not provide an opportunity for the Commis-

[9] 19 U.S.C. § 1675(c)(5) requires the Commission to complete a full sunset review "within 360 days after the date on which a review is initiated," unless there is no response to the notice of initiation, or the response to the notice of initiation is inadequate. *See* 19 U.S.C. § 1675(c)(3)(A)-(B). On September 1, 2021, the Commission published notice of the institution of the sunset reviews. *Hot-Rolled Steel Flat Products from Australia, Brazil, Japan, Korea, the Netherlands, Russia, Turkey, and the United Kingdom; Institution of Five-Year Reviews*, 86 Fed. Reg. 49,057, 49,058 (ITC Sept. 1, 2021) ("The Commission will assess the adequacy of interested party responses to this notice of institution to determine whether to conduct a full review or an expedited review."). Then, on December 6, 2021, "the Commission determined that it should proceed to full reviews in the subject five-year reviews" because "the domestic interested party group response and the respondent interested party group responses from Australia, Brazil, Japan, the Netherlands, Turkey, and the United Kingdom to its notice of institution . . . were adequate." *Notice of Full Five-Year Reviews*, 87 Fed. Reg. at 3,124.

sion to reconsider and amend its original injury determination." *Id.* at 73,332. As a result, the Commission denied Erdemir's request. *Id.*

In that decision, the Commission noted that Erdemir's comments of January 2022 requesting a changed circumstances review included also an alternative request that the Commission institute a reconsideration proceeding. *Id.* The Commission declined plaintiff's request for reconsideration of its negligibility analysis and the finding of non-negligibility with respect to the original AD investigation of hot-rolled steel flat products from Turkey. *Id.* at 73,332–73,333.

The Commission explained that its reconsideration authority is reserved for "extraordinary circumstances," such as when reconsideration is necessary to protect the integrity of its proceedings from fraud. *Id.* at 73,332. In the instant proceedings, the Commission determined that there was "no evidence of fraud or other facts that suggest extraordinary circumstances" and therefore concluded that "the recalculation of the dumping margin by Commerce with respect to hot-rolled steel flat products" did not warrant reconsideration. *Id.* To support that conclusion, the Commission relied on legislative history "in which Congress specifically contemplated subsequent changes to the antidumping duty margins and instructed that such changes would not be a basis to reconsider the Commission's impact analysis."[10] *Id.*

According to the Commission, Erdemir was required to challenge the Commission's affirmative material injury determination in the original investigation, which was the sole "path for Erdemir to avail itself to preserve its rights to obtain a reexamination of the Commission's original determination in light of the subsequent successful appeal of Commerce's final original determination that resulted in a de minimis dumping margin for Colakoglu and exclusion of imports from Colakoglu from the scope of Commerce's final affirmative antidumping duty determination." *Id.* at 73,333.

The Commission explained that "[t]he potential impact on Erdemir at the time that Erdemir and Colakoglu appealed Commerce's final antidumping duty determination was known to Erdemir at that time, and[,] in fact, Erdemir joined Colakoglu in appealing Commerce's

[10] Commissioners Kearns and Karpel did not join the Commission's decision on this point. *See Denial of Request for CCR and Reconsideration Proceeding*, 87 Fed. Reg. at 73,332 n.1. In the view of Commissioners Kearns and Karpel, "it is not clear that 19 U.S.C. [§] 1677(7)(C)(iii)(v) and [§] 1677(35)(C) and the related SAA language address the circumstances here" because those provisions and the accompanying language in the SAA pertain to "the 'magnitude of margins of dumping' that the Commission is to consider in its *impact* analysis." *Id.* (emphasis supplied). Here, the Commissioners added, plaintiff had requested that the Commission "reconsider its *negligibility* analysis for purposes of 19 U.S.C. [§] 1673d(b)(1) and 19 U.S.C. [§] 1677(24)." *Id.* (emphasis supplied).

original determination." *Id.* The Commission determined, as a result, that "[t]he interests of finality of the agency's decision are paramount under the circumstances presented." *Id.* The Commission therefore denied Erdemir's request for reconsideration. *Id.*

On November 25, 2022, the Commission completed its first sunset review and determined that revocation of the AD order on hot-rolled steel flat products from Turkey would be likely to lead to continuation or recurrence of material injury. *See Hot-Rolled Steel from Australia, Brazil, Japan, Netherlands, Russia, South Korea, Turkey, and the United Kingdom*, 87 Fed. Reg. 74,167 (ITC Dec. 2, 2022). The Commission analyzed subject hot-rolled steel imports from Turkey on a cumulated basis[11] with subject imports from Australia, Japan, the Netherlands, South Korea, Russia and the United Kingdom and determined that revocation of the AD order on hot-rolled steel flat products from Turkey would be likely to lead to continuation or recurrence of material injury.[12] *Sunset Review Determination*, USITC Pub. No. 5,380 at 48, 67; *see also* 19 U.S.C. § 1675a(a)(7). Thereafter, Commerce published a notice of continuation of the AD order. *Certain Hot-Rolled Steel Flat Products from Australia, Brazil, Japan, the Republic of Korea, the Netherlands, the Republic of Turkey, and the United Kingdom: Continuation of Antidumping Duty Orders (Australia, Japan, Korea, the Netherlands, Turkey, and the United Kingdom) and Countervailing Duty Order (Korea) and Revocation of Antidumping and Countervailing Duty Orders (Brazil)*, 87 Fed. Reg. 78,642 (Dep't of Commerce Dec. 22, 2022).

Plaintiff then brought multiple actions to challenge different decisions made by the Commission during the course of the proceedings before the agency. In the instant action, plaintiff contends that it was "adversely affected or aggrieved by the Commission's decision not to

[11] 19 U.S.C. § 1677(7)(G)(i) requires that the Commission "cumulatively assess the volume and effect of imports of the subject merchandise from all countries with respect to which . . . (I) petitions were filed under section 1671a(b) or 1673a(b) of this title on the same day, (II) investigations were initiated under section 1671a(a) or 1673a(a) of this title on the same day, or (III) petitions were filed under section 1671a(b) or 1673a(b) of this title and investigations were initiated under section 1671a(a) or 1673a(a) of this title on the same day," so long as such imports compete with each other and with domestic like products in the United States market. However, the statute also prohibits the Commission from cumulatively assessing the volume and effect of imports under clause (i) "from any country with respect to which the investigation has been terminated." 19 U.S.C. § 1677(7)(G)(ii)(II). This exception — that imports that are the subject of terminated investigations may not be cumulated — "implements the requirements of the [URAA] that negligible or de minimis imports not be cumulated." *Statement of Administrative Action Accompanying the Uruguay Round Agreements Act*, H.R. Rep. No. 103–316, vol. 1 (1994), at 849, *reprinted in* 1994 U.S.C.C.A.N. 4040 ("SAA").

[12] In its sunset reviews, the Commission indicated that it would address outside of the sunset reviews plaintiff's request for a changed circumstances review or reconsideration proceeding. *Sunset Review Determination*, USITC Pub. No. 5380 at 48 n.298.

conduct a reconsideration proceeding within the meaning of the APA." Am. Compl. ¶ 5 (citing 5 U.S.C. § 702; 28 U.S.C. § 2631(i)).

On June 13, 2024, the court held oral argument. *See* Oral Arg. Tr., ECF No. 71.

JURISDICTION AND STANDARD OF REVIEW

Whether a court has subject matter jurisdiction to hear an action is a "threshold" inquiry. *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94 (1998).

Plaintiff files its action under 28 U.S.C. § 1581(i)(1)(B) and (D), which provide:

> [T]he Court of International Trade shall have exclusive jurisdiction of any civil action commenced against the United States, its agencies, or its officers, that arises out of any law of the United States providing for —
>
> (A). . .
>
> (B) tariffs, duties, fees, or other taxes on the importation of merchandise for reasons other than the raising of revenue;
>
> [or]
>
> (C). . .
>
> (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.

Section 1581(i) is the Court's "residual" jurisdictional provision, *Fujitsu Gen. Am., Inc. v. United States*, 283 F.3d 1364, 1371 (Fed. Cir. 2002) (citing *Conoco, Inc. v. United States Foreign-Trade Zones Bd.*, 18 F.3d 1581, 1584 n.4 (Fed. Cir. 1994)), which allows the Court to "take jurisdiction over designated causes of action founded on other provisions of law." *Norcal/Crosetti Foods, Inc. v. United States*, 963 F.2d 356, 359 (Fed. Cir. 1992) (citation omitted).

However, the "scope" of § 1581(i) is "strictly limited," *id.*, and jurisdiction under this provision "may not be invoked when jurisdiction under another [sub]section of § 1581 is or could have been available, unless the relief provided under that other subsection would be manifestly inadequate." *Consol. Bearings Co. v. United States*, 25 CIT 546, 549, 166 F. Supp. 2d 580, 583 (2001) (alterations in original) (internal quotation marks omitted) (quoting *Ad Hoc Comm. of Fla. Producers of Gray Portland Cement v. United States*, 22 CIT 902, 906, 25 F. Supp. 2d 352, 357 (1998)); *see also* 28 U.S.C. § 1581(i)(2)(A) (providing that "[§ 1581(i)] shall not confer jurisdiction over an antidumping or coun-

tervailing duty determination which is reviewable by . . . the Court of International Trade under [§ 1581(c)].").

With respect to defendant-intervenors' USCIT Rule 12(b)(6) motion for failure to state a claim, "any factual allegations in the complaint are assumed to be true and all inferences are drawn in favor of the plaintiff." *Env't One Corp. v. United States*, 47 CIT __, __, 627 F. Supp. 3d 1349, 1355 (2023) (quoting *Amoco Oil Co. v. United States*, 234 F.3d 1374, 1376 (Fed. Cir. 2000)); USCIT Rule 12(b)(6).

"A court may properly dismiss a claim pursuant to [USCIT] Rule 12(b)(6) only if Plaintiff['s] allegations of fact are not 'enough to raise a right to relief above the speculative level.'" *VoestAlpine USA Corp. v. United States*, 46 CIT __, __, 578 F. Supp. 3d 1263, 1276 (2022) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555–56 (2007)). To survive a motion to dismiss, plaintiff's complaint must contain sufficient factual material to "state a claim to relief that is plausible on its face." *Twombly*, 550 U.S. at 570.

"[A]n agency's denial of a petition for reconsideration is committed to agency discretion and not subject to judicial review unless the request is based on 'new evidence or changed circumstances,' in which case the court evaluates whether 'the refusal to reopen was arbitrary, capricious, [or] an abuse of discretion.'" *Consol. Fibers, Inc. v. United States*, 30 CIT 1820, 1825, 465 F. Supp. 2d 1338, 1343 (2006) (citation omitted) (alteration in original).

DISCUSSION

I. Whether jurisdiction under § 1581(c) could have been available

A. Legal framework

"An inquiry into § 1581(i) jurisdiction is . . . a two-step process." *ARP Materials, Inc. v. United States*, 47 F.4th 1370, 1377 (Fed. Cir. 2022). First, the court considers whether jurisdiction under a subsection other than § 1581(i) was available. *Erwin Hymer Grp. N. Am., Inc. v. United States*, 930 F.3d 1370, 1375 (Fed. Cir. 2019) (citing *Ford Motor Co. v. United States*, 688 F.3d 1319, 1323 (Fed. Cir. 2012)). Second, "if jurisdiction was available under a different subsection of § 1581," the court then examines "whether the remedy provided under that subsection is 'manifestly inadequate.'" *Id.* (citing 28 U.S.C. § 1581(i)). In determining whether jurisdiction under another subsection is or could have been available, the court must discern the "'true nature' of the action." *Norsk Hydro Can., Inc. v. United States,* 472 F.3d 1347, 1355 (Fed. Cir. 2006).

28 U.S.C. § 1581(c) grants the court jurisdiction to review antidumping and countervailing duty determinations issued under 19 U.S.C. §§ 1516a and 1517. Moreover, 19 U.S.C. § 1516a(a)(2)(B)(i) lists "[f]inal affirmative determinations by . . . the Commission" of material injury in antidumping duty investigations as one of the reviewable determinations under 28 U.S.C. § 1581(c). *See also* 19 U.S.C. § 1673d(b)(1).

B. Analysis

1. The true nature of plaintiff's action

The court examines first whether jurisdiction could have been available under another subsection of § 1581.

Defendant-intervenors argue that jurisdiction is unavailable under § 1581(i) because the true nature of plaintiff's action is a challenge to the Commission's negligibility analysis, which, according to defendant-intervenors, plaintiff was required to challenge within 30 days of the Commission's determination under § 1581(c). Def.-Intervenors Br. at 19, 23.

Plaintiff asserts in response that the true nature of its action is in fact a challenge to the Commission's denial of plaintiff's request to institute reconsideration proceedings. Pl. Br. at 9. According to plaintiff, it "could not have raised . . . a claim appealing the final injury determination." *Id.* at 10. Plaintiff argues on this basis that jurisdiction is proper under § 1581(i) because a challenge to the Commission's decision not to initiate reconsideration proceedings is not listed as an appealable decision under any other subsection of § 1581. *Id.*

The court concludes that the true nature of the instant action is a challenge to the Commission's negligibility analysis in the original investigation because the source of the alleged harm to plaintiff is the Commission's finding of non-negligibility in that investigation.

The court looks to the "true nature of the action" to determine whether jurisdiction is or could have been available under another subsection of § 1581. *Hutchison Quality Furniture, Inc. v. United States*, 827 F.3d 1355, 1360 (Fed. Cir. 2016). "The true nature of a particular action will depend upon the attendant facts asserted in the pleadings." *Id.* (citing *Norsk Hydro*, 472 F.3d at 1355). Therefore, "'[d]etermining the true nature of an action under § 1581' requires that [the court] 'discern the particular agency action that is the source of the alleged harm so that [the court] may identify which subsection of § 1581 provides the appropriate vehicle for judicial review.'" *ARP Materials,* 47 F.4th at 1378 (citing *Hutchison*, 827 F.3d at 1360).

Here, plaintiff's complaint demonstrates that the source of the alleged harm to plaintiff lies in the Commission's negligibility analy-

sis. For example, the complaint alleges that the harm suffered by plaintiff is redressable if the Commission "correct[ed] errors in the AD negligibility determination in the original investigation." Am. Compl. ¶ 38. The complaint alleges further: "[B]ut for Commerce's initial unlawful decisions, the volume of subject imports considered by the Commission would have been below the negligibility threshold for the AD injury investigation, just as they had been for the CVD investigation: there would be no AD order on hot-rolled steel flat products from Turkey." *Id.* ¶ 19. In the only count of the amended complaint, plaintiff alleges also that the Commission "has the authority to reconsider and correct errors in the AD negligibility determination *in the original investigation*." *Id.* ¶ 38 (emphasis supplied).

Therefore, the source of plaintiff's harm is not the Commission's decision not to reconsider its negligibility analysis, but the Commission's initial finding of non-negligibility in the original investigation. The court notes that plaintiff asserts in its complaint that plaintiff is challenging the Commission's denial of plaintiff's request for a reconsideration proceeding. *Id.* ¶ 1. However, "mere recitation of a basis for jurisdiction [is not] controlling." *ARP Materials*, 47 F.4th at 1378 (quoting *Harford Fire Ins. v. United States*, 544 F.3d 1289, 1293 (Fed. Cir. 2008)). Moreover, the Federal Circuit has instructed that "a party may not expand a court's jurisdiction by creative pleading." *Norsk Hydro*, 472 F.3d at 1378. Section 1581(i) "[was not] meant to supersede more specific jurisdictional provisions." *Koyo Seiko Co. v. United States*, 13 CIT 461, 463, 715 F. Supp. 1097, 1099 (1989). This Court's comments on this point in *San Vicente Camalu SPR De Ri v. United States*, 29 CIT 436, 444, 336 F. Supp. 2d 1373, 1380 n.19 (2005), are instructive:

> [Plaintiff] cannot invoke (i) jurisdiction . . . simply by requesting that the agencies retract or reconsider their determinations. Section 1581(i) was never intended to create new causes of action. H.R. Rep. No. 96–1235, at 47 (1980). Nor was it intended to supersede more specific jurisdictional provisions. . . . [Plaintiff] cannot make an "end run" around § 1581(c) and secure (i) jurisdiction simply by using the procedural mechanism of a request to reopen.

(internal citation omitted).

Because the agency action that is the source of the alleged harm is the Commission's inclusion of Colakoglu in the Commission's computation of total imports from Turkey, which resulted in a finding of

non-negligibility, the "true nature" of plaintiff's action is a challenge to the Commission's affirmative final determination of material injury in the original investigation.

2. Whether jurisdiction is or could have been available under § 1581(c)

The court considers next whether jurisdiction could have been available under § 1581(c).

Plaintiff argues that jurisdiction under § 1581(c) could not have been available because "[plaintiff] could not have raised such a claim in the final injury determination." Pl. Br. at 10. According to plaintiff, any challenge to the Commission's final determination would have been speculative, as it would have depended by necessity on the success of plaintiff's then pending challenge to the final dumping margin of Commerce. *Id.* at 13. Plaintiff argues that, as a result, plaintiff would not have had standing to challenge the Commission's determination. *Id.*

Defendant-intervenors respond that plaintiff, as an interested party in the original investigation, had the opportunity to commence an action under § 1581(c) "to seek judicial review of the Commission's final material injury determination and any factual findings or legal conclusions upon which that determination was based." Def.-Intervenors Br. at 18 (citing 19 U.S.C. § 1516a(a)(2)(A)(i)(II) and (a)(2)(B)(i)). Defendant-intervenors assert also that plaintiff's challenge to the Commission's determination, had plaintiff filed such a challenge, "could have been stayed pending the outcome of Erdemir [sic] and Colakoglu's appeal of Commerce's final dumping margins." *Id.* According to defendant-intervenors, previous cases in which interested parties brought concurrent actions under § 1581(c) to determinations of both Commerce and the Commission establish that plaintiff in the instant action could have challenged also the final material injury determination of the Commission. *Id.* at 20.

The court concludes that jurisdiction could have been available under § 1581(c) because plaintiff could have challenged the Commission's final material injury determination.

28 U.S.C. § 1581(c) grants the court jurisdiction to review antidumping and countervailing duty determinations issued under 19 U.S.C. §§ 1516a and 1517. Moreover, 19 U.S.C. § 1516a(a)(2)(B)(i) lists "[f]inal affirmative determinations by . . . the Commission" of material injury in AD investigations as one of the reviewable determinations under 28 U.S.C. § 1581(c). *See also* 19 U.S.C. § 1673d(b)(1).

Here, plaintiff could have challenged the Commission's final determination of material injury in the original investigation by filing an appeal within 30 days of the date of publication of the AD order. *See*

19 U.S.C. § 1516a(a)(2)(A)(i)(II); *PAO TMK v. United States*, 47 CIT __, Slip Op. 23–150, 2023 WL 6939242 (CIT Oct. 12, 2023) (exercising jurisdiction under § 1581(c) in a plaintiff's challenge to the Commission's finding of non-negligibility). The court concludes, as a result, that jurisdiction could have been available under § 1581(c).

Plaintiff maintains that its request for reconsideration was made "in light of" Colakoglu's exclusion from the AD order. Pl. Resp. Br. at 7–11. According to plaintiff, because Colakoglu's exclusion from the AD order was not known at the time of the original investigation, jurisdiction under § 1581(c) was not available. *Id.* Plaintiff asserts further that "a challenge to the negligibility decision in the original investigation never existed . . . because it would have to rely upon a speculative result of a separate appeal of a separate administrative action with a separate administrative record." *Id.* at 11.

That Colakoglu's entries were excluded from the AD order pursuant to a recalculation by Commerce upon judicial remand did not render unavailable jurisdiction under § 1581(c) to challenge the Commission's final determination of material injury. Plaintiff acknowledges that, as a plaintiff in the litigation that resulted in Colakoglu's exclusion from the AD order, plaintiff was aware that had Colakoglu's imports been excluded, "the volume of subject imports considered by the Commission would have been below the negligibility threshold for the AD injury investigation, as they had been for the CVD injury investigation." Am. Compl. ¶ 19; Pl. Resp. Br. at 11–12. That the Commission's decision to include Colakoglu's imports in the Commission's cumulated import volume became erroneous only after Commerce's retroactive exclusion of Colakoglu's imports from Commerce's AD order — as opposed to an exclusion ab initio under a negligibility analysis — does not negate the fact that plaintiff had available to it a remedy under § 1581(c) that would have preserved plaintiff's rights. *See* 28 U.S.C. § 1581(c).

In fact, plaintiff's contention that any challenge to the Commission's final affirmative determination of material injury would have been "[]frivolous" or "purely speculative," Pl. Resp. Br. at 11, is contradicted by multiple decisions of this Court. For example, in *Diamond Sawblades Mfrs' Coalition v. United States*, 39 CIT __, __, Slip Op. 15–92, 2015 WL 4978726, at *9 (CIT Aug. 20, 2015), this Court held expressly and specifically that "the lawfulness of an agency determination may hinge upon the outcome of separate litigation." Similarly, in *Encon Indus., Inc. v. United States*, 18 CIT 867, 869 (1994), the Court's decision rebuts directly plaintiff's arguments that it did not have a nonspeculative claim to challenge the Commission's final affirmative determination of material injury:

> Encon argues that it could not have brought its claim during the original litigation. Encon alleges that its claim arose only after publication of the amended order resulting in the exclusion of one company from the antidumping order and consequently elimination of its volume of imports from the volumes previously relied upon by the ITC. Encon argues that before that time "there were no facts or evidence in existence that could have supported this claim." This of course ignores the fact that parties can and do challenge ITC's actions on the basis of errors in the information furnished to it by Commerce. It may be that in such cases the ITC litigation must be stayed in order for the plaintiff to have the maximum chance of success, but such stays have been granted.

Id. (internal citations omitted); *cf. ARP Materials*, 47 F.4th at 1378–79 (concluding that the fact that "Customs' classification decisions became erroneous after USTR granted retroactive exclusions" was irrelevant because "[t]he obligation to protest a Customs classification error does not turn on whether it was erroneous ab initio or became erroneous because of retractive administrative action. It instead turns on whether Customs' classifications of the importers' entries were protestable 'decisions' under 19 U.S.C. § 1514 . . . .").

In addition, that jurisdiction "could have been available" to plaintiff under § 1581(c) is demonstrated plainly by previous instances in which interested parties asserted jurisdiction under § 1581(c) in similar circumstances. For example, in the 2014 AD investigation of oil country tubular goods, Commerce issued a negative final dumping determination for Saudi Arabia, *Amended Final Determination and Termination of the Investigation of Sales at Less Than Fair Value: Certain Oil Country Tubular Goods from Saudi Arabia*, 79 Fed. Reg. 49,051, 49,052 (Dep't of Commerce Aug. 19, 2014), which resulted in the Commission terminating its investigation of Saudi Arabia. *See Certain Oil Country Tubular Goods from Saudi Arabia: Termination of Investigation*, 79 Fed. Reg. 51,192 (ITC Aug. 27, 2014). Commerce's negative final determination resulted also in a finding that imports from the Philippines and Thailand were negligible. *Certain Oil Country Tubular Goods from India, Korea, the Philippines, Taiwan, Thailand, Turkey, Ukraine, and Vietnam*, 79 Fed. Reg. 53,080 (ITC Sept. 5, 2014); *Certain Oil Country Tubular Goods from India, Korea, the Philippines, Saudi Arabia, Taiwan, Thailand, Turkey, Ukraine, & Vietnam*, USITC Pub. No. 4489, Inv. No. 701-TA-499 (Sept. 2014), at 5. There, domestic producers brought concurrent actions under § 1581(c) to challenge both (1) the determination by Commerce that

imports from Saudi Arabia were not sold at less than fair value and (2) the subsequent finding of negligibility by the Commission. Domestic producers then moved for a stay in the action against the Commission pending resolution of the action against Commerce. *Boomerang Tube LLC v. United States*, Court No. 14–00196, ECF No. 6 (stating in plaintiff's complaint that plaintiffs were challenging Commerce's amended final negative determination in the AD investigation of oil country tubular goods from Saudi Arabia); *United States Steel Corp. v. United States*, Consol. Ct. No. 14–00232, ECF Nos. 2 (stating in their complaint that plaintiffs were challenging the Commission's termination of the AD investigation), 25 (consent motion for stay) and 26 (order granting consent motion for stay pending "final resolution of the appeal in *Boomerang Tube LLC v. United States*, Consol. Court No. 14–196"); *United States Steel. Corp. v. United States*, Consol. Ct. No. 14–00237, ECF Nos. 35 (consent motion for stay) and 36 (order granting consent motion for stay pending "final resolution of *Boomerang Tube LLC v. United States*").[13] Other similarly situated litigants have also availed themselves of the statutorily prescribed remedy under § 1581(c) by requesting — and receiving — a stay of the Commission challenge, even where other interested parties opposed the stay. *See, e.g.*, *ArcelorMittal USA LLC v. United States*, Consol. Ct. No. 16–00214, ECF No. 43 (requesting reconsideration of court's denial of plaintiff's stay motion because "[t]he Commission's negative injury determinations as to [subject imports] were based entirely on negligibility findings that resulted directly from Commerce's calculation of a de minimis . . . dumping margin" (citations omitted)), ECF No. 52 (motion of defendant-intervenors in opposition to reconsideration and stay), ECF No. 54 (granting plaintiff's motion for reconsideration and staying challenge to the Commission's injury determination).

The path pursued by other litigants in plaintiff's position establishes that plaintiff in the instant case could have asserted jurisdiction under § 1581(c) to challenge the Commission's final affirmative determination of material injury. A party "may not simply 'elect to proceed under [§] 1581(i), without having first availed himself of the remedy provided by [§] 1581(c).'" *Wanxiang Am. Corp. v. United*

[13] Ultimately, domestic producers were not successful in their challenge to Commerce's final determination. *Boomerang Tube LLC v. United States*, 39 CIT__, 125 F. Supp. 3d 1357 (2015), *vacated and remanded*, 856 F.3d 908 (Fed. Cir. 2017). Because, as here, success in domestic producers' challenge to the Commission's final negative determination of material injury depended on success in domestic producers' challenge to Commerce's final determination, domestic producers voluntarily dismissed their appeal of the Commission's determination. *United States Steel Corp. v. United* States, Consol. Ct. No. 14–00232, ECF Nos. 36–37.

States, 12 F.4th 1369, 1374 (Fed. Cir. 2021) (quoting *Sunpreme Inc. v. United States*, 892 F.3d 1186, 1193 (Fed. Cir. 2018) (citation omitted)). "[T]he § 1581(i) standard . . . asks only whether another route under § 1581 existed that was not manifestly inadequate." *Id.* Here, decisions of this Court and the litigation strategy of interested parties in previous investigations demonstrate that jurisdiction could have been available under § 1581(c).

In sum, the court concludes that jurisdiction could have been available under § 1581(c).

II. Whether jurisdiction under § 1581(c) would have been manifestly inadequate

A. Legal framework

If jurisdiction could have been available under another subsection of § 1581, the party that seeks to invoke the Court's jurisdiction "bears the burden of demonstrating manifest inadequacy." *Intercontinental Chems., LLC v. United States*, 44 CIT __, __, 483 F. Supp. 3d 1232, 1241 (2020) (citing *Miller & Co. v. United States*, 824 F.2d 961, 964 (Fed. Cir. 1987)); *Erwin Hymer Grp. N. Am.*, 930 F.3d at 1375.

"[T]o be manifestly inadequate, the protest must be an exercise in futility, or incapable of producing any result; failing utterly of the desired end through intrinsic defect; useless, ineffectual, vain." *ARP Materials*, 47 F.4th at 1379 (alterations in original) (quoting *Sunpreme*, 892 F.3d at 1193–94).

B. Analysis

The court considers next whether the remedy available to plaintiff under § 1581(c) would have been manifestly inadequate.

Defendant-intervenors contend that plaintiff cannot establish that relief under § 1581(c) would have been manifestly inadequate, citing the case of oil country tubular goods. Def.-Intervenors Br. at 20–21. In response to plaintiff's contention that any challenge under § 1581(c) to the Commission's final determination would have failed as "purely speculative," defendant-intervenors note that, as plaintiff concedes, "the termination of the Commission's countervailing duty investigation on negligibility grounds made it clear how a decision favorable to the Turkish respondents in the parallel appeal of Commerce's final dumping margins . . . would have affected the Commission's antidumping duty investigation." Def.-Intervenors Reply Br. at 11. Defendant-intervenors argue also that the fact that a stay would have been required for any challenge to the Commission's final affirmative determination to be successful does not, in itself, render such a challenge manifestly inadequate. *Id.* at 12.

Plaintiff argues that relief under § 1581(c) — even had it been available — would have been manifestly inadequate because, according to plaintiff, any challenge under § 1581(c) to the Commission's final determination would have failed. Pl. Br. at 14. Plaintiff asserts that such a challenge — filed by necessity prior to Colakoglu's exclusion from the AD order — would have been based on "purely speculative" grounds. *Id.* at 11. Plaintiff adds that, even if a challenge under § 1581(c) would not have been dismissed as speculative, the court would not have granted a stay pending the resolution of the parallel case challenging Commerce's final determination. *Id.* at 14–17.

The court concludes that plaintiff has failed to establish that relief under § 1581(c) would have been manifestly inadequate. "[T]o be manifestly inadequate," the remedy (in this case) under § 1581(c) "must be an 'exercise in futility, or incapable of producing any result; failing utterly of the desired end through intrinsic defect; useless, ineffectual, vain.'" *Sunpreme,* 892 F.3d at 1193–94 (quoting *Hartford Fire Ins. Co v. United States*, 544 F.3d 1289, 1294 (Fed. Cir. 2008) (emphasis omitted)).

To start, whether to stay a case lies "'within the sound discretion of the trial court.'" *RHI Refractories Liaoning Co. v. United States*, 35 CIT 407, 410, 774 F. Supp. 2d 1280, 1284 (2011) (quoting *Cherokee Nation of Okla. v. United States*, 124 F.3d 1413, 1416 (Fed. Cir. 1997)). Given that the decision to stay a case is within the court's "sound discretion," *id.*, plaintiff's definitive assertion that a stay "would not have been granted" — and that therefore relief under § 1581(c) was manifestly inadequate, Pl. Br. at 14 — is unsupported.

In addition, plaintiff's attempt to establish that relief under § 1581(c) would have been manifestly inadequate is further undermined by cases in which parties in plaintiff's position sought and received a stay pending the result of a challenge to Commerce's final determination. "Persuasive of the adequacy of the § 1581(c) remedy is that another [party] . . . used it." *Miller & Co,* 824 F.2d at 963. Domestic producers in oil country tubular goods followed the path prescribed by statute by filing concurrent actions under § 1581(c) to challenge the determinations of both Commerce and the Commission. *Boomerang Tube LLC v. United States*, Court No. 14–00196, ECF No. 6 (stating in plaintiff's complaint that plaintiffs were challenging Commerce's amended final negative determination in the AD investigation of oil tubular goods from Saudi Arabia); *United States Steel Corp. v. United States*, Consol. Ct. No. 14–00232, ECF Nos. 2 (stating in their complaint that plaintiffs were challenging the Commission's termination of the AD investigation). There, domestic producers filed

a consent motion to stay the challenge to the Commission determination pending the result of domestic producers' challenge to the Commerce determination. *United States Steel Corp. v. United States*, Consol. Ct. No. 14–00232, ECF Nos. 25 (consent motion to stay) and 26 (order granting consent motion to stay pending "final resolution of the appeal in *Boomerang Tube LLC v. United States*, Consol. Ct. No. 14–196"); *see also ArcelorMittal USA LLC v. United States*, Consol. Ct. No. 16–00214, ECF No. 54 (granting contested motion to stay pending result of challenge to Commerce determination). "[T]he use of 'the § 1581(c) remedy' by other litigants in plaintiff's position is persuasive of its adequacy." *Royal United Corp. v. United States*, 34 CIT 756, 766, 714 F. Supp. 2d 1307, 1317 (2010) (quoting *Miller & Co.*, 824 F.2d at 964). As a consequence, plaintiff cannot demonstrate that relief under § 1581(c) would have been manifestly inadequate.

Plaintiff maintains that *United States Steel Corp.* is inapposite because the motion to stay in that case was filed with the consent of all parties. Pl. Br. at 15–16 (citing *United States Steel Corp. v. United States*, Consol. Ct. No. 14–00232, ECF No. 25 (consent motion to stay)). In the instant case, plaintiff envisions that defendant-intervenors would have opposed any stay, and that the court would have been required to deny any motion to stay after weighing parties' competing interests. *Id.* at 14. Plaintiff maintains also that relief under § 1581(c) would have been manifestly inadequate because "contested motions for stay been [sic] rejected by the Court of International Trade." *Id.* at 16–17 (citing *LG Elecs., Inc. v. U.S. Int'l Trade Comm'n* (*LG Elecs. II*), 38 CIT 103 (2014)); *see also LG Elecs., Inc. v. U.S. Int'l Trade Comm'n* (*LG Elecs. I*), 37 CIT 1589, 1589–90 (2013).

However, that domestic producers *may* have opposed a stay, or that the court *may* have denied any request for a stay, does not render relief under § 1581(c) manifestly inadequate. "[A] remedy is not inadequate simply because a party believes such remedy is unavailable." *Rimco Inc. v. United States*, 98 F.4th 1046, 1054 (Fed. Cir. 2024) (citing *Hartford Fire*, 544 F.3d at 1294). For relief under § 1581(c) to be manifestly inadequate, plaintiff is required to show that relief under § 1581(c) would have been "an exercise in futility, or 'incapable of producing any result; failing utterly of the desire end through intrinsic defect; useless, ineffectual, vain.'" *Id.* The mere possibility that the court may have denied a stay in a challenge to the Commission's final material injury determination does not render relief under § 1581(c) manifestly inadequate. *Cf. Int'l Custom Prods., Inc. v. United States*, 467 F.3d 1324, 1328 (Fed. Cir. 2006) ("Plaintiff cannot take it upon itself to determine whether it would be futile to protest

or not." (quoting *Inner Secrets / Secretly Yours v. United States*, 18 CIT 1028, 1036, 869 F. Supp. 959, 966 (1994))).

And, in any event, this Court has granted contested motions to stay in circumstances similar to those in the instant case. *See DuPont Teijin Films v. United States*, 39 CIT __, Slip Op. 15–95, 2015 WL 5024950 (CIT Aug. 26, 2015); *ArcelorMittal USA LLC v. United States*, Consol. Ct. No. 16–00214, ECF No. 54.

In *Teijin Films*, Commerce issued a scope ruling that concluded that defendant-intervenors' product was outside the scope of the AD order. 39 CIT at __, 2015 WL 5024950, at *1. Domestic producers of the subject merchandise appealed Commerce's determination to this Court. *Id.* Then, the Commission instituted the first sunset review of the subject merchandise. *Id.* at *2. In their response to the Commission's notice of institution of the sunset review, defendant-intervenors directed the Commission's attention to Commerce's scope ruling concluding that defendant-intervenors' product was not within the scope of the AD order. *Id.* In its material injury analysis, the Commission noted that "imports from Brazil would focus on out-of-scope merchandise" and concluded that "revocation of the antidumping duty order on subject imports from Brazil would not likely lead to a significant adverse impact on the domestic industry." *Id.*

Domestic producers challenged the Commission's determination and moved to stay those proceedings pending the outcome of parallel litigation contesting Commerce's scope ruling. *Id.* at *3. Defendant-intervenors opposed the stay, largely for the same reasons that plaintiff surmises that defendant-intervenors would have opposed any stay in the instant case: "the complexity of trade cases renders them 'not conducive to quick judicial review,' [which] counsels against granting a stay." *Id.* at *4. However, the Court granted the stay because "the validity of the Scope Ruling is central to [plaintiff's] claims." *Id.* at *5. Specifically, the Court reasoned that "the ITC's reliance on the Scope Ruling, which underpinned its decision not to cumulate Brazilian subject imports, ultimately led to a negative injury determination." *Id.* The Court concluded, therefore, that granting the stay "pending the conclusion" of the parallel case "would best conserve the resources of the court and parties, as well as preclude the issuance of conflicting judgments." *Id.* (citations omitted). In light of this Court's decision in *Teijin Films*, plaintiff cannot establish that this Court uniformly denies contested motions to stay challenges to a Commission determination pending the outcome of a separate appeal of a Commerce decision, such that any challenge under § 1581(c) would have been "an exercise in futility, useless or incapable of producing the result it seeks," *Sunpreme*, 892 F.3d at 1194.

Finally, *LG Electronics*, the case on which plaintiff relies, is inapposite. In *LG Electronics*, plaintiffs challenged both (1) Commerce's antidumping and countervailing duty determinations and (2) the Commission's final determinations of material injury. *LG Elecs. I*, 37 CIT at 1589–90. Plaintiffs sought a stay of proceedings challenging the Commission's determination pending final resolution of the Commerce cases. *Id.* The Court denied plaintiffs' motion to stay because plaintiffs "fail[ed] to show a clear non-speculative nexus between the possible outcome in the related Commerce Department Cases and [the case before the court]." *Id.* at 1593. The Court observed that, for plaintiff to succeed, it "would need to be successful in its appeal so that the court would remand and instruct Commerce to recalculate the margins." *Id.* at 1592. The Court observed also that the *effect* of plaintiffs' successful appeal in the Commerce cases on the Commission's *impact* analysis was also speculative. *Id.* at 1592–93 (internal citations omitted) (emphasis supplied) (citing *GPX Int'l. Tire Corp. v. United States*, 37 CIT 19, 30, 893 F. Supp. 2d 1296, 1310 n.15 (2013) (noting "that the dumping margin is only one of several factors that the ITC considers in evaluating injury, and the ITC has not developed standard methodology for weighing the impact of the Commerce-calculated dumping margin, making this argument largely speculative")); *see also LG Elecs. II*, 38 CIT at 104 ("[A]s explained in this court's prior order, Plaintiffs' claim is still speculative.").

The instant action stands in sharp contrast. Plaintiff's action concerns the impact of the successful appeal of Commerce's determination on the Commission's *negligibility* analysis. Am. Compl. ¶ 38. Plaintiff acknowledges that the negligibility analysis in the CVD investigation — which excluded Colakoglu's imports and therefore found imports from Turkey negligible — rendered the impact of a successful appeal of Commerce's AD determination on a challenge under § 1581(c) to the Commission's determination indisputable: the volume of dumped merchandise from Turkey would also have been negligible. Am. Compl. at 1–2. That is, in the instant case it would have been clear to the reviewing court that a successful challenge to Commerce's determination would result in imports of the subject merchandise from Turkey falling below the negligibility threshold. As a result, the basis for the Court's denial of plaintiffs' request to stay in *LG Electronics* is inapposite to the instant case.

Accordingly, plaintiff has failed to establish that relief under § 1581(c) would have been manifestly inadequate.

As noted, an adequate remedy was available to Ereğli Demir ve Çelik Fabrikalari T.A.Ş. to challenge the final determination of the Commission. Plaintiff did not avail itself of that remedy. Now, plain-

tiff would have the court act to expand the scope of the court's residual jurisdiction to fashion a remedy that the law does not provide. The court declines, as it must, to do so.

CONCLUSION

For the reasons discussed above, the court grants defendant-intervenors' motion to dismiss for lack of subject matter jurisdiction. Judgment will enter accordingly.

Dated: July 22, 2024
New York, New York

/s/ Timothy M. Reif
TIMOTHY M. REIF, JUDGE

Slip Op. 24–82

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: Timothy M Reif, Judge
Court No. 22–00350

[Granting defendant's motion to dismiss.]

Dated: July 22, 2024

David L. Simon, Law Office of David 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*.

Frank H. Morgan, Attorney-Advisor, Office of the General Counsel, U.S. International Trade Commission, of Washington, D.C., argued for defendant U.S. International Trade Commission. With him on the brief were *Andrea C. Casson*, Assistant General Counsel for Litigation, and *Michael K. Haldenstein*, Attorney-Advisor.

Jeffrey D. Gerrish, Schagrin Associates, of Washington, D.C., argued for defendant-intervenors. With him on the brief were *Roger B. Schagrin* and *Saad Y. Chalchal*, Schagrin Associates, of Washington, D.C., for defendant-intervenors Steel Dynamics, Inc. and SSAB Enterprises, LLC, *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., and *Thomas M. Beline* and *Sarah E. Shulman*, Cassidy Levy Kent LLP, of Washington D.C., for defendant-intervenor United States Steel Corporation.

OPINION

Reif, Judge:

Before the court is the motion to dismiss of defendant U.S. International Trade Commission (the "Commission"). Plaintiff Ereğli Demir ve Çelik Fabrikaları T.A.Ş. ("plaintiff" or "Erdemir") invokes this Court's subject matter jurisdiction under 28 U.S.C. § 1581(c) and alleges that the refusal of the Commission to conduct a changed circumstances review ("CCR") to reconsider the negligibility decision in the Commission's investigation of hot-rolled steel flats from Turkey is unsupported by substantial evidence and not in accordance with law. Compl. ¶ 37, ECF No. 4. Plaintiff asserts that the Commission "has the authority to conduct a changed circumstances review for purposes of retroactive correction of errors in the AD negligibility determination in the original investigation." *Id.* ¶ 37. Plaintiff asks the court to set aside the Commission's denial of plaintiff's request for a CCR and remand to the Commission to conduct such a review and reconsider whether the volume of imports of hot-rolled steel from Turkey is above the negligibility threshold. *Id.* at 12. The Commission has filed a motion to dismiss, asserting that (1) the court lacks subject matter jurisdiction because plaintiff's claim is moot and (2) plaintiff has failed to state a claim upon which relief may be granted. Def.'s Mot. to Dismiss ("Def. Br."), ECF No. 38.

For the reasons discussed below, the court grants the Commission's motion to dismiss.

BACKGROUND

I. The final determination of the Department of Commerce of sales at less than fair value and the Commission's final affirmative determination of material injury

In August and September 2015, the U.S. Department of Commerce ("Commerce") initiated and the Commission instituted investigations in response to petitions filed on behalf of the domestic industry requesting the imposition of antidumping and countervailing duties on imports of hot-rolled steel flat products from various countries (including Turkey). *Certain Hot-Rolled Steel Flat Products from Australia, Brazil, Japan, Korea, the Netherlands, Turkey, and the United Kingdom; Institution of Antidumping and Countervailing Duty Investigations and Scheduling of Preliminary Phase Investigations*, 80 Fed. Reg. 50,028 (ITC Aug. 18, 2015); *Certain Hot-Rolled Steel Flat Products from Australia, Brazil, Japan, the Republic of Korea, the*

Netherlands, the Republic of Turkey, and the United Kingdom: Initiation of Less-Than-Fair-Value Investigations, 80 Fed. Reg. 54,261 (Dep't of Commerce Sept. 9, 2015); *Certain Hot-Rolled Steel Flat Products from Brazil, the Republic of Korea, and Turkey: Initiation of Countervailing Duty Investigations*, 80 Fed. Reg. 54,267 (Dep't of Commerce Sept. 9, 2015).

On October 1, 2015, the Commission made an affirmative preliminary determination that there was a reasonable indication that an industry in the United States was materially injured due to imports of hot-rolled steel flat products from the subject countries. *Certain Hot-Rolled Steel Flat Products from Australia, Brazil, Japan, Korea, the Netherlands, Turkey, and the United Kingdom*, USITC Pub. 4570, Inv. Nos. 701-TA-545–547 and 731-TA-1291–1297 (Oct. 2015), at 3.

The Commission preliminarily determined also that the volume of imports of hot-rolled steel from Turkey was above the three percent threshold for exclusion from the investigation on grounds of negligibility.[1] *See id.* at 13.

On August 12, 2016, Commerce published its affirmative final countervailing duty determination for Turkey. *Countervailing Duty Investigation of Certain Hot-Rolled Steel Flat Products from the Republic of Turkey: Final Affirmative Determination*, 81 Fed. Reg. 53,433 (Dep't of Commerce Aug. 12, 2016).

Commerce found that Çolakoğlu Dis Ticaret A.Ş. ("Colakoglu") — another Turkish producer of hot-rolled steel — received a de minimis level of countervailable subsidies. *Id.* at 53,434. However, Commerce made an affirmative determination because it calculated a 6.01 percent net countervailable subsidy rate for Erdemir. *Id.* All remaining Turkish producers and exporters were assigned Erdemir's 6.01 percent CVD rate. *Id.* Also on August 12, 2016, Commerce published its affirmative final determination of sales at less than fair value for Turkey. *Certain Hot-Rolled Steel Flat Products from the Republic of Turkey: Final Determination of Sales at Less Than Fair Value* ("*Final Determination of Sales at Less Than Fair Value*"), 81 Fed. Reg. 53,428 (Dep't of Commerce Aug. 12, 2016). Commerce determined that Colakoglu was selling hot-rolled steel in the United States for less than fair value and calculated a weighted-average dumping margin of 7.15 percent. *Id.* at 53,429.

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[1] 19 U.S.C. § 1677(24)(A)(i) defines "negligible imports" as "imports from a country of merchandise corresponding to a domestic like product identified by the Commission" that "account for less than 3 percent of the volume of all such merchandise imported into the United States in the most recent 12-month period for which data are available that precedes" the filing of a petition under 19 U.S.C. § 1673a(b) or the initiation of an investigation under 19 U.S.C. § 1673a(a).

On September 29, 2016, the Commission published its affirmative final determinations that an industry in the United States was materially injured due to imports of hot-rolled steel flat products from the subject countries.[2] *Certain Hot-Rolled Steel Flat Products from Australia, Brazil, Japan, Korea, the Netherlands, Turkey, and the United Kingdom*, 81 Fed. Reg. 66,996 (ITC Sept. 29, 2016). As to Turkey, the Commission explained that "imports from Turkey that are subject to the antidumping duty investigation are different from those subject to the countervailing duty investigation" because Colakoglu's final net countervailable subsidy rate was de minimis. *Certain Hot-Rolled Steel Flat Products from Australia, Brazil, Japan, Korea, the Netherlands, Turkey, and the United Kingdom* ("*Final Determination of Material Injury*"), USITC Pub. 4638, Inv. Nos. 701-TA-545–547 and 731-TA-1291–1297 (Sept. 2016), at 13.

Colakoglu's imports were excluded from the Commission's injury analysis in the CVD investigation because "Colakoglu received a *de minimis* subsidy margin." *Id.* As a result of the exclusion of Colakoglu's imports, the volume of imports from Turkey subject to the CVD investigation fell below the negligibility threshold.[3] *Id.* Because subsidized imports from Turkey were negligible, the Commission "terminate[d] the countervailing duty investigation on hot-rolled steel from Turkey." *Id.* at 14; *see also* 19 U.S.C. § 1677(24)(A)(i).[4]

However, because Commerce determined that Colakoglu's imports were sold at less than fair value, *Final Determination of Sales at Less Than Fair Value*, 81 Fed. Reg. at 53,428, Colakoglu's imports were included in the Commission's negligibility analysis for purposes of its antidumping duty determination. *See Final Determination of Material Injury*, USITC Pub. 4638 at 13. The Commission determined that the volume of imports subject to the AD investigation exceeded the negligibility threshold. *Id.*

As a result, the Commission's final determination of material injury applied only to dumped imports from Turkey — not to subsidized

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[2] When evaluating whether the domestic industry is materially injured by reason of imports sold at less than fair value, the Commission is required to consider "the volume of imports of the subject merchandise," "the effect of imports of that merchandise on prices in the United States for domestic like products," and "the impact of imports of such merchandise on domestic producers of domestic like products." 19 U.S.C. § 1677(7)(B)(i)(I)-(III). Under § 1677(7)(C)(iii)(V), in examining the impact on the affected domestic industry, "the Commission shall evaluate all relevant economic factors . . . including, but not limited to . . . the magnitude of the margin of dumping."

[3] Plaintiff states in its complaint that Colakoglu is the "largest shipper" of hot-rolled steel from Turkey. Compl. at 1.

[4] 19 U.S.C. § 1673d(b)(1) requires that "[i]f the Commission determines that imports of the subject merchandise are negligible, the investigation shall be terminated."

imports from Turkey. *Id.* at 3. The Commission analyzed subject imports on a cumulated basis, meaning that the Commission cumulated dumped imports from Turkey with subject imports from Australia, Brazil, Japan, Korea, the Netherlands and the United Kingdom found by Commerce to be dumped or subsidized. *Id.* at 14–21. The Commission determined that an industry in the United States was materially injured by reason of the cumulated subject imports. *Id.* at 21, 39–47, 52.

On October 3, 2016, Commerce published the final AD order on imports of hot-rolled steel flat products from Turkey. *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. 67,962 (Dep't of Commerce Oct. 3, 2016).

Commerce calculated revised dumping margins of 6.77 percent for Colakoglu, 4.15 percent for Erdemir and 6.41 percent for all other producers or exporters. *Id.* at 67,965.

II. Colakoglu and Erdemir challenged Commerce's final determination

Colakoglu and Erdemir appealed Commerce's final determination of sales at less than fair value. On April 13, 2020, this Court entered judgment sustaining Commerce's third remand redetermination, in which Commerce calculated a zero percent AD duty margin for Colakoglu. *Ereğli Demir ve Çelik Fabrikaları T.A.Ş. v. United States*, 44 CIT __, 435 F. Supp. 3d 1378 (2020*); see also Ereğli Demir ve Çelik Fabrikaları T.A.Ş. v. United States*, 43 CIT __, 415 F. Supp. 3d 1216 (2019); *Ereğli Demir ve Çelik Fabrikaları T.A.Ş. v. United States*, 42 CIT __, 357 F. Supp. 3d 1325 (2018); *Ereğli Demir ve Çelik Fabrikaları T.A.Ş. v. United States*, 42 CIT __, 308 F. Supp. 3d 1297 (2018).[5]

On May 15, 2020, Commerce published an amended final determination with recalculated weighted-average dumping margins. *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*

[5] Nucor Corporation, one of the six domestic producers that filed petitions in the hot-rolled steel investigations, appealed the Commission's negligibility determination in the CVD investigation. *Nucor Corp. v. United States*, 42 CIT __, 296 F. Supp. 3d 1276 (2018). On February 28, 2018, this Court affirmed the Commission's negligibility determination. *Id.*

2017–18 and 2018–19 Antidumping Duty Administrative Reviews, in Part, 85 Fed. Reg. 29,399 (Dep't of Commerce May 15, 2020). Those margins were zero percent for Colakoglu, 2.73 percent for Erdemir and 2.73 percent for all other producers or exporters. *Id.* at 29,400.

Commerce partially revoked the AD order to exclude merchandise produced and exported by Colakoglu because Colakoglu's dumping margin was reduced to zero.[6] *Id.* at 29,399, 29,400 ("Commerce is hereby excluding merchandise produced and exported by [Colakoglu] from the Order.").

Therefore, Colakoglu was successful in its appeal of Commerce's final determination of sales at less than fair value. However, none of the Turkish respondents challenged the Commission's final material injury determination concerning dumped imports from Turkey.

III. Plaintiff requested that the Commission institute reconsideration proceedings or a changed circumstances review

After Commerce excluded Colakoglu from the AD order on hot-rolled steel from Turkey — and with appeals of the USCIT judgment still pending before the U.S. Court of Appeals for the Federal Circuit ("Federal Circuit") — Erdemir requested reconsideration of the Commission's original material injury determination. Def.'s Ex. C, Letter from Erdemir to the Commission, Request for Reconsideration ("Letter Request for Reconsideration") (May 18, 2020) at 5, PR 1 ("Erdemir respectfully requests that the Commission reopen the . . . investigations to consider the impact of Çolakoğlu's exclusion from the [AD] order."). Plaintiff asked the Commission to consider whether, "after the exclusion of Çolakoğlu's imports from the universe of unfairly traded imports [from Turkey], the remaining volume of HRS from Turkey sold at LTFV is below the negligibility threshold and that the other conditions for a negative injury determination are met, as was determined in the CVD injury investigation." *Id.* at 5.

Also in that letter, plaintiff requested in the alternative that the Commission treat Colakoglu's exclusion from the AD order as a changed circumstance and treat Erdemir's letter as a request for a CCR. *Id.* at 6. However, plaintiff's letter did not analyze whether the requirements for conducting a CCR had been met. *Id.* ; *see also 19 U.S.C. § 1675(b)(1); 19 C.F.R. § 207.45(a) ("All requests shall set forth*

[6] Both the United States and domestic producers appealed the judgment of the USCIT. On December 18, 2020, the United States voluntarily dismissed its appeal. *Ereğli Demir ve Çelik Fabrikaları T.A.Ş. v. United States*, No. 20–1999, Mandate Order (Fed. Cir. Dec. 18, 2020). Then, on June 4, 2021, domestic producers voluntarily dismissed their appeal. *Ereğli Demir ve Çelik Fabrikaları T.A.Ş. v. United States*, 20–2003, Mandate Order (Fed. Cir. June 4, 2021), docketed in Ct. No. 16–00218, ECF No. 161 (Ct. Int'l Trade June 4, 2021).

a description of changed circumstances sufficient to warrant the institution of a review . . . ."). *Plaintiff noted in its letter that "in the past 'the Commission determined that reconsideration was a more appropriate procedure for review of the original determinations.'" Letter Request for Reconsideration at 6 (citing Ferrosilicon from Brazil, China, Kazakhstan, Russia, Ukraine, and Venezuela*, USITC Pub. 3218, Inv. Nos. 303-TA-23 & 731-TA-21–27 (Aug. 1999), 1999 WL 957691, at *4).[7]

On September 1, 2021, Commerce initiated and the Commission instituted the first sunset review of the AD and CVD orders on hot-rolled steel flat products from multiple countries. *Initiation of Five-Year (Sunset) Reviews*, 86 Fed. Reg. 48,983 (Dep't of Commerce Sept. 1, 2021); *Hot-Rolled Steel Flat Products from Australia, Brazil, Japan, Korea, the Netherlands, Russia, Turkey, and the United Kingdom; Institution of Five-Year Reviews*, 86 Fed. Reg. 49,057 (ITC Sept. 1, 2021), PR 5; *see also* 19 U.S.C. § 1675(c).

Then, on September 10, 2021, after the United States and domestic producers had voluntarily dismissed their appeals of the judgment of the USCIT in the challenges to the Commerce determination, Erdemir requested that the Commission institute a CCR to revisit its affirmative final determination of material injury in the original investigation. Def.'s Ex. F, Request for Commission Changed Circumstances Review ("Pl. Request for CCR") (Sept. 10, 2021), PR 18. Erdemir argued that "Commerce's recalculation of Colakoglu's antidumping duty margin to zero percent and its exclusion from the antidumping duty order as a result of judicial review constitute significantly changed circumstances from those in existence at the time of the original investigation because the facts underlying the Com-

[7] On July 22, 2020, plaintiff sent the Commission a follow up to its letter of May 18, 2020. Def.'s Ex. D, Letter in Support of Request for Reconsideration ("Letter in Support of Request for Reconsideration") (July 22, 2020), PR 2. In its letter of July 22, 2020, plaintiff stated that the purpose of the letter was "to renew [plaintiff's] May 18, 2020, request . . . to inform the Commission that the Court of Appeals for the Federal Circuit has now docketed an appeal of the Court of International Trade decision that was the basis for our May 18, 2020 request . . . [and] to explain why the pendency of the CAFC appeal should not render Erdemir's current request premature." *Id.* at 1–2. Plaintiff argued that the Commission should not wait until the completion of the appeal to the Federal Circuit to reconsider the Commission's material injury determination because the completion of the appellate process would coincide with the sunset review, scheduled to begin in September 2021. *Id.* at 3. According to plaintiff in that letter:

> [T]he sunset review will not afford the Commission an opportunity to review the present matter, as the import statistics from the original investigation will not be part of the sunset review record. Thus, folding the present matter into a sunset review would prevent Erdemir from ever having its claim heard, and, in effect, would cause irreparable harm by denying Erdemir any possibility of review of the injury determination. *Id*.

mission's negligibility determination completely changed." *Hot-Rolled Steel Flat Products from Turkey; Request for Comments Regarding the Institution of a Section 751(b) Review Concerning the Commission's Affirmative Determination* ("*Request for Comments*"), 86 Fed. Reg. 68,512, 68,513 (ITC Dec. 2, 2021), PR 105. In that letter, Erdemir argued also that the exclusion of Colakoglu from the AD order "cannot effectively be considered in the sunset review currently underway, because specific imports [sic] data from the original investigation will not be part of the sunset review record." Pl. Request for CCR at 8 (footnote omitted).

On December 2, 2021, the Commission published a notice in the Federal Register requesting comment on "whether the alleged changed circumstances . . . are sufficient to warrant institution of a review" and "the degree to which any changed circumstances proceeding concerning hot-rolled steel flat products from Turkey can be conducted in conjunction with the five-year review of the antidumping duty order on the same subject merchandise." *Request for Comments*, 86 Fed. Reg. at 68,513.

The Commission then received a joint submission from Cleveland-Cliffs, Nucor, SDI, SSAB and the United States Steel Corporation opposing the institution of a CCR. *See Hot-Rolled Steel Flat Products from Turkey; 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* ("*Denial of Request for CCR and Reconsideration Proceeding*"), 87 Fed. Reg. 73,331, 73,332 (ITC Nov. 29, 2022). The Commission received also submissions from both the Turkish government and plaintiff in support of instituting a CCR. *Id.* at 73,332.

In plaintiff's comments in support of its request for a CCR, plaintiff cited to certain language in the Statement of Administrative Action in which, according to plaintiff, Congress stated expressly that recalculations by Commerce of the dumping margin in the original investigation were a sufficient reason to conduct a CCR, if the party seeking such a review establishes that it is warranted. Def.'s Ex. L, Erdemir Comments on Institution of Changed Circumstances Review (Jan. 3, 2022) at 8, PR 109 (citing *Statement of Administrative Action accompanying the Uruguay Round Agreements Act*, H.R. Doc. No. 103–316, vol. 1 (1994), *reprinted in* 1994 U.S.C.C.A.N. 4040, 4184 ("SAA")).

IV. The Commission conducted full sunset review and denied plaintiff's request for reconsideration or a changed circumstances review

On December 6, 2021, the Commission determined to conduct full sunset reviews of the hot-rolled steel orders.[8] *Notice of Commission Determination to Conduct Full Five-Year Reviews; Hot-Rolled Steel Flat Products from Australia, Brazil, Japan, Korea, the Netherlands, Russia, Turkey, and the United Kingdom* ("*Notice of Full Five-Year Reviews*"), 87 Fed. Reg. 3,123 (ITC Jan. 20, 2022), PR 116. In those reviews, plaintiff maintained that the Commission should conduct a CCR or reconsideration proceeding so that the Commission could correct its negligibility analysis in light of the exclusion of Colakoglu from Commerce's AD order. *Hot-Rolled Steel from Australia, Brazil, Japan, Netherlands, Russia, South Korea, Turkey, and the United Kingdom* ("*Sunset Review Determination*"), USITC Pub. No. 5380, Inv. Nos. 701-TA-545–546 and 731-TA-1291–1297 (Review), and 731-TA-808 (Fourth Review), at 26 n.132 (Nov. 2022), PR 355. Plaintiff argued also that the Commission should reverse its original negligibility determination involving dumped imports from Turkey in the sunset reviews.[9] *Id.*

Then, on November 29, 2022, the Commission "declined to institute [a changed circumstances review] or grant reconsideration." *Denial of Request for CCR and Reconsideration*, 87 Fed. Reg. at 73,331. The Commission noted that, "[a]t the time Erdemir filed its request for a changed circumstance review, the Commission was already conducting a five-year review of the antidumping duty order on hot-rolled steel flat products from Turkey." *Id.* at 73,332. The Commission determined that "[c]onducting a changed circumstances review at the same time as a five-year review would be unwarranted because it

[8] 19 U.S.C. § 1675(c)(5) requires the Commission to complete a full sunset review "within 360 days after the date on which a review is initiated," unless there is no response to the notice of initiation, or the response to the notice of initiation is inadequate. *See* 19 U.S.C. § 1675(c)(3)(A)-(B). On September 1, 2021, the Commission published notice of the institution of the sunset reviews. *Hot-Rolled Steel Flat Products from Australia, Brazil, Japan, Korea, the Netherlands, Russia, Turkey, and the United Kingdom; Institution of Five-Year Reviews*, 86 Fed. Reg. 49,057, 49,058 ("The Commission will assess the adequacy of interested party responses to this notice of institution to determine whether to conduct a full review or an expedited review."). Then, on December 6, 2021, "the Commission determined that it should proceed to full reviews in the subject five-year reviews" because "the domestic interested party group response and the respondent interested party group responses from Australia, Brazil, Japan, the Netherlands, Turkey, and the United Kingdom to its notice of institution . . . were adequate." *Notice of Full Five-Year Reviews*, 87 Fed. Reg. at 3,124.

[9] On September 15, 2022, the Commission conducted a public hearing as part of its sunset review. Def.'s Ex. J, Commission Hearing Transcript (Sept. 15, 2022), PR 315. In that hearing, interested parties provided testimony to the Commissioners concerning plaintiff's request for a CCR or reconsideration proceeding. *Id.* at 78:8–16, 81:13–83:17.

would be duplicative of the full five-year review." *Id.* (citing *Eveready Battery Co., Inc. v. United States*, 23 CIT 896, 77 F. Supp. 2d 1327 (1999)). The Commission stated also that "the result that Erdemir seeks — reexamination of the Commission's original negligibility finding — is not possible in a changed circumstances review because negligibility is not a factor for the Commission to consider under the statute in a changed circumstances review." *Id.* The Commission concluded that, because a CCR "involves a forward-looking inquiry," it "does not provide an opportunity for the Commission to reconsider and amend its original injury determination." *Id.* (*comparing* 19 U.S.C. § 1675a(a), *with* 19 U.S.C. §§ 1673d(b)(1), *and* 1677(24)). As a result, the Commission denied Erdemir's request. *Id.*

In that decision, the Commission noted that Erdemir's comments of January 2022 requesting a CCR included also an alternative request that the Commission institute a reconsideration proceeding. *Id.* The Commission declined to institute a proceeding to reconsider its negligibility analysis and the finding of non-negligibility with respect to the original AD investigation of hot-rolled steel flat products from Turkey. *Id.* at 73,332–73,333.

The Commission explained that its reconsideration authority is reserved for "extraordinary circumstances," such as when reconsideration is necessary to protect the integrity of its proceedings from fraud. *Id.* at 73,332. In the instant proceedings, the Commission determined that there was "no evidence of fraud or other facts that suggest extraordinary circumstances" and therefore concluded that "the recalculation of the dumping margin by Commerce with respect to hot-rolled steel flat products" did not warrant reconsideration. *Id.* To support that conclusion, the Commission relied on legislative history "in which Congress specifically contemplated subsequent changes to the antidumping duty margins and instructed that such changes would not be a basis to reconsider the Commission's impact analysis."[10] *Id.*

According to the Commission, Erdemir was required to challenge the Commission's affirmative material injury determination in the original investigation, which was the proper "path for Erdemir to avail itself to preserve its rights to obtain a reexamination of the

[10] Commissioners Kearns and Karpel did not join the Commission's decision on this point. *See Denial of Request for CCR and Reconsideration Proceeding*, 87 Fed. Reg. at 73,332 n.1. In the view of Commissioners Kearns and Karpel, "it is not clear that 19 U.S.C. [§] 1677(7)(C)(iii)(v) and [§] 1677(35)(C) and the related SAA language address the circumstances presented here" because those provisions and the accompanying language in the SAA pertain to "the 'magnitude of margins of dumping' that the Commission is to consider in its *impact* analysis." *Id.* (emphasis supplied). Here, the Commissioners added, plaintiff had requested that the Commission "reconsider its *negligibility* analysis for purposes of 19 U.S.C. [§] 1673d(b)(1) and 19 U.S.C. [§] 1677(24)." *Id.* (emphasis supplied).

Commission's original determination in light of the subsequent successful appeal of Commerce's final original determination that resulted in a de minimis dumping margin for Colakoglu and exclusion of imports from Colakoglu from the scope of Commerce's final affirmative antidumping duty determination." *Id.* at 73,333.

The Commission explained that "[t]he potential impact on Erdemir at the time that Erdemir and Colakoglu appealed Commerce's final antidumping duty determination was known to Erdemir at that time, and[,] in fact, Erdemir joined Colakoglu in appealing Commerce's original determination." *Id.* The Commission determined, as a result, that "[t]he interests of the finality of the agency's decision are paramount under the circumstances presented." *Id.* On this basis, the Commission denied Erdemir's request for reconsideration. *Id.*

On November 25, 2022, the Commission completed its first sunset review and determined that revocation of the AD order on hot-rolled steel flat products from Turkey would be likely to lead to continuation or recurrence of material injury. *Hot-Rolled Steel from Australia, Brazil, Japan, Netherlands, Russia, South Korea, Turkey, and the United Kingdom*, 87 Fed. Reg. 74,167 (ITC Dec. 2, 2022), PR 357. The Commission analyzed subject hot-rolled steel imports from Turkey on a cumulated basis[11] with subject imports from Australia, Japan, the Netherlands, South Korea, Russia and the United Kingdom and determined that revocation of the AD order on hot-rolled steel flat products from Turkey would be likely to lead to continuation or recurrence of material injury.[12] *See Sunset Review Determination*, USITC Pub. No. 5380 at 48, 67; *see also* 19 U.S.C. § 1675a(a)(7). Thereafter, Commerce published a notice of continuation of the AD order. *Certain Hot-Rolled Steel Flat Products from Australia, Brazil, Japan, the Republic of Korea, the Netherlands, the Republic of Turkey, and the United Kingdom: Continuation of Antidumping Duty Orders (Australia, Japan, Korea, the Netherlands, Turkey, and United King-*

[11] 19 U.S.C. § 1677(7)(G)(i) requires that the Commission "cumulatively assess the volume and effect of imports of the subject merchandise from all countries with respect to which . . . (I) petitions were filed under section 1671a(b) or 1673a(b) of this title on the same day, (II) investigations were initiated under section 1671a(a) or 1673a(a) of this title on the same day, or (III) petitions were filed under section 1671a(b) or 1673a(b) of this title and investigations were initiated under section 1671a(a) or 1673a(a) of this title on the same day," so long as such imports compete with each other and with domestic like products in the United States market. However, the statute also prohibits the Commission from cumulatively assessing the volume and effect of imports under clause (i) "from any country with respect to which the investigation has been terminated." 19 U.S.C. § 1677(7)(G)(ii)(II). This exception — that imports that were the subject of terminated investigations may not be cumulated — "implements the requirements of the [URAA] that negligible or de minimis imports not be cumulated." SAA at 849.

[12] In its sunset reviews, the Commission indicated that it would address outside of the sunset reviews plaintiff's request for a CCR or a reconsideration proceeding. *Sunset Review Determination*, USITC Pub. No. 5380 at 48 n.298.

dom) and Countervailing Duty Order (Korea) and Revocation Antidumping and Countervailing Duty Orders (Brazil), 87 Fed. Reg. 78,642 (Dep't of Commerce Dec. 22, 2022).

Plaintiff then brought multiple actions to challenge different decisions made by the Commission during the course of the proceedings before the agency. In the instant action, plaintiff contends that the Commission has the authority to conduct a CCR for purposes of retroactive correction of errors in the antidumping negligibility determination in the original investigation. Compl. ¶ 37. Plaintiff asserts that the Commission's decision not to conduct a CCR is not supported by substantial evidence and otherwise is not in accordance with law.[13] *Id.*

On June 13, 2024, the court held oral argument. *See* Oral Arg. Tr., ECF No. 54.

JURISDICTION AND STANDARD OF REVIEW

Whether a court has subject matter jurisdiction to hear an action is a "threshold" inquiry. *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94 (1998). 28 U.S.C. § 1581(c) grants the Court "exclusive jurisdiction of any civil action commenced under" 19 U.S.C. § 1516a. 19 U.S.C. § 1516a(a)(1)(B) provides for judicial review of "a determination by the Commission, under section 1675(b) of [title 19], not to review a determination based upon changed circumstances."

In an action to challenge "a determination by the Commission . . . not to review a determination based upon changed circumstances," *id.*, the Court "shall hold unlawful any determination, finding, or conclusion found . . . to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." *Id.* § 1516a(b)(1)(A).

However, "[b]ecause Article III of the Constitution requires that the court adjudicate only a presently pending case or controversy, jurisdiction is improper if the action is moot." *Eveready Battery Co., Inc. v. United States*, 23 CIT 896, 897, 77 F. Supp. 2d 1327, 1329 (1999) (citing *Associacao Dos Industriais de Cordoaria E Redes v. United States*, 17 CIT 754, 759, 828 F. Supp. 978, 984 (1993)). "A case will be dismissed as moot when the challenge presented to the [c]ourt cannot result in a meaningful remedy." *Verson v. United States*, 22 CIT 151, 154, 5 F. Supp. 2d 963, 966 (1998). Moreover, if "the issues presented are no longer 'live' or the parties lack a legally cognizable interest in

[13] Plaintiff states incorrectly the court's standard of review of the Commission's denial of plaintiff's request for a CCR. *See* Compl. ¶ 37. The court is required to hold unlawful the Commission's denial of plaintiff's request for a CCR when that denial is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(A). The court does not review for substantial evidence the Commission's denial of plaintiff's request for a CCR. *Id.*

the outcome," the case is moot. *PPG Industries, Inc. v. United States*, 11 CIT 303, 306, 660 F. Supp. 965, 968 (1987) (quoting *Powell v. McCormack*, 395 U.S. 486, 496 (1969)).

With respect to the Commission's 12(b)(6) motion for failure to state a claim, "any factual allegations in the complaint are assumed to be true and all inferences are drawn in favor of the plaintiff." *Env't One Corp. v. United States*, 47 CIT __, __, 627 F. Supp. 3d 1349, 1355 (2023) (quoting *Amoco Oil Co. v. United States*, 234 F.3d 1374, 1376 (Fed. Cir. 2000)); *see generally* USCIT Rule 12(b)(6).

"A court may properly dismiss a claim pursuant to [USCIT] Rule 12(b)(6) only if Plaintiff's allegations of fact are not 'enough to raise a right to relief above the speculative level.'" *VoestAlpine USA Corp. v. United States*, 46 CIT __, __, 578 F. Supp. 3d 1263, 1276 (2022) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007)). To survive a motion to dismiss, plaintiff's complaint must contain sufficient factual material to "state a claim to relief that is plausible on its face." *Twombly*, 550 U.S. at 570.

DISCUSSION

I. Whether plaintiff's request for a changed circumstances review was rendered moot by the sunset review

A. Legal framework

19 U.S.C. § 1675(b)(1)(A) requires that the Commission conduct a review of "a final affirmative determination that resulted in" an AD or CVD order whenever the Commission "receives information . . . or a request from an interested party . . . which shows changed circumstances sufficient to warrant a review."

Section 1675(b)(2)(A) provides the standard that the Commission applies when conducting a CCR:

> [I]n the case of a countervailing duty order or antidumping duty order or finding, [the Commission shall] determine *whether revocation of the order or finding is likely to lead to continuation or recurrence* of *material injury*,

(emphasis supplied).

In addition, § 1675(b)(3)(A) places on the "party seeking revocation of an order" pursuant to a CCR "the burden of persuasion with respect to whether there are changed circumstances sufficient to warrant" revocation of the order.

19 U.S.C. § 1675(c) provides the statutory requirements for a five-year review ("sunset review") of a CVD or AD order of the Commis-

sion. Under 19 U.S.C. § 1675(c)(1), "5 years after the date of publication" of an AD or CVD order the Commission is required to "conduct a review to determine . . . *whether revocation* of the *[order] would be likely to lead to continuation or recurrence of dumping or a countervailable subsidy (as the case may be) and of material injury*." (emphasis supplied).

19 U.S.C. § 1675a(a)(1) sets out the factors that the Commission is required to consider when determining the likelihood of continuation or recurrence of material injury in either a sunset review or CCR. The provision requires that the Commission consider "the likely volume, price effect, and impact of imports of the subject merchandise on the industry if the order is revoked." *Id.* § 1675a(a)(1). Section 1675a(a)(6) further provides that in conducting a sunset review or a CCR "the Commission may consider the magnitude of the margin of dumping."

Section 1677(35)(C)(ii)-(iii) describes the "magnitude of the margin of dumping" to be used by the Commission:

> (ii) in making a final determination under section 1673d(b) of this title, the dumping margin or margins most recently published by the administering authority prior to the closing of the Commission's administrative record;
>
> (iii) in a [changed circumstances] review under section 1675(b)(2) of this title, the most recent dumping margin or margins determined by the administering authority under section 1675a(c)(3) of this title, if any, or under section 1673b(b) or 1673d(a) of this title . . . .

19 U.S.C. § 1677(35)(C)(ii)-(iii).

Finally, Congress in the SAA elaborated on the addition of § 1677(35)(C):

> In final staggered investigations, the Commission is to use Commerce's final margins as to the pending investigations. For other investigations for which cumulation is appropriate, the Commission is to use the most recent dumping margin issued by Commerce at the time the Commission closes its record. This precludes challenges to a Commission determination on the basis that Commerce later modifies the original dumping margin. Changes in the original margin could occur due to further proceedings in staggered investigations, corrections of ministerial errors, reconsideration of a determination, or judicial remand. Absent this provision, Commission determinations could be subject to repeated requests for reconsideration or judicial remands. The finality of injury determinations would be seri-

> ously compromised if the Commission were required to amend or revisit its determination each time the administering authority modified its dumping margin. The Commission, however, may conduct a changed circumstances review of its determination pursuant to Section 751(b) on the basis of recalculations by Commerce of the dumping margin in the original investigation, if the party seeking such review establishes that it is warranted.

SAA at 851.

B. Analysis

The court addresses first whether plaintiff's action is moot by reason of the Commission's decision to institute a full sunset review. "A case will be dismissed as moot when the challenge presented to the Court cannot result in a meaningful remedy." *Verson*, 22 CIT at 153, 5 F. Supp. 2d at 966. Moreover, if "the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome," the case is moot. *PPG Industries, Inc.*, 11 CIT at 306, 660 F. Supp. at 968 (quoting *Powell*, 395 U.S. at 496).

The Commission relies on this Court's decision in *Eveready Battery*, in which the Court held that a challenge of a domestic producer to the Commission's denial of the request by the domestic producer for a CCR was moot by reason of the Commission's institution of a sunset review. Def. Br. at 14 (citing *Eveready Battery*, 23 CIT at 898, 77 F. Supp. 2d at 1329). According to the Commission, "[g]iven the statutory scheme, even if the Commission were to conduct a CCR of the antidumping duty order on imports from Turkey, it would simply perform the same analysis that it already undertook in the five-year review of the hot-rolled steel orders." Def. Reply Br. at 15.

Plaintiff maintains that *Eveready Battery* is inapposite and this case is not moot for multiple reasons: (1) the SAA authorizes a CCR to provide retrospective relief, which the sunset review could not provide, Pl. Br. at 25–26; (2) cumulation of plaintiff's imports with imports of other subject countries "does not make sense" in the instant case, *id.* at 28; (3) the Commission violated its regulations by delaying its response to plaintiff's request for a CCR, *id.* at 26–27; and (4) plaintiff did not receive full consideration of its arguments in the sunset review. *Id.* at 28–29. The court examines each argument in turn.

The court concludes that the institution of the sunset review rendered moot plaintiff's request for a CCR because the sunset review accorded to plaintiff the same potential remedy plaintiff could have received pursuant to a CCR.

In *Eveready Battery*, this Court held that the institution of a sunset review rendered plaintiff's request for a CCR moot because "[t]he purpose of both reviews is to determine whether revocation of an antidumping order is likely to lead to a continuation or recurrence of material injury, and in making this determination the statute provides that the Commission will consider the same criteria [in both reviews]." 23 CIT at 904, 77 F. Supp. 2d at 1334. There, the Commission denied plaintiff's request for a CCR, and plaintiff appealed to this Court. *Id.* at 897, 77 F. Supp. 2d at 1328. Over a year after plaintiff's request for a CCR, the Commission published its determination to conduct a sunset review of the subject merchandise from Greece and Japan "to determine whether revocation of the antidumping duty orders . . . from Greece and Japan would be likely to lead to continuation or recurrence of material injury." *Id.* at 897, 77 F. Supp. 2d at 1328–29. Then, the Commission filed a motion to dismiss plaintiff's appeal of the Commission's denial of plaintiff's request for a CCR. *Id.*

The Court framed the mootness inquiry as follows: "If the Commission's institution of a full sunset review accords Eveready all of the relief it sought by suing for the institution of a changed circumstances review, the current action will be rendered moot." *Id.* at 898, 77 F. Supp. 2d at 1329 (citing 13A Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure ("*Wright & Miller*") § 3533.2, at 238 (2d ed. 1984)). The Court noted that, in both a CCR and a sunset review, the Commission is required to determine "whether revocation of the order is likely to lead to continuation or recurrence of material injury." *Id.* (*comparing* 19 U.S.C. § 1675(b)(2)(A), *with* 19 U.S.C. § 1675(c)(1)). The Court concluded that "[t]he standard applied by Commerce and the Commission in conducting a sunset review is the same as the standard applied in a changed circumstances review." *Id.* at 899, 77 F. Supp. 2d at 1330. Moreover, in both reviews, "the Commission is required to consider the same factors, namely, the likely volume of imports, price effects, and impact of imports of the subject merchandise on the industry if the order is revoked."[14] *Id.* (citing 19 U.S.C. § 1675a(a)(1)). For that reason, "[n]othing would be gained by the institution of a changed circumstances review," and, as a result, plaintiff's appeal was moot. *Id.* at 904, 77 F. Supp. 2d at 1334.

Similarly, plaintiff in the instant case challenges the Commission's denial of its request for a CCR. Compl. ¶ 1. As in *Eveready Battery*, the Commission instituted a sunset review after plaintiff filed a request for a CCR. *See* Pl. Request for CCR at 1; *Notice of Full*

[14] The Court noted also that a sunset review is "more favorable to [plaintiff] than a changed circumstances review" because "[t]he only difference of significance in the two types of reviews" is that the party seeking a changed circumstances review "bear[s] the burden of persuasion." *Eveready Battery*, 23 CIT at 899, F. Supp. 2d at 1330.

Five-Year Reviews, 87 Fed. Reg. at 3,124; *Denial of Request for CCR and Reconsideration Proceeding*, 87 Fed. Reg. at 73,331. And, for the reasons articulated by the court in *Eveready Battery*, the Commission's decision to institute a sunset review accorded to plaintiff the same potential remedy that plaintiff could have received had the Commission instituted a CCR. *See also Wright & Miller* § 3533.2.1 (3 d ed. 2024) ("If full relief is accorded by another tribunal — whether judicial, administrative, arbitral, or a combination — a proceeding seeking the same relief is moot.").

1. Whether the SAA authorizes a CCR for a retrospective correction of errors in the AD negligibility determination in the original investigation

Plaintiff argues first that *Eveready Battery* is inapposite to this case because "[t]he substantive CCR request in *Eveready Battery* is significantly different from Erdemir's CCR request." Pl. Br. at 25–26. Plaintiff notes that the CCR request in *Eveready Battery* "looked at changes to the market after the order went into effect and looked forward to the effect of those changes," whereas plaintiff's CCR request "looks back at the Commission's determination in the original investigation in light of dumping margins recalculated . . . by Commerce on judicial remand." *Id.* at 27–28. According to plaintiff, its CCR request "fits in a unique category of CCR requests specifically contemplated by the SAA to revisit a prior Commission determination." *Id.* at 26.

Plaintiff's position finds no support in the text of the statute or SAA. To begin, the text of the statute is clear that a CCR applies a prospective — not retrospective — standard. 19 U.S.C. § 1675(b)(2)(A) governs a CCR of the Commission and provides:

In conducting a review under this subsection, the Commission shall—

> (A) in the case of a countervailing duty order or antidumping duty order or finding, determine whether revocation of the order or finding is likely to lead to continuation or recurrence of material injury.

In addition, § 1675a(a)(1) sets forth the factors that the Commission is required to consider when determining whether revocation of the order or finding is likely to lead to continuation or recurrence of material injury under § 1675(b):

> The Commission shall 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.

Plaintiff's position is inconsistent with the plain meaning of § 1675(b)(2)(A) and § 1675a(a)(1). The language of the statute is clear that a CCR is prospective in nature and focused on what is likely to occur if an order is revoked. The terms of § 1675(b)(2)(A) and § 1675a(a)(1) do not permit the Commission to *reconsider* the negligibility finding in the injury investigation. Moreover, Congress discussed the meaning and purpose of a CCR in different sections throughout the SAA.[15] The SAA instructs that a CCR is a forward-looking, and not backward-looking, inquiry. For example, in contrasting a CCR and a sunset review with critical circumstances determinations, the SAA provides:

> If Commerce determines that critical circumstances exist, then the Commission determines whether retroactive duties are necessary to prevent recurrence of material injury. . . . Critical circumstances determinations focus on whether an order's effectiveness is undermined by increasing shipments prior to the effective date of the order. *Changed circumstances and five-year reviews focus on likely developments if an order is revoked*.

SAA at 876–77 (emphasis supplied).

Similarly, the section of the SAA pertaining directly to CCRs states:

> In the case of an antidumping or countervailing duty order or finding or a suspended investigation, the Commission must determine whether revocation of the order or finding, or termination of the suspended investigation, is likely to lead to continuation or recurrence of material injury.

SAA at 878.

In addition, the SAA discusses in tandem the "likelihood" standard for both a CCR and sunset review:

> [S]ection 752 elaborates on the standards for determining whether revocation of an order or termination of a suspended investigation would be likely to lead to a continuation or recurrence of injury, countervailable subsidies, or dumping. The determination called for in these types of reviews is inherently predictive and speculative.

SAA at 883.

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[15] By statute, Congress has stated that the SAA "shall be regarded as an authoritative expression by the United States concerning the interpretation and application of the Uruguay Round Agreements and this Act in any judicial proceeding in which a question arises concerning such interpretation or application." 19 U.S.C. § 3512(d).

Finally, the language of the SAA on which plaintiff relies does not authorize the backward-looking CCR that plaintiff requests. Rather, that language expressly *prohibits* such a retrospective analysis in a CCR:

> In final staggered investigations, the Commission is to use Commerce's final margins as to the pending investigations. For other investigations for which cumulation is appropriate, the Commission is to use the most recent dumping margin issued by Commerce at the time the Commission closes its record. This precludes challenges to a Commission determination on the basis that Commerce later modifies the original dumping margin. Changes in the original margin could occur due to further proceedings in staggered investigations, corrections of ministerial errors, reconsideration of a determination, or judicial remand. Absent this provision, Commission determinations could be subject to repeated requests for reconsideration or judicial remands. The finality of injury determinations would be seriously compromised if the Commission were required to amend or revisit its determination each time the administering authority modified its dumping margin. The Commission, however, may conduct a changed circumstances review of its determination *pursuant to Section 751(b)* on the basis of recalculations by Commerce of the dumping margin in the original investigation, if the party seeking such review establishes that it is warranted.

SAA at 851 (emphasis supplied).

Moreover, under 19 U.S.C. § 1675a(a)(6), the Commission "may consider the magnitude of the margin of dumping" in a CCR pursuant to § 1675(b). On this point, the Commission's sunset review engaged in precisely the same analysis and afforded plaintiff precisely the same opportunity that the Commission would have provided pursuant to a CCR. In the sunset review, plaintiff received the benefit of the revised de minimis dumping margin that Colakoglu received on remand. *Sunset Review Determination*, USITC Pub. No. 5380 at 45 n.276; *see also* 19 U.S.C. § 1677(35)(C)(iii). As a result, Colakoglu's imports were excluded from the Commission's analysis of subject imports from Turkey during the sunset review.[16] *Sunset Review Determination*, USITC Pub. No. 5380 at 45 n.276.

[16] The Commission stated:

> Based on a remand from the CIT regarding Commerce's original determination, Commerce found a zero antidumping duty margin for Colakoglu and subsequently excluded Colakoglu from the antidumping duty order. Therefore, it 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.

Sunset Review Determination, USITC Pub. No. 5380 at 45 n.276.

2. Cumulation

Plaintiff maintains also that *Eveready Battery* is inapposite to this case because, according to plaintiff, in the instant case it "does not make sense" to cumulatively assess the effects of subject imports from multiple subject countries in a CCR. Pl. Br. at 28. Plaintiff argues that *Eveready Battery* is inapposite because, in *Eveready Battery*, the changed circumstances pertained to the domestic industry and therefore the Commission requested comments as to whether the Commission should review the outstanding AD order on subject imports from both Greece and Japan on a cumulative basis. *Id.* (citing *Electrolytic Manganese Dioxide from Greece and Japan*, 63 Fed. Reg. 30,254, 30,255 (Dep't of Commerce June 3, 1998); *Eveready Battery*, 23 CIT at 897–901, 77 F. Supp. 2d at 1328–32). Plaintiff asserts that cumulation would not be appropriate in a CCR of the order on Turkey because plaintiff's request "is limited solely to the effect of Commerce's recalculation of Colakoglu's dumping margin." *Id.*

Plaintiff's cumulation argument is not consistent with the statute. In both a CCR and a sunset review, "the Commission may cumulatively assess the volume and effect of imports of the subject merchandise from all countries with respect to which reviews under section 1675(b) or (c) of this title 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." 19 U.S.C. § 1675a(a)(7); *see also Eveready Battery*, 23 CIT at 901, 77 F. Supp. 2d at 1332 ("[U]nder both a changed circumstances review and a sunset review, the Commission has the authority to cumulatively assess the volume and effect of imports from all countries."). Section 1675a(a)(7) *prohibits* the Commission in a CCR or a sunset review from cumulating imports "in a case in which it determines that such imports are likely to have no discernible adverse impact on the domestic industry."[17]

[17] In the sunset review, the Commission addressed cumulation and determined that cumulation was appropriate. *See Sunset Review Determination*, USITC Pub. No. 5380 at 19–67. In those proceedings, Erdemir argued that "since imports of hot-rolled steel from Colakoglu are not subject merchandise in these reviews, subject imports from Turkey will not have a discernable adverse impact." *Id.* at 26. After excluding Colakoglu's data from the review, *id.* at 45 n.276, the Commission received questionnaire responses from two Turkish exporters of hot-rolled steel, plaintiff Erdemir and Habas Sinai Ve Tibbi Gazlar Istihsal Endustrisi A.S. ("Habas"). *Id.* at 46 n.284. The Commission noted that Habas added 2.0 million metric tons of capacity in 2023 and that the United States "remains an attractive export market for subject producers in Turkey." *Id.* at 47. Moreover, the Commission observed that Turkey "face[d] an antidumping order in the European Union, which may foreclose an important export market for the subject industry." *Id.* at 48. The Commission found for those reasons 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." *Id.* The Commission subsequently exercised its discretion "to cumulate subject imports from Australia, Japan, the Netherlands, Russia, South Korea, Turkey, and the United Kingdom." *Id.* at 67.

The statute is clear with respect to the authority it provides to the Commission in both a CCR and sunset review to cumulate imports. Accordingly, plaintiff's argument fails.

3. The effect of 19 C.F.R. § 207.45

Next, plaintiff maintains that *Eveready Battery* is inapposite to the instant case because, in this case, the Commission "violated its own regulations" by delaying its response to plaintiff's request for a CCR, whereas in *Eveready Battery*, the Commission "promptly published notice" of Eveready's CCR request.[18] Pl. Br. at 26. Plaintiff asserts that its letter of May 18, 2020, was a properly filed CCR request requiring the Commission to promptly publish notice and request comments under 19 C.F.R. § 207.45(b). *Id.* According to plaintiff, the Commission violated its regulations by waiting until December 3, 2021, to publish notice of plaintiff's CCR request. *Id.* Plaintiff argues further that the Commission "again violated its own regulation by delaying its decision on whether to initiate the CCR." *Id.* Plaintiff notes that the Commission's notice of December 3, 2021, set a 30-day deadline for filing comments. *Id.* (citing *Request for Comments*, 86 Fed. Reg. 68,513). Plaintiff maintains that, under the Commission's regulations, the Commission had until February 18, 2022 — 45 days after the close of the comment period — to decide whether to initiate the CCR. *Id.* (citing 19 C.F.R. § 207.45(c)). However, plaintiff points out, the Commission did not decline to initiate a CCR until November 29, 2022. *Id.* (citing *Denial of Request for CCR and Reconsideration Proceeding*, 87 Fed. Reg. 73,331). Plaintiff argues that "[t]he Commission's delay in addressing a CCR request, along with the realities of the time it takes to appeal a Commerce AD margin calculations [sic], means that — under the Commission's preferred [sic] interpretation — no party could ever successfully seek a CCR."[19] *Id.* at 27.

Section 207.45(b) requires that the Commission publish notice and invite comment "[u]pon the receipt of a properly filed and sufficient request for a review." 19 C.F.R. § 207.45(b). Plaintiff's letters of May and July 2020 were neither properly filed nor sufficient requests for a CCR. Neither letter provided the standard for CCRs or attempted to

[18] 19 C.F.R. § 207.45(b) provides:

> Upon the receipt of a properly filed and sufficient request for a review investigation, *the Secretary shall publish* a notice of having received such a request in the Federal Register inviting public comment on the question of whether the Commission should institute a review investigation.

(emphasis supplied).

[19] On this point, plaintiff notes also that, "[i]n the absence of good cause shown," the Commission "may not review" an order "less than 24 months after the date of publication of the notice of" determination. Pl. Br. at 27 (citing 19 U.S.C. § 1675(b)(4)).

explain how the recalculated dumping margin constituted "changed circumstances sufficient to warrant a review" of the injury determination. 19 U.S.C. § 1675(b)(1); *see also* 19 C.F.R. § 207.45(a) ("All requests shall set forth a description of changed circumstances sufficient to warrant the institution of a review investigation . . . ."); Def. Br. at 12. Therefore, the Commission was under no obligation to publish notice and invite public comment under 19 C.F.R. § 207.45(b).[20] [21]

By contrast, plaintiff's September 10, 2021 CCR request included an explanation of the changed circumstances as well as the legal standard that the Commission applies when determining whether to institute a CCR. *See* Pl. Request for CCR at 6–9. Accordingly, it was "properly filed and sufficient" under 19 C.F.R. § 207.45(b). As to this request, the Commission failed to post notice of its denial within 45 days of the close of the period for public comment, as required by the Commission's regulations. 19 C.F.R. § 207.45(c). In fact, the Commission did not respond to plaintiff's CCR request until the November 29, 2022 notice in which the Commission denied both plaintiff's CCR request and plaintiff's requests for reconsideration — nearly a year after the CCR request. *See Denial of Plaintiff's Request for CCR and Reconsideration*, 87 Fed. Reg. at 73,331. As to the CCR request, the Commission acknowledged the requirement of § 207.45(c) when it published the November 29, 2022 denial. *See id.* at 73,333 n.2. In a footnote in that notice, the Commission explained that "the additional analysis needed to consider [plaintiff's] alternative reconsideration request was good cause to exercise [the Commission's] authority to waive the institution period pursuant to 207.45(c)." *Id.* At oral argument, the Commission elaborated: "The Commission waived the 45-day period . . . . The Commission has the authority to do that and it exercised that authority in this instance."[22] Oral Arg. Tr. at 36:6–10.

The Commission's failure to respond in a more timely manner to plaintiff's CCR request and then to waive perfunctorily the period for

[20] The court observes that the letters of May and July 2020 were titled "Request for Reconsideration" and "Letter in Support of Request for Reconsideration," respectively. *Compare* Request for Reconsideration, *and* Letter in Support of Request for Reconsideration, *with* Pl. Request for CCR. Each letter made only a passing reference to a CCR. Request for Reconsideration at 7; Letter in Support of Request for Reconsideration at 1.

[21] The Commission argues in addition that plaintiff's letters of May and July 2020 were premature because they were sent before Colakoglu's recalculated dumping margin became final. Def. Reply Br. at 11. Specifically, in May and July 2020, the appeal of the USCIT judgment in the Commerce case was still pending before the Federal Circuit. *Id.*

[22] Also at oral argument, the Commission discussed the lack of a response by the Commission on the record to plaintiff's letters of May and July 2020. *See* Oral Arg. Tr. at 39:19–25. According to the Commission, it "did not ignore [plaintiff's] letters" because there were "oral communications" that occurred between plaintiff and the agency with respect to those letters. *Id.* at 39:19–40:7.

response specified in its regulations was suboptimal. Transparency and responsiveness are cornerstones of administrative process under U.S. law. Agencies are entrusted with these responsibilities by Congress and should treat them at all times as of utmost priority, regardless of the circumstances.

In this case, however, none of the Commission's actions impaired plaintiff's opportunity to be heard. The failure of the Commission to post within 45 days after the close of the period for public comment its denial of plaintiff's request for a CCR and the perfunctory nature of the Commission's decision to waive that timeframe is at most harmless error. *See Timken Co. v. Regan*, 4 CIT 174, 179–81, 552 F. Supp. 47, 51–53 (1982) (holding that agency action should not be disturbed in the event of a harmless procedural error, especially where there is no resulting prejudice).

4. Whether plaintiff received full consideration of the issues it raised in the properly filed CCR request

The court examines next whether plaintiff received full consideration of the issues it raised in its CCR request. Plaintiff contends that the Commission's decision to institute a full sunset review did not moot plaintiff's CCR request because "Erdemir did not receive full consideration of the issues it raised in its CCR request" in the sunset review. Pl. Br. at 29. Plaintiff argues that the Commission in the sunset review "explicitly did not address issues raised by Erdemir's CCR request."[23] Id.

Plaintiff received full consideration in the sunset review of the issues it raised in its CCR request. The sunset review took account of the recalculated dumping margin of Colakoglu by excluding Colakoglu's imports from the volume of subject imports from Turkey. *Sunset Review Determination*, USITC Pub. No. 5380 at 45 n.276. The Commission in its denial of plaintiff's request for a CCR or reconsideration proceeding explained its reasoning. *See Denial of Request for CCR and Reconsideration Proceeding*, 87 Fed. Reg. at 73,332. The Com-

[23] In responding to Erdemir's argument that the Commission is authorized to revisit its negligibility finding in the original determination, the Commission stated:

> We note that in asserting that subject imports from Turkey would likely have no discernible adverse impact in the event of revocation, Erdemir has raised several arguments concerning the Commission's negligibility determination in the original antidumping duty investigation with respect to subject imports from Turkey. It contends that the Commission should revisit that determination either in these reviews, in a changed circumstance review, or in a reconsideration proceeding. These arguments have also been raised in proceedings outside of these reviews and the Commission has addressed them there. Five-year reviews are prospective in nature and therefore do not accommodate reconsideration of an original determination. *See generally* 19 U.S.C. § 1675(c)(1)(C).

Sunset Review Determination, USITC Pub. No. 5380 at 48 n.298 (internal citations omitted).

mission noted first that "[c]onducting a changed circumstances review at the same time as a five-year review would be unwarranted because it would be duplicative of the full five-year review." *Id.* (citing *Eveready Battery*, 23 CIT at 896, 77 F. Supp. 2d at 1327). The Commission then responded to plaintiff's arguments that the Commission might revisit its original finding of negligibility pursuant to a CCR, noting that plaintiff's request was inconsistent (as discussed above) with the statute. *Id.* (*comparing* 19 U.S.C. § 1675a(a), *with* 19 U.S.C. § 1673d(b)(1), *and* § 1677(24)).

Therefore, the Commission addressed fully plaintiff's arguments that the Commission could conduct a CCR to reconsider the Commission's negligibility determination in the original injury investigation. The Commission concluded that the statute does not permit the Commission to use a CCR as a vehicle to reconsider the Commission's finding of non-negligibility in the investigation. *Id.* For that reason, the Commission concluded that the institution of the full sunset review rendered moot plaintiff's request for a CCR. *Id.*

In sum, the court concludes that the institution of the full sunset review of the AD order rendered moot plaintiff's request for a CCR.

CONCLUSION

For the reasons discussed above, the court grants the Commission's motion to dismiss for lack of subject matter jurisdiction. Judgment will enter accordingly.

Dated: July 22, 2024
New York, New York

/*s*/ *Timothy M. Reif*
TIMOTHY M. REIF, JUDGE

Slip Op. 22–84

ACQUISITION 362, LLC, d.b.a., STRATEGIC IMPORT SUPPLY, LLC, Plaintiff, v. UNITED STATES, Defendant.

Before: Mark A. Barnett, Chief Judge
Court No. 24–00011

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

Dated: July 23, 2024

Thomas G. Wallrich and *Heather L. Marx*, Cozen O'Connor, of Minneapolis, MN, for Plaintiff Acquisition 362, LLC.

Hardeep K. Josan, Trial Attorney, International Trade Field Office, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of New York, NY, for Defendant United States. Also on the brief were *Brian M. Boynton*, Principal Deputy Assistant Attorney General, *Patricia M. McCarthy*, Director, and *Justin R. Miller*,

Attorney-In-Charge. Of counsel on the brief was *Sabahat Chaudhary*, Office of the Assistant Chief Counsel, International Trade Litigation, U.S. Customs and Border Protection, of Washington, DC.

OPINION AND ORDER

Barnett, Chief Judge:

In *YC Rubber Co. (N. Am.) LLC v. United States*, Consol. Ct. No. 19–00069 ("*YC Rubber*"), this court granted several statutory injunctions enjoining liquidation of entries of certain passenger vehicle and light truck tires relevant to the parties in that consolidated action. For injunctions sought by exporters, the injunctions covered all entries during the relevant period by that exporter. For injunctions sought by importers, the injunctions covered entries by that importer from specified exporters during the relevant period. The injunctions were directed at the United States, including employees of U.S. Customs and Border Protection ("Customs") and the U.S. Department of Commerce ("Commerce"). Consistent with its practice, Commerce instructed Customs to continue to suspend liquidation of entries covered by the injunctions. Acquisition 362, LLC ("Plaintiff" or "Acquisition 362"), a company that is not a party to *YC Rubber* and not named in any of those injunctions or corresponding instructions, now challenges liquidation of its entries. For the reasons explained below, the court will dismiss the case for lack of subject-matter jurisdiction.

BACKGROUND

Acquisition 362 is a U.S. importer of certain passenger vehicle and light truck tires ("Certain Tires"). Compl. ¶ 8, ECF No. 2. In particular, between August 7, 2016, and November 22, 2016, Acquisition 362 entered Certain Tires from Shandong Hengyu Science & Technology Co., Ltd. ("Hengyu") and Shandong Wanda Boto Tyre Co., Ltd. ("Wanda Boto"), both of which are located in the People's Republic of China ("China"). *See* Compl. ¶ 8–12.

On October 16, 2017, Commerce initiated the second administrative review of the antidumping duty order on Certain Tires from China for the period of review ("POR") August 1, 2016, through July 31, 2017. *See Initiation of Antidumping and Countervailing Duty Admin. Revs.*, 82 Fed. Reg. 48,051, 48,055 (Dep't Commerce Oct. 16, 2017). On April 26, 2019, Commerce published the final results of that review and, among other determinations, assigned a so-called separate rate of 64.57 percent to entries exported from Hengyu and Wanda Boto. *See Certain Passenger Vehicle and Light Truck Tires From the People's Republic of China*, 84 Fed. Reg. 17,781, 17,782 (Dep't Commerce Apr. 26, 2019) (final results of antidumping duty admin. rev. and final determination of no shipments; 2016–2017)

("*Final Results*"). On May 14, 2019, Commerce issued instructions to Customs to assess antidumping duties in accordance with the *Final Results*, including on entries exported from Hengyu and Wanda Boto. Compl. ¶ 23; Def.'s Mot. to Dismiss, Ex. A, ECF No. 17–1.

In May 2019, various parties challenged Commerce's *Final Results* and those challenges were consolidated under *YC Rubber*. Namely, importers YC Rubber Co. (N. Am.) LLC ("YC Rubber"), Sutong Tire Resources, Inc. ("Sutong"), and ITG Voma Corporation ("ITG Voma") challenged the determination, as did exporters Mayrun Tyre (Hong Kong) Limited ("Mayrun") and Kenda Rubber (China) Co., Ltd. ("Kenda"). Each party challenged the *Final Results* as they applied to their entries during the POR. As noted above, pursuant to requests by the parties and the court's authority under 19 U.S.C. § 1516a(c)(2) (2018),[1] the court enjoined the liquidation of entries of merchandise exported or imported by the parties to the litigation. Specifically, for plaintiffs that were exporters, the injunctions covered all entries of Certain Tires during the POR by that exporter. For plaintiffs that were importers, the injunctions covered entries of Certain Tires by that importer during the POR from specified exporters. Of greatest relevance here, Sutong obtained an injunction against liquidation for its entries exported from Hengyu, Wanda Boto, and Shandong Linglong Tyre Co., Ltd. Order for Statutory Inj. Upon Consent, *YC Rubber* (CIT May 24, 2019), ECF No. 12. Separately, ITG Voma obtained an injunction against liquidation for its entries exported from Wanda Boto.[2] Order for Statutory Inj. Upon Consent, *ITG Voma Corp. v. United States*, Ct. No. 19–00078 (CIT June 5, 2019), ECF No. 14. Neither Hengyu nor Wanda Boto are parties to *YC Rubber*, and no injunction issued with respect to all entries from either company. Similarly, no injunction named Acquisition 362 as an importer.[3]

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

[2] The injunction enjoining liquidation of entries of subject merchandise by Sutong from Hengyu and Wanda Boto is the purported basis for this present suit. *See* Compl. ¶¶ 24–25. Although Acquisition 362 focuses on entries exported from Wanda Boto, Plaintiff did not address the statutory injunction regarding entries by ITG Voma exported from Wanda Boto in its complaint, *see id.* ¶ 24, and neither party addresses this injunction in their respective briefs on the motion to dismiss. The ITG Voma injunction does not, however, alter the court's analysis below.

[3] The three additional injunctions are not relevant to this suit because they do not name the importer (Acquisition 362) or the relevant exporters (Wanda Boto and Hengyu). *See* Order for Statutory Inj. Upon Consent, *YC Rubber* (CIT May 24, 2019), ECF No. 11 (enjoining liquidation of entries of subject merchandise by YC Rubber exported from Winrun Tyre Co., Ltd.); Order for Statutory Inj. Upon Consent, *Mayrun Tyre (H.K.) Ltd. v. United States*, Ct. No. 19–00077 (CIT June 4, 2019), ECF No. 13 (enjoining liquidation of entries of subject merchandise exported by Mayrun); Order for Statutory Inj. Upon Consent, *YC Rubber* (CIT July 2, 2019), ECF No. 26 (enjoining liquidation of entries of subject merchandise exported by Kenda).

On May 28, 2019, Commerce issued instructions to Customs in connection with the court's injunctions. Consistent with the terms of the injunctions, those instructions indicated that the liquidation of entries by Sutong from Hengyu and Wanda Boto must remain suspended. Compl. ¶ 25; Def.'s Mot. to Dismiss, Ex. B at ECF pp. 4, 8, ECF No. 17–2. Commerce sent additional instructions based on other injunctions in the litigation (including the injunction covering entries by ITG Voma from Wanda Boto); however, none identified Acquisition 362's entries from Hengyu and Wanda Boto.

Customs subsequently liquidated Acquisition 362's entries of Certain Tires that were exported from Hengyu and Wanda Boto during the POR. Compl. ¶ 29. Acquisition 362 protested those liquidations, and Customs denied the protests, explaining that the entries were "correctly liquidated per" Commerce's instructions. *See, e.g.*, Protest Denial at ECF p. 2, ECF No. 16–1.

After Customs denied Plaintiff's protests, Acquisition 362 commenced this action seeking to invoke the court's jurisdiction pursuant to 28 U.S.C. § 1581(a). Compl. ¶¶ 1–2. Defendant United States ("the Government") moved to dismiss. Def.'s Mot. to Dismiss and accompanying Mem. in Supp. of Def.'s Mot. to Dismiss ("Def.'s Mem."), ECF No. 17. The Government first argues that the court lacks subject-matter jurisdiction as to six protests: two because Acquisition 362 commenced this action after the 180-day statute of limitations, *see* 28 U.S.C. § 2636(a), and four because Acquisition 362 was not the protestant, *see* 28 U.S.C. § 2631(a). Def.'s Mem. at 6–9. As to the remaining protests, the Government argues that Plaintiff failed to state a claim for which relief could be granted because Customs properly liquidated the entries according to Commerce's instructions. *Id.* at 9–12. In making this second argument, the Government notes that "Customs has merely a ministerial role in liquidating antidumping duties." *Id.* at 9 (quoting *Mitsubishi Elecs. Am. v. United States*, 44 F.3d 973, 977 (Fed. Cir. 1994)).

Upon review of the motion to dismiss, the court instructed Plaintiff (in its response) and the Government (in its reply) to address whether Customs had acted ministerially in liquidating Plaintiff's entries and, if so, what effect such action might have on the court's jurisdiction. Order (May 7, 2024), ECF No. 18.

In its response, Acquisition 362 argues that the case should not be dismissed in its entirety. Pl.'s Mem. of Law in Opp'n to Def.'s Mot. to Dismiss, ECF No. 19. First, Plaintiff concedes that the court lacks jurisdiction over the six protests identified as untimely or filed by protestants other than Plaintiff and that those claims should be

dismissed. *Id*. at 2.[4] Next, as to the remaining protests, Plaintiff argues that Customs' actions were not ministerial because Customs exercised its discretionary authority when it declined to apply the statutory injunction to Acquisition 362's entries and that the exercise of that discretion is sufficient to state a claim for relief. *Id*. at 7–10.

In reply, the Government argues that the court lacks jurisdiction over the remaining protests because Customs "simply follow[ed] Commerce's instructions." Def.'s Reply Mem. in Further Supp. of its Mot. to Dismiss at 2–5, ECF No. 21.

JURISDICTION

A court must have subject-matter jurisdiction over the claims presented to adjudicate a case. *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94–95 (1998). Jurisdiction is "a threshold matter," to be decided before any merits decision. *Id.* Courts "have an independent obligation to determine whether subject-matter jurisdiction exists, even in the absence of a challenge from any party." *Arbaugh v. Y&H Corp.*, 546 U.S. 500, 514 (2006).

Pursuant to 28 U.S.C. § 1581(a), this court has exclusive jurisdiction over "any civil action commenced to contest the denial of a protest." Only certain decisions of Customs, however, are protestable. 19 U.S.C. § 1514(a)(1)–(7); *see also Rimco Inc. v. United States*, 98 F.4th 1046, 1051–52 (Fed. Cir. 2024) (describing the "seven circumstances in which a party may file a 'protest against decisions of Customs'" as "limited"). When Customs takes an action that is non-protestable, section 1581(a) jurisdiction is not available. *See Indus. Chems., Inc. v. United States*, 941 F.3d 1368, 1373 (Fed. Cir. 2019) (noting that precedent does not support jurisdiction "over any denial of a protest," but only "over the denial of a timely, valid protest"). When Customs acts ministerially in liquidating entries subject to antidumping and countervailing duty orders, those decisions are not protestable and therefore do not give rise to the court's section

[4] As for the timeliness issue, the U.S. Court of Appeals for the Federal Circuit has characterized 28 U.S.C. § 2636(a) as "a jurisdictional requirement." *DaimlerChrysler Corp. v. United States*, 442 F.3d 1313, 1317 (Fed. Cir. 2006). However, the question whether 28 U.S.C. § 2636(a) is jurisdictional was not squarely before the appellate court and may be called into question by the more recent determination that 28 U.S.C. § 2636(i) is not jurisdictional. *See Ford Motor Co. v. United States*, 811 F.3d 1371, 1377 (Fed Cir. 2016); *Wilkins v. United States*, 598 U.S. 152, 158–59 (2023) (noting that most time bars and filing deadlines are not jurisdictional). For the purpose of this case, Acquisition 362 conceded that the court lacks subject-matter jurisdiction over the untimely challenges and waived any other jurisdictional arguments. Regarding the protests not filed by Acquisition 362, a party who did not file the protest lacks standing to challenge the denial of the protest. *See Ovan Int'l, Ltd. v. United States*, 39 CIT __, __, 49 F. Supp. 1327, 1330–31 (2015); *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560–61 (1992) (standing requirements); *Florsheim Shoe Co., Div. of Interco v. United States*, 744 F.2d 787, 789 (Fed. Cir. 1984) ("[Section 2631(a)] confers standing on a person who files a protest.").

1581(a) jurisdiction. *Rimco*, 98 F.4th at 1052–53. A ministerial decision is one that does not require Customs to engage in any decision-making. *Id.* at 1052.

DISCUSSION

Here, Customs did not make a protestable decision when it followed Commerce's May 14, 2019, liquidation instructions. As described above, those liquidation instructions were superseded, in part, by Commerce's May 28, 2019, instructions that communicated this court's injunction against liquidation. Both the injunction and Commerce's superseding instructions, to the extent that they applied to entries exported from Hengyu and Wanda Boto, were limited to entries imported by Sutong (and, pursuant to another injunction and instructions, to entries imported by ITG Voma only as to Wanda Boto merchandise).

Acquisition 362 asserts that Customs took non-ministerial and, thus, protestable action when it declined to extend the statutory injunction and Commerce's May 28, 2019, instructions to Acquisition 362's entries. However, Acquisition 362 offers no legal support for the proposition that Customs was empowered to expand the court-issued statutory injunction or Commerce's instructions beyond their respective terms. The statute provides that it is the court, not Customs, that may enjoin liquidation "upon request by an interested party." 19 U.S.C. § 1516a(c)(2). Acquisition 362 never requested such relief from this court: it did not join the *YC Rubber* litigation, it did not seek an injunction from this court, and it was not included in or covered by any other party's injunction.

In fact, once Commerce issued the *Final Results*, the publication thereof constituted notice to Customs that the suspension of liquidation in effect during the administrative review had been lifted. *See Am. Power Pull Corp. v. United States*, 39 CIT __, __,121 F. Supp. 3d 1296, 1301 (2015) (citing *Int'l Trading Co. v. United States,* 281 F.3d 1268, 1275 (Fed. Cir. 2002)). Absent some further legal action to suspend, again, the liquidation of those entries, Customs' failure to liquidate the entries within six months after receiving notice of the lifting of suspension would result in the entries being deemed liquidated by operation of law at the cash-deposit rate in effect at the time of entry. *See* 19 U.S.C. § 1504(d). Thus, contrary to Acquisition 362's assertion, it was not within Customs' discretion to extend the court's injunction to Acquisition 362's entries, and any gratuitous withholding of liquidation of those entries by Customs could have caused Customs to lose the ability to liquidate those entries at the correct assessment rate.

CONCLUSION AND ORDER

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

Dated: July 23, 2024
New York, New York

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

Index

Customs Bulletin and Decisions
Vol. 58, No. 31, August 7, 2024

U.S. Customs and Border Protection
CBP Decisions

General Notices

U.S. Court of International Trade
Slip Opinions

U.S. G.P.O.: 2024—427-373/30087