U.S. Customs and Border Protection

PROPOSED REVOCATION OF FIVE RULING LETTERS AND PROPOSED REVOCATION OF TREATMENT RELATING TO THE TARIFF CLASSIFICATION OF LITHIUM-ION BATTERY CELLS

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

ACTION: Notice of proposed revocation of five ruling letters, and proposed revocation of treatment relating to the tariff classification of Lithium-Ion Battery Cells.

SUMMARY: Pursuant to section 625(c), Tariff Act of 1930 (19 U.S.C. § 1625(c)), as amended by section 623 of title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that U.S. Customs and Border Protection (CBP) intends to revoke five ruling letters concerning tariff classification of Lithium-Ion Battery Cells 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 December 6, 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: Julio Ruiz-Gomez, Electronics, Machinery, Automotive and International Nomenclature Branch, Regulations and Rulings, Office of Trade, at (202) 325–0736.

SUPPLEMENTARY INFORMATION:

BACKGROUND

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

Pursuant to 19 U.S.C. § 1625(c)(1), this notice advises interested parties that CBP is proposing to revoke five ruling letters pertaining to the tariff classification of Lithium-Ion Battery Cells. Although in this notice, CBP is specifically referring to New York Ruling Letters (NY) N335569, dated October 12, 2023 (Attachment A), NY N335325, dated September 28, 2023 (Attachment B), NY N335323, dated September 28, 2023 (Attachment C), NY N319771, dated June 22, 2021 (Attachment D), and Headquarters Ruling Letter (HQ) H155376, dated June 22, 2021 (Attachment E), this notice also covers any rulings on this merchandise which may exist, but have not been specifically identified. CBP has undertaken reasonable efforts to search existing databases for rulings in addition to the five identified. No further rulings have been found. Any party who has received an interpretive ruling or decision (i.e., a ruling letter, internal advice memorandum or decision, or protest review decision) on the merchandise subject to this notice should advise CBP during the comment period.

Similarly, pursuant to 19 U.S.C. § 1625(c)(2), CBP is proposing to revoke any treatment previously accorded by CBP to substantially identical transactions. Any person involved in substantially identical transactions should advise CBP during this comment period. An importer's failure to advise CBP of substantially identical transactions or of a specific ruling not identified in this notice may raise

issues of reasonable care on the part of the importer or its agents for importations of merchandise subsequent to the effective date of the final decision on this notice.

In NY N335569, NY N335325, NY N335323, NY N319771, and HQ H155376, CBP classified Lithium-Ion Battery Cells in heading 8507, HTSUS, specifically in subheading 8507.90.80, HTSUS, which provides for "Electric storage batteries, including separators therefor, whether or not rectangular (including square); parts thereof: Parts: Other." CBP has reviewed NY N335569, NY N335325, NY N335323, NY N319771, and HQ H155376 and has determined the ruling letters to be in error. It is now CBP's position that Lithium-Ion Battery Cells are properly classified, in heading 8507, HTSUS, specifically in subheading 8507.60.00, HTSUS, which provides for "Electric storage batteries, including separators therefor, whether or not rectangular (including square); parts thereof: Lithium-ion batteries."

Pursuant to 19 U.S.C. § 1625(c)(1), CBP is proposing to revoke NY N335569, NY N335325, NY N335323, NY N319771, and HQ H155376, and to revoke or modify any other ruling not specifically identified to reflect the analysis contained in the proposed HQ H341085, set forth as Attachment F to this notice. Additionally, pursuant to 19 U.S.C. § 1625(c)(2), CBP is proposing to revoke any treatment previously accorded by CBP to substantially identical transactions.

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

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

Attachments

N335569
October 12, 2023
CLA-2–85:OT:RR:NC:N1:103
CATEGORY: Classification
TARIFF NO.: 8507.90.8000

JEONGWON SEO
SK ON CO. LTD.
51, JONG-RO, JONGNO-GU
SEOUL 03161
SOUTH KOREA

RE: The tariff classification of a rechargeable lithium-ion secondary battery from South Korea

DEAR MR. SEO:

In your letter dated September 26, 2023, you requested a tariff classification ruling.

The item under consideration is identified as a rechargeable lithium nickel-cobalt-manganese battery, part number CS0003C001A, which is described as a pouch-type cell with opposing positive and negative tabs. Each cell measures approximately 531 millimeters in length, 102.5 millimeters in width, 14.5 millimeters in thickness, and weighs 1710 grams. The subject battery cell is used in Energy Storage applications, which you describe as systems that store surplus energy generated from wind and solar power sources, and then release that stored energy during periods of high-power demand. Each cell has a nominal voltage of 3.67 V and a nominal capacity of 120.2 Ah.

You suggest the subject lithium nickel-cobalt-manganese battery is classified under subheading 8507.60.0020, Harmonized Tariff Schedule of the United States ("HTSUS"). We agree. You state the cells are primarily designed to be assembled into modules, which will subsequently be utilized in an Energy Storage Station. In HQ ruling H155376, dated June 22, 2011, Customs and Border Protection reviewed the classification of rechargeable lithium-ion cells used in a power source. We find the function of the subject cells to be similar to that of the cells discussed in HQ ruling H155376. In both instances, the cells need to be combined with additional cells to fulfill their intended function. The physical characteristics of the subject cells indicate they are designed to be incorporated into an Energy Storage Station, and they must be connected to other cells to form a battery module or pack of a greater electric capacity.

As such, the applicable subheading for the rechargeable lithium nickel-cobalt-manganese battery, part number CS0003C001A, will be 8507.90.8000, HTSUS, which provides for "Electric storage batteries, including separators therefor, whether or not rectangular (including square); parts thereof: Parts: Other." The rate of duty will be 3.4 percent ad valorem.

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

The holding set forth above applies only to the specific factual situation and merchandise description as identified in the ruling request. This position is clearly set forth in Title 19, Code of Federal Regulations (CFR), Section 177.9(b)(1). This section states that a ruling letter is issued on the assumption that all of the information furnished in the ruling letter, whether di-

rectly, by reference, or by implication, is accurate and complete in every material respect. In the event that the facts are modified in any way, or if the goods do not conform to these facts at time of importation, you should bring this to the attention of U.S. Customs and Border Protection (CBP) and submit a request for a new ruling in accordance with 19 CFR 177.2. Additionally, we note that the material facts described in the foregoing ruling may be subject to periodic verification by CBP.

This ruling is being issued under the provisions of Part 177 of the Customs and Border Protection 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, please contact National Import Specialist Paul Huang at paul.huang@cbp.dhs.gov.

Sincerely,

STEVEN A. MACK
Director
National Commodity Specialist Division

N335325
September 28, 2023
CLA-2–85:OT:RR:NC:N1:103
CATEGORY: Classification
TARIFF NO.: 8507.90.8000; 9903.88.01

BRYAN POELLOT
WILSON SONSINI GOODRICH & ROSATI, PC
1700 K ST. NW
WASHINGTON, DC 20006

RE: The tariff classification of a rechargeable lithium-ion battery from China

DEAR MR. POELLOT:

In your letter dated September 14, 2023, you requested a tariff classification ruling on behalf of your client, Lunar Energy, Inc.

The item under consideration is referred to as a rechargeable lithium-ion battery, part number E41, which is constructed as a rectangular pouch cell with opposing tabs. Each unit has a nominal voltage of 3.65 V, a nominal capacity of 65 Ah, and measures approximately 301.5 mm in length, 99.7 mm in width, and 14.3 mm in thickness. After the subject lithium-ion battery is imported into the United States, it will be incorporated into a residential energy storage solution, which requires a battery management system, additional battery units, enclosures, and other components.

In your letter, you suggest the subject rechargeable lithium-ion battery is classified under subheading 8507.60.0020, Harmonized Tariff Schedule of the United States ("HTSUS"). Although we agree the lithium-ion battery is classified in heading 8507, HTSUS, we disagree on the subheading. In HQ ruling H155376, dated June 22, 2011, Customs and Border Protection reviewed the classification of rechargeable lithium-ion cells used in a power source. We find the function of the subject battery to be similar to that of the cells discussed in HQ ruling H155376. In both instances, the cells need to be combined with additional cells to fulfill their intended function. Although you provided several examples of potential applications for the battery outside of a residential energy storage solution, you also state that you do not have access to information regarding actual applications. Based on the described physical characteristics, we find the subject battery must be connected to other cells to form a battery module or pack of a greater electric capacity to function in an energy storage solution.

As such, the applicable subheading for the lithium-ion battery cell, part number E41, will be 8507.90.8000, HTSUS, which provides for "Electric storage batteries, including separators therefor, whether or not rectangular (including square); parts thereof: Parts: Other." The rate of duty will be 3.4 percent ad valorem.

Pursuant to U.S. Note 20 to Subchapter III, Chapter 99, HTSUS, products of China classified under subheading 8507.90.8000, 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., 9903.88.01, in addition to subheading 8507.90.8000, HTSUS, listed above.

The HTSUS is subject to periodic amendment so you should exercise reasonable care in monitoring the status of goods covered by the Note cited above and the applicable Chapter 99 subheading. For background information regarding the trade remedy initiated pursuant to Section 301 of the Trade Act of 1974, you may refer to the relevant parts of the USTR and CBP

websites, which are available at *https://ustr.gov/issue-areas/enforcement/section-301-investigations/tariff-actions* and *https://www.cbp.gov/trade/remedies/301-certain-products-china* respectively.

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

The holding set forth above applies only to the specific factual situation and merchandise description as identified in the ruling request. This position is clearly set forth in Title 19, Code of Federal Regulations (CFR), Section 177.9(b)(1). This section states that a ruling letter is issued on the assumption that all of the information furnished in the ruling letter, whether directly, by reference, or by implication, is accurate and complete in every material respect. In the event that the facts are modified in any way, or if the goods do not conform to these facts at time of importation, you should bring this to the attention of U.S. Customs and Border Protection (CBP) and submit a request for a new ruling in accordance with 19 CFR 177.2. Additionally, we note that the material facts described in the foregoing ruling may be subject to periodic verification by CBP.

This ruling is being issued under the provisions of Part 177 of the Customs and Border Protection 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, please contact National Import Specialist Paul Huang at paul.huang@cbp.dhs.gov.

Sincerely,

STEVEN A. MACK
Director
National Commodity Specialist Division

N335323
September 28, 2023
CLA-2–85:OT:RR:NC:N1:103
CATEGORY: Classification
TARIFF NO.: 8507.90.8000; 9903.88.01

JEREMY PAGE
PAGE FURA, P.C.
939 W. NORTH AVENUE, SUITE 750
CHICAGO, IL 60642

RE: The tariff classification of lithium-ion battery pouch cells from China

DEAR MR. PAGE:

In your letter dated September 14, 2023, you requested a tariff classification ruling on behalf of your client, Kia Georgia, Inc.

The item under consideration is identified as a rechargeable lithium-ion battery pouch cell, part number SK E603. Each cell has a nominal voltage of 3.66 V, a capacity of 60.3 Ah, and measures approximately 354 mm in length, 101 mm in width, and 9.5 mm in thickness. Each cell is encased in an aluminum pouch fitted with battery tabs and weighs between 738 grams and 758 grams. In the United States, each cell is incorporated into a battery module that will be used in an electric vehicle. It is explained that each cell is specially designed to be used in an automotive application and is not interchangeable with pouches designed and developed for other commercial applications.

You suggest the subject lithium-ion battery pouch cell is classified under subheading 8507.60.0010, Harmonized Tariff Schedule of the United States ("HTSUS"). Although we agree the subject battery pouch cell is classified in heading 8507, HTSUS, we disagree on the subheading. In HQ ruling H155376, dated June 22, 2011, Customs and Border Protection reviewed the classification of rechargeable lithium-ion cells used in a power source. We find the function of the subject cells to be similar to that of the cells discussed in HQ ruling H155376. In both instances, the cells need to be combined with additional cells to fulfill their intended function. At this time, you explain there is no identifiable application where the subject cells can be used on their own. Rather, they must be connected to other cells to form a battery module or pack of a greater electric capacity.

As such, the applicable subheading for the lithium-ion battery pouch cell, part number SK E603, will be 8507.90.8000, HTSUS, which provides for "Electric storage batteries, including separators therefor, whether or not rectangular (including square); parts thereof: Parts: Other." The rate of duty will be 3.4 percent ad valorem.

Pursuant to U.S. Note 20 to Subchapter III, Chapter 99, HTSUS, products of China classified under subheading 8507.90.8000, 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., 9903.88.01, in addition to subheading 8507.90.8000, HTSUS, listed above.

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

section-301-investigations/tariff-actions and *https://www.cbp.gov/trade/remedies/301-certain-products-china* respectively.

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

The holding set forth above applies only to the specific factual situation and merchandise description as identified in the ruling request. This position is clearly set forth in Title 19, Code of Federal Regulations (CFR), Section 177.9(b)(1). This section states that a ruling letter is issued on the assumption that all of the information furnished in the ruling letter, whether directly, by reference, or by implication, is accurate and complete in every material respect. In the event that the facts are modified in any way, or if the goods do not conform to these facts at time of importation, you should bring this to the attention of U.S. Customs and Border Protection (CBP) and submit a request for a new ruling in accordance with 19 CFR 177.2. Additionally, we note that the material facts described in the foregoing ruling may be subject to periodic verification by CBP.

This ruling is being issued under the provisions of Part 177 of the Customs and Border Protection 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, please contact National Import Specialist Paul Huang at paul.huang@cbp.dhs.gov.

Sincerely,

STEVEN A. MACK
Director
National Commodity Specialist Division

N319771
June 22, 2021
CLA-2–85:OT:RR:NC:N1:103
CATEGORY: Classification
TARIFF NO.: 8507.90.8000; 9903.88.01

JEREMY PAGE
PAGE FURA, P.C.
939 W. NORTH AVENUE, SUITE 750
CHICAGO, IL 60642

RE: The tariff classification of lithium-ion pouch cells and battery modules from Germany and China

DEAR MR. PAGE:

In your letter dated June 1, 2021 you requested a tariff classification ruling on behalf of your client, Farasis Energy USA, Inc.

The first item under consideration, part number 1004038, is a rechargeable lithium-ion battery pouch cell with a nominal voltage of 3.7 V and a nominal capacity of 74 Ah. The pouch cell is rectangular, fully sealed, and has conductive positive and negative foil-tabs welded to battery electrodes. You state the pouch cell has a proprietary design for installation solely in a Farasis battery module that has specific interfaces and a specialized battery management system. Specifically, the cells must be arranged in a group to achieve the required operating voltage and capacity of the battery module and has no alternative application. Without the pouch cells, the battery module would not be able to function as a power source for an electrical vehicle.

The applicable subheading for the lithium-ion pouch cells will be 8507.90.8000, Harmonized Tariff Schedule of the United States (HTSUS), which provides for "Electric storage batteries, including separators therefor, whether or not rectangular (including square); parts thereof: Parts: Other." The rate of duty will be 3.4 percent ad valorem.

The second item under consideration is a battery module, part number 1008006, with a nominal voltage of 66.6 V and consists of 36 individual lithium-ion pouch cells connected in series and in parallel to achieve the operating voltage. The lithium-ion pouch cells are enclosed in a housing together with a temperature sensor, voltage sensor, terminals, connectors, insulators, and other electrical components. No additional post-importation processing is required before the battery modules are integrated into a vehicle's battery pack and battery management system.

In your submission, you suggested the battery module is classified under subheading 8507.60.0010, HTSUS, which provides for "Electric storage batteries, including separators therefor, whether or not rectangular (including square); parts thereof: Lithium-ion batteries: Of a kind used as the primary source of electrical power for electrically powered vehicles of subheadings 8703.40, 8703.50, 8703.60, 8703.70 or 8703.80." However, you state the vehicle in which the battery module is designed to be used is still under development and specifications are not available. In this case, we will require additional information in order to issue a ruling. Please provide the complete vehicle specifications once available.

If you decide to resubmit your request regarding the classification of the battery module, please include all of the material that we have returned to you and mail your request to Director, National Commodity Specialist Division, Customs and Border Protection, 201 Varick Street, Suite 501, New York

NY 10014, Attn: Binding Ruling Request. If your request was submitted electronically and the information required does not involve sending a sample, you can re-submit your request and the additional information electronically.

Pursuant to U.S. Note 20 to Subchapter III, Chapter 99, HTSUS, products of China classified under subheading 8507.90.8000, 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., 9903.88.01, in addition to subheading 8507.90.8000, 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 Paul Huang at paul.huang@cbp.dhs.gov.

Sincerely,

STEVEN A. MACK
Director
National Commodity Specialist Division

HQ H155376
June 22, 2011
CLA-2 OT:RR:CTF:TCM H155376 EG
CATEGORY: Classification
TARIFF NO.: 8507.80.80; 8507.90.80

APRIL J. COLLIER
PACIFIC CUSTOMS BROKERS, INC.
P.O. BOX 4505
BLAINE, WA 98231–4505

RE: Classification of the Battery Management System and Its Lithium-Ion Cells; Eligibility for the North American Free Trade Agreement Duty Preference for the Battery Management System; General Note 12, HTSUS

DEAR MS. COLLIER:

This responds to your letter dated September 17, 2010 which you submitted to U.S. Customs and Border Protection (CBP) on behalf of Exide Technologies (Exide). In your letter, you request a ruling on the classification of Exide's Battery Management System (BMS) and its lithium-ion cells under the Harmonized Tariff Schedule of the United States (HTSUS). You also request a ruling on the applicability of the North American Free Trade Agreement (NAFTA) on the BMS. You forwarded a sample BMS and lithium-ion cell to our office. All confidential financial information included in this ruling letter will be bracketed and redacted from the public version of this decision.

FACTS:

The programmable BMS is a system of individual rechargeable lithium-ion cells of Chinese and Korean origin. The BMS is also comprised of two printed circuit board assemblies (PCBAs) and a plastic housing, all of Canadian origin. The Chinese or Korean manufacturer ships the lithium-ion cells to Canada for assembly into the finished BMS.

During the assembly process in Canada, the individual rechargeable lithium-ion cells are string-welded to the two Canadian PCBAs. The two PCBAs that make up the BMS are the Protection Board and the Power Board. The Protection Board sits on the bottom and has the circuitry to measure and balance the voltages of the individual cell strings. It establishes charge and discharge limits, and collects data for communication.

The Power Board is the top PCBA. Its electrical connections enable the BMS to communicate with other batteries when it is set up in a bank configuration. The PCBA transfers information to the outside world through a serial data interface and reports the individual BMS' condition through an LED display. This PCBA also contains the power connection port.

After the lithium-ion cells are string-welded together and connected to the two PCBAs, the unit is placed in the plastic housing of Canadian origin. This process allows the lithium-ion cells to be joined together, thus creating a rechargeable battery. The finished BMS provides robust power that will be used for emergency lighting, closed circuit television systems, mobile communications and other commercial applications. The BMS is available in a variety of configurations. *See www.restoreenergysystems.com*.

You provided us with a bill of materials for the 48 Volt 10Ah BMS (10Ah BMS), which is the smallest of the BMS units. The prices are provided in

Canadian dollars (C$). The name and cost of the originating and non-originating parts utilized to assemble the 10Ah BMS are as follows:

Originating Parts (Canadian Origin)

Part	Cost
Spacer, Cell Rev. 0	[XXXX]
Fishpaper Cell Insulator	[XXXX]
Nickel Tab Main	[XXXX]
Nickel Tab Intercell	[XXXX]
Fishpaper End Cap	[XXXX]
Tape Polyamide Ft.	[XXXX]
PCB -48V Power Populated	[XXXX]
PCB -48V Protection Populated	[XXXX]
Spacer Board 13 Cell	[XXXX]
Fishpaper PCB Insulator 13 Cell	[XXXX]
Wire, Jumper, 1", 0.2", stripped	[XXXX]
Case 13 x 5	[XXXX]
Foam 8.50" x 1.25" x 0.375"	[XXXX]
Screw, Hex Security Button Head	[XXXX]
Screw, Philips Pan Head	[XXXX]
Label, Battery Caution	[XXXX]
Label, Battery	[XXXX]
Total:	**[XXXX]**

Non-Originating Parts (Chinese or South Korean Origin)

Part	Cost
Lithium Ion Cell, Cobalt 18650	[XXXX]
Lithium Ion Cell Lid – 48V	[XXXX]
Total:	**[XXXX]**

You also stated that the cost of labor to assemble the 10Ah BMS in Canada is [XXXX]. You stated that the aforementioned prices do not include sales costs, promotion costs, marketing, shipping, packing or after-sales service costs.

ISSUE:

1. What is the tariff classification of the BMS under the HTSUS?
2. What is the tariff classification of the lithium-ion cells under the HTSUS?
3. Is the BMS eligible for preferential treatment under NAFTA?

LAW AND ANALYSIS:

CLASSIFICATION

Classification under the HTSUS is made in accordance with the General Rules of Interpretation (GRIs). GRI 1 provides that the classification of goods shall be determined according to the terms of the headings of the tariff schedule and any relative section or chapter notes. In the event that the

goods cannot be classified solely on the basis of GRI 1, and if the headings and legal notes do not otherwise require, the remaining GRIs 2 through 6 may then be applied in order.

The HTSUS provisions under consideration in this case are as follows:

8506	Primary cells and primary batteries; parts thereof ...
	* * *
8507	Electric storage batteries, including separators therefor, whether or not rectangular (including square); parts thereof:
8507.80	Other storage batteries ...
	* * *
8507.90	Parts ...
	* * *

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

EN 85.06 provides, in pertinent part, as follows:

> This heading does not cover rechargeable cells and batteries, whose upper terminal is usually a perforated brass cap; these are classified in heading 85.07 as electric accumulators.

EN 85.07 states, in pertinent part, that:

> Electric accumulators (storage batteries or secondary batteries) are characterized by the fact that the electrochemical action is reversible so that the accumulator may be recharged. They are used to store electricity and supply it when required ...
>
> * * *
>
> Accumulators consist essentially of a container holding the electrolyte in which are immersed two electrodes fitted with terminals for connection to an external circuit. In many cases the container may be subdivided, each subdivision (cell) being an accumulator in itself; these cells are usually connected together in series to produce a higher voltage. A number of cells so connected is called a battery. A number of accumulators may also be assembled in a larger container...
>
> * * *
>
> Accumulators containing one or more cells and the circuitry to interconnect the cells amongst themselves, often referred to as "battery packs", are covered by this heading, whether or not they include any ancillary components which contribute to the accumulators' function of storing and supplying energy, or protect it from damage, such as electrical connectors, temperature control devices (e.g., thermistors), circuit protection devices, and protective housings. They are classified in this heading even if they are designed for use with a specific device.

The lithium-ion cells are manufactured in China or South Korea. The remaining components in the BMS are manufactured in Canada. The BMS undergoes its final assembly process in Canada before it is imported into the U.S. In order to determine if the finished BMS is a product of Canada, we

must determine the tariff classification of the lithium-ion cells under the HTSUS. Then, we will use this tariff classification to determine if the assembled BMS satisfies the tariff shift rules required to be a product of Canada and thus be eligible for NAFTA preferential treatment.

The BMS contains several rechargeable lithium-ion cells string-welded together. These cells are attached to two PCBAs, and then the entire unit is placed inside plastic housing. In your ruling request, you assert that the BMS should be classified under heading 8507, HTSUS, as an electric storage battery.

The term "battery" is not defined in the HTSUS. When, as in this case, the tariff terms are not defined in the HTSUS or its legislative history, "the term's correct meaning is its common meaning." *Mita Copystar Am. v. United States*, 21 F.3d 1079, 1082 (Fed. Cir. 1994). The common meaning of a term used in commerce is presumed to be the same as its commercial meaning. *Simod Am. Corp. v. United States*, 872 F. 2d 1572, 1576 (Fed. Cir. 1989). To ascertain the common meaning of a term, a court may consult "dictionaries, scientific authorities, and other reliable information sources" and "lexicographic and other materials." *C.J. Tower & Sons v. United States*, 673 F.2d 1268, 1271 (CCPA 1982); *Simod*, 872 F.2d at 1576.

In Headquarters Ruling Letter (HQ) 963870, dated July 14, 2000, CBP set forth several definitions of the term "battery." In HQ 963870, CBP cites *Van Nostrand's Scientific Encyclopedia* (D. Van Nostrand Company, Inc., 1968), which defines a battery as "a collection of chemical cells, normally connected in a series, for the production or storage of electrical energy." CBP also cites the *McGraw-Hill Multimedia Encyclopedia of Science and Technology*, (McGraw Hill, Inc. 1994), which describes a storage battery as "[a]n assembly of identical voltaic cells in which the electrochemical action is reversible so that the battery may be recharged by passing a current through the cells in the opposite direction to that of the discharge. While many nonstorage batteries have a reversible process, only those that are economically rechargeable are classified as storage batteries." Finally, EN 85.07 states that "[a] number of cells [connected together in series to produce a higher voltage] is called a battery."

The BMS contains rechargeable lithium-ion cells which are connected together to produce a higher voltage. However, the BMS also includes two PCBAs and plastic housing. EN 85.07 states that certain batteries include ancillary components "which contribute to the accumulators' function of storing and supplying energy, or protect it from damage, such as electrical connectors, temperature control devices (e.g., thermistors), circuit protection devices, and protective housings." The two PCBAs assist the BMS with storing and supplying energy by monitoring voltage and determining when the BMS requires additional charging. Accordingly, the BMS is classified under heading 8507, HTSUS, as an electric storage battery because these components support the BMS' battery functions. It is specifically provided for as an "other" storage battery under subheading 8507.80, HTSUS.

Regarding the independent classification of the rechargeable lithium-ion cells, we note that heading 8506, HTSUS, which provides for primary cells and primary batteries, and heading 8507, HTSUS, which provides for electric batteries and parts thereof, are both under consideration. The terms "primary cell" and "primary battery" are not defined in the HTSUS. In *Webster's New World Dictionary* 1069 (3d. College Ed. 1988), the term primary cell is defined as "a battery cell whose energy is derived from an essentially irre-

versible electrochemical reaction and which is hence incapable of being efficiently recharged." A primary battery, therefore, is a collection of primary cells. According to the dictionary definition, primary cells and primary batteries cannot be recharged. In addition, EN 85.06 states that the heading does not include rechargeable cells or batteries. Because the lithium-ion cells are rechargeable, they cannot be classified under heading 8506, HTSUS, and must be classified under heading 8507, HTSUS.

Classification of the lithium-ion cells within heading 8507, HTSUS, is governed by GRI 6. GRI 6 states that the classification of goods in the subheadings of headings shall be determined according to the terms of those subheadings, any related subheading notes and *mutatis mutandis*, to the GRIs 1 through 5. The HTSUS subheadings under consideration are subheading 8507.80, HTSUS, which provides for other electric storage batteries, and subheading 8507.90, HTSUS, which provides for parts of electric storage batteries.

The courts have construed the nature of "parts" under the HTSUS and two distinct though not inconsistent tests have resulted. *See Bauerhin Techs. Ltd. P'ship. v. United States* ("*Bauerhin*"), 110 F. 3d 774 (Fed. Cir. 1997). The first, articulated in *United States v. Willoughby Camera Stores, Inc*. ("*Willoughby Camera*"), 21 C.C.P.A. 322, 324 (1933), requires a determination of whether the imported item is an "integral, constituent, or component part, without which the article to which it is to be joined, could not function as such article." *Bauerhin*, 110 F.3d at 778 (quoting *Willoughby Camera*, 21 C.C.P.A. 322 at 324). The second, set forth in *United States v. Pompeo* ("*Pompeo*"), 43 C.C.P.A. 9, 14 (1955), states that an "imported item dedicated solely for use with another article is a 'part' of that article within the meaning of the HTSUS." *Id.* at 779 (citing *Pompeo*, 43 C.C.P.A. 9 at 13.) Under either line of cases, an imported item is not a part if it is "a separate and distinct commercial entity." *Id.*

The rechargeable lithium-ion cells satisfy the *Willoughby Camera* test because they are integral to the BMS. The purpose of the BMS is to act as a power source for certain electrical equipment. The BMS stores and provides high voltage power through its lithium-ion cells. Without the lithium-ion cells, the BMS could not function as a power source. As such, the lithium-ion cells are parts of electric storage batteries.

Under Note 2(b) to Section XVI, parts which are suitable for use solely or principally with a particular kind of machine are to be classified with the machines of that kind.[1] Since the lithium-ion cells are suitable for use solely or principally with the BMS, they are classified as parts of machines of the same kind as the BMS. Therefore, the lithium-ion cells are classified as parts of electric storage batteries under subheading 8507.90, HTSUS. *See also* HQ 963870 (rechargeable lead-acid cells were classified as parts of lead acid batteries under subheading 8507.90, HTSUS).

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[1] Note 2(b) to Section XVI states that:

> Other parts, if suitable for use solely or principally with a particular kind of machine, or with a number of machines of the same heading (including a machine of heading 8479 or 8543) are to be classified with the machines of that kind or in heading 8409, 8431, 8448, 8466, 8473, 8503, 8522, 8529 or 8538 as appropriate. However, parts which are equally suitable for use principally with the goods of headings 8517 and 8525 to 8528 are to be classified in heading 8517[.]

NAFTA ELIGIBILITY

General Note 12, HTSUS, incorporates Article 401 of the NAFTA into the HTSUS. General Note 12 (a)(i), HTSUS, provides, in pertinent part, that:

> Goods that originate in the territory of a NAFTA party under the terms of subdivision (b) of this note and that qualify to be marked as goods of Canada under the terms of the marking rules set forth in regulations issued by the Secretary of the Treasury (without regard to whether the goods are marked), and goods enumerated in subdivision (u) of this note, when such goods are imported into the customs territory of the United States and are entered under a subheading for which a rate of duty appears in the "Special" subcolumn followed by the symbol "CA" in parentheses, are eligible for such duty rate, in accordance with section 201 of the North American Free Trade Agreement Implementation Act.

Accordingly, the BMS will be eligible for the "Special" "CA" rate of duty provided: it is deemed to be NAFTA originating under the provisions of General Note 12(b), HTSUS, and it qualifies to be marked as a product of Canada under the NAFTA Marking Rules that are set forth in Part 102 of the Code of Federal Regulations (19 C.F.R. § 102).

A. NAFTA ELIGIBILITY: GENERAL NOTE 12, HTSUS

General Note 12(b), HTSUS, provides, in pertinent part, as follows:

> For the purposes of this note, goods imported into the Customs territory of the United States are eligible for the tariff treatment and quantitative limitations set forth in the tariff schedule as "*goods originating in the territory of a NAFTA party*" only if—
>
> (i) they are goods wholly obtained or produced entirely in the territory of Canada, Mexico and/or the United States; or
>
> (ii) they have been transformed in the territory of Canada, Mexico and/or the United States so that—
>
> (A) except as provided in subdivision (f) of this note, each of the non-originating materials used in the production of such goods undergoes a change in tariff classification described in subdivisions (r), (s) and (t) of this note or the rules set forth therein, or
>
> (B) the goods otherwise satisfy the applicable requirements of subdivisions (r), (s) and (t) where no change in tariff classification is required, and the goods satisfy all other requirements of this note; or
>
> (iii) they are goods produced entirely in the territory of Canada, Mexico and/or the United States exclusively from originating materials.

Because the BMS includes non-originating lithium-ion cells from China and South Korea, General Note 12(b)(i), HTSUS, does not apply. Therefore, we must determine whether the non-originating materials undergo the requisite tariff shift (or other applicable requirement) prescribed under General Note 12(b)(ii), HTSUS. The applicable rule for subheading 8507.80, HTSUS, specifically provides:

> (A) A change to subheading 8507.10 through 8507.80 from any other heading, except from tariff items 8548.10.05 or 8548.10.15; or

(B) A change to subheading 8507.10 through 8507.80 from subheading 8507.90, whether or not there is also a change from any other heading, except from tariff items 8548.10.05 or 8548.10.15, provided there is a regional value content of not less than:

(1) 60 percent where the transaction value method is used, or

(2) 50 percent where the net cost method is used.

Since the finished BMS and the lithium-ion cells are both classified under heading 8507, HTSUS, GN 12(t)/85(13)(A), HTSUS, does not apply. Thus, we must proceed to GN 12(t)/85(13)(B), HTSUS. GN 12(t)/85(13)(B), HTSUS, requires that non-originating materials undergo a change in tariff classification and further requires that the good satisfy an applicable regional value content (RVC) requirement. The non-originating lithium-ion cells in the BMS are classified under subheading 8507.90, HTSUS. Thus, they satisfy the required tariff shift because the BMS, once completely assembled, is classified under subheading 8507.80, HTSUS.

In order to determine if the BMS will receive NAFTA preferential treatment, we must calculate the RVC. Although you have not specifically requested either calculation method, you have only provided enough information to utilize the net cost method.

General Note 12(c)(ii), HTSUS, provides the formula for calculating RVC using the net cost method. GN 12(c)(ii), HTSUS, provides as follows:

Regional value content: Except as provided in subdivision (c)(iv) of this note, the regional value content of a good shall be calculated, at the choice of the exporter or producer of such good, on the basis of either the transaction value method set out in subdivision (c)(i) or the net cost method set out in subdivision (c)(ii).

(ii) *Net cost method*. The regional value content of a good may be calculated on the basis of the following net cost method:

$$RVC = \frac{NC - VNM}{NC} \times 100$$

where RVC is the regional value content, expressed as a percentage; NC is the net cost of the good; and VNM is the value of non-originating materials used by the producer in the production of the good. *See also* 19 C.F.R. Part 181, Appendix, Part III, Sec. 6(3).

The methods of calculating the net cost of a good are set forth in 19 CFR Part 181, Appendix, Part III, Sec. 6 (11). Subsection (11) provides three methods from which the producer of a good may choose to calculate the net cost. The options are:

(a) calculating the total cost incurred with respect to all goods produced by that producer, subtracting any excluded costs that are included in the total cost, and reasonably allocating, in accordance with Schedule VII, the remainder to the good;

(b) calculating the total cost incurred with respect to all goods produced by that producer, reasonably allocating, in accordance with Schedule VII, that total cost to the good, and subtracting any excluded costs that are included in the amount allocated to that good; or

(c) reasonably allocating, in accordance with Schedule VII, each cost that forms part of the total cost incurred with respect to the good so that the aggregate of those costs does not include any excluded costs. 19 CFR Part 181, Appendix, Part III, Sec. 6 (11).

"Excluded costs" as used in section 6 (11) is defined in Part I, section 2 (1), and means "sales promotion, marketing and after-sales service costs, royalties, shipping and packing costs and non-allowable interest costs." Each of these aspects of "excluded costs" are further defined in section 2 (1).

The calculation of net cost initially requires the proper calculation of the total cost. Subsection (12) of section 6 addresses "total cost" and states that "[t]otal cost ... consists of the costs referred to in section 2 (6), and is calculated in accordance with that subsection." In this case, CBP was provided with cost information involved in the manufacturing of the 10Ah BMS. Based upon the information contained in your submission, we note that the formula under the net cost method of determining regional value content is:

$$RVC = \frac{NC\ [XXXX] - VNM\ [XXXX]}{NC\ [XXXX]} \times 100$$

Performing the required calculation renders a result of [XX]%, a RVC in excess of that required under Part B of GN 12(t)/85(13), HTSUS. Therefore, based upon the information before us, the imported BMS would satisfy the applicable NAFTA rule of origin. However, this calculation would be subject to appropriate review upon importation into the United States based upon the final appraised value of the merchandise.

B. NAFTA ELIGIBILITY: COUNTRY OF ORIGIN MARKING

General Note 12(a)(ii), HTSUS, establishes that NAFTA-originating goods must also qualify to be marked as goods of Canada under the NAFTA Marking Rules before preferential treatment is granted. In this regard, section 304 of the Tariff Act of 1930, as amended (19 U.S.C. §1304), requires that, unless excepted, every article of foreign origin (or its container) imported into the U.S. shall be marked in a conspicuous place as legibly, indelibly and permanently as the nature of the article (or its container) will permit in such manner as to indicate to the ultimate purchaser the English name of the country of origin of the article. The regulations implementing the requirements and exceptions to 19 U.S.C. §1304 are set forth in Part 134, CBP Regulations (19 C.F.R. Part 134).

Title19 C.F.R. §134.1(b) defines "country of origin" as:

> The country of manufacture, production, or growth of any article of foreign origin entering the United States. Further work or material added to an article in another country must effect a substantial transformation in order to render such other country the "country of origin" within this part; however, for a good of a NAFTA country, the NAFTA Marking Rules will determine the country of origin.

Section 134.1(j) provides that the "NAFTA Marking Rules" are the rules promulgated for purposes of determining whether a good is a good of a NAFTA country. Section 134.1(g) defines a "good of a NAFTA country" as an article for which the country of origin is Canada, Mexico or the United States as determined under the NAFTA Marking Rules.

Part 102 of the CBP Regulations sets forth the NAFTA Marking Rules. Section 102.11 sets forth the required hierarchy for determining country of origin for marking purposes:

> The following rules shall apply for purposes of determining the country of origin of imported goods other than textile and apparel products covered by § 102.21.
>
> (a) The country of origin of a good is the country in which:
>
> (1) The good is wholly obtained or produced;
>
> (2) The good is produced exclusively from domestic materials; or
>
> (3) Each foreign material incorporated in that good undergoes an applicable change in tariff classification set out in § 102.20 and satisfies any other applicable requirements of that section, and all other applicable requirements of these rules are satisfied.

Under 19 C.F.R. § 102.11(a)(3), any non-originating BMS components must satisfy the tariff change, or tariff shifting requirements of 19 C.F.R. § 102.20. The finished BMS is classified under subheading 8507.80, HTSUS. Under 19 C.F.R. § 102.20, a product of subheading 8507.80, HTSUS, can be marked as a product of Canada so long as any foreign material incorporated into it undergoes "a change to subheading 8507.10 through 8507.80 **from any other subheading**, including another subheading within that group." (emphasis added).

Therefore, in order for the BMS to be labeled as a product of Canada, the non-originating lithium-ion cells must be classified in a subheading other than 8507.80, HTSUS. Since the non-originating lithium cells are classified under heading 8507.90, HTSUS, the BMS satisfies the tariff shift rules for subheading 8507.80, HTSUS. Therefore, Canada is the BMS' country of origin for NAFTA marking purposes.

HOLDING:

By application of GRI 1, the completed BMS is classified under heading 8507, HTSUS, and specifically provided for under subheading 8507.80.80, HTSUS, which provides for "Electric storage batteries ...; other storage batteries: other ...." The column one, general rate of duty is 3.4% *ad valorem.*

By application of GRI 1, the lithium-ion cells are classified under heading 8507, HTSUS, as electric storage batteries. By application of GRI 6, GRI 1 and Note 2(b) to Section XVI, HTSUS, the lithium-ion cells specifically provided for under subheading 8507.90.80, HTSUS, which provides for "Electric storage batteries...; parts thereof; parts: other ...." The column one, general rate of duty is 3.4% *ad valorem.*

Based upon the specific facts considered in this case, the imported BMS would satisfy the NAFTA rule of origin set forth in Part B of General Note 12(t)/85(13), HTSUS. However, please be advised that the calculation set forth above would be subject to review upon importation into the United States based upon the final appraised value of the merchandise. Moreover, the country of origin of the imported BMS under the NAFTA Marking Rules will be Canada. Based upon the facts in your submission, the 10Ah BMS is eligible for preferential treatment under NAFTA as a product of Canada.

A copy of this ruling letter should be attached to the entry documents filed at the time the subject goods are entered. If the documents have been filed without a copy, this ruling letter should be brought to the attention of CBP.

Sincerely,

MONIKA R. BRENNER
Chief,
Valuation & Special Programs Branch

HQ H341085
OT:RR:CTF:EMAIN H341085 JRG
CATEGORY: Classification
TARIFF NO.: 8507.60.00; 9903.88.15

JEONGWON SEO
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SOUTH KOREA

RE : Revocation of NY N335569 (October 12, 2023), NY N335325 (September 28, 2023), NY N335323 (September 28, 2023), NY N319771 (June 22, 2021), and HQ H155376 (June 22, 2021); Tariff classification of Lithium-Ion Battery Cells

DEAR MR. SEO:

This is regarding New York Ruling Letter (NY) N335569, dated October 12, 2023, in which U.S. Customs and Border Protection (CBP) classified certain Lithium-Ion Battery Cells under subheading 8507.90.80 of the Harmonized Tariff Schedule of the United States (HTSUS). Upon reconsideration, we find the classification of the subject merchandise in previously identified rulings to be in error. CBP classified similar merchandise under subheading 8507.90.80, HTSUS, in NY N335325, dated September 28, 2023; NY N335323, dated September 28, 2023; NY N319771, dated June 22, 2021; and Headquarters Ruling Letter (HQ) H155376, dated June 22, 2021. For the foregoing reasons, we revoke these rulings.

FACTS:

The facts of NY N335569 are as follows:

> The item under consideration is identified as a rechargeable lithium nickel-cobalt-manganese battery, part number CS0003C001A, which is described as a pouch-type cell with opposing positive and negative tabs. Each cell measures approximately 531 millimeters in length, 102.5 millimeters in width, 14.5 millimeters in thickness, and weighs 1710 grams. The subject battery cell is used in Energy Storage applications, which you describe as systems that store surplus energy generated from wind and solar power sources, and then release that stored energy during periods of high-power demand. Each cell has a nominal voltage of 3.67 V and a nominal capacity of 120.2 Ah.

The facts of NY N335325 are as follows:

> The item under consideration is referred to as a rechargeable lithium-ion battery, part number E41, which is constructed as a rectangular pouch cell with opposing tabs. Each unit has a nominal voltage of 3.65 V, a nominal capacity of 65 Ah, and measures approximately 301.5 mm in length, 99.7 mm in width, and 14.3 mm in thickness. After the subject lithium-ion battery is imported into the United States, it will be incorporated into a residential energy storage solution, which requires a battery management system, additional battery units, enclosures, and other components.

The facts of NY N335323 are as follows:

> The item under consideration is identified as a rechargeable lithium-ion battery pouch cell, part number SK E603. Each cell has a nominal voltage

of 3.66 V, a capacity of 60.3 Ah, and measures approximately 354 mm in length, 101 mm in width, and 9.5 mm in thickness. Each cell is encased in an aluminum pouch fitted with battery tabs and weighs between 738 grams and 758 grams. In the United States, each cell is incorporated into a battery module that will be used in an electric vehicle. It is explained that each cell is specially designed to be used in an automotive application and is not interchangeable with pouches designed and developed for other commercial applications.

The facts of NY N319771 are as follows:

The first item under consideration, part number 1004038, is a rechargeable lithium-ion battery pouch cell with a nominal voltage of 3.7 V and a nominal capacity of 74 Ah. The pouch cell is rectangular, fully sealed, and has conductive positive and negative foil-tabs welded to battery electrodes. You state the pouch cell has a proprietary design for installation solely in a Farasis battery module that has specific interfaces and a specialized battery management system. Specifically, the cells must be arranged in a group to achieve the required operating voltage and capacity of the battery module and has no alternative application. Without the pouch cells, the battery module would not be able to function as a power source for an electrical vehicle.

The facts of HQ H155376 are as follows:

The programmable [Battery Management System] BMS is a system of individual rechargeable lithium-ion cells of Chinese and Korean origin. The BMS is also comprised of two printed circuit board assemblies (PCBAs) and a plastic housing, all of Canadian origin. The Chinese or Korean manufacturer ships the lithium-ion cells to Canada for assembly into the finished BMS.

During the assembly process in Canada, the individual rechargeable lithium-ion cells are string-welded to the two Canadian PCBAs. The two PCBAs that make up the BMS are the Protection Board and the Power Board. The Protection Board sits on the bottom and has the circuitry to measure and balance the voltages of the individual cell strings. It establishes charge and discharge limits, and collects data for communication.

The Power Board is the top PCBA. Its electrical connections enable the BMS to communicate with other batteries when it is set up in a bank configuration. The PCBA transfers information to the outside world through a serial data interface and reports the individual BMS' condition through an LED display. This PCBA also contains the power connection port.

After the lithium-ion cells are string-welded together and connected to the two PCBAs, the unit is placed in the plastic housing of Canadian origin. This process allows the lithium-ion cells to be joined together, thus creating a rechargeable battery. The finished BMS provides robust power that will be used for emergency lighting, closed circuit television systems, mobile communications and other commercial applications. The BMS is available in a variety of configurations.

ISSUE:

Whether lithium-ion battery cells are parts of "electric storage batteries" under heading 8507, HTSUS, and, if so, whether the cells are classified as "lithium-ion batteries," under subheading 8507.60.00, HTSUS, or as parts, under subheading 8507.90.80, HTSUS.

LAW AND ANALYSIS:

Classification under the HTSUS is determined in accordance with the General Rules of Interpretation (GRIs) and, in the absence of special language or context which otherwise requires, by the Additional U.S. Rules of Interpretation (ARI). GRI 1 provides that the classification of goods shall be "determined according to the terms of the headings and any relative section or chapter notes." If the goods cannot be classified solely using GRI 1, and the headings and legal notes do not otherwise require, GRIs 2 through 6 may be applied in order.

The HTSUS provisions at issue are the following:

8507	Electric storage batteries, including separators therefor, whether or not rectangular (including square); parts thereof:
8507.60.00	Lithium-ion batteries
	* * *
8507.90	Parts:
8507.90.80	Other

Note 2 to Section XVI, HTSUS, in relevant part, provides:

> 2. Subject to note 1 to this section, note 1 to chapter 84 and to note 1 to chapter 85, parts of machines (not being parts of the articles of heading 8484, 8544, 8545, 8546 or 8547) are to be classified according to the following rules:
>
> (a) Parts which are goods included in any of the headings of chapter 84 or 85 (other than headings 8409, 8431, 8448, 8466, 8473, 8487, 8503, 8522, 8529, 8538 and 8548) are in all cases to be classified in their respective headings.
>
> (b) Other parts, if suitable for use solely or principally with a particular kind of machine, or with a number of machines of the same heading (including a machine of heading 8479 or 8543) are to be classified with the machines of that kind or in heading 8409, 8431, 8448, 8466, 8473, 8503, 8522, 8529 or 8538 as appropriate. However, parts which are equally suitable for use principally with the goods of headings 8517 and 8525 to 8528 are to be classified in heading 8517, and parts which are suitable for use solely or principally with the goods of heading 8524 are to be classified in heading 8529....

There is no dispute that the instant lithium-ion cells are classified under heading 8507, HTSUS, as electric storage batteries and parts thereof. As such, this matter is governed by GRI 6, which provides:

> 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. For the purposes of this rule, the relative section, chapter and subchapter notes also apply, unless the context otherwise requires.

Taking notice that the instant lithium-ion cells are "parts" under the HTSUS, they are classified, at the subheading level, according to Note 2 to Section XVI, HTSUS, *supra*. Pursuant to Note 2(a) to Section XVI, HTSUS, if the cells fall under the scope of subheading 8507.60, which provides for "lithium-ion batteries", they must be classified under that provision and not as parts of batteries under subheading 8507.90, HTSUS, by operation of Note 2(b).

In understanding the language of the HTSUS, the Harmonized Commodity Description and Coding System Explanatory Notes (ENs) may be utilized. The ENs, though not dispositive or legally binding, provide commentary on the scope of each heading of the HTSUS, and are the official interpretation of the Harmonized System at the international level. *See* T.D. 89–80, 54 Fed. Reg. 35127, 35128 (August 23, 1989). The ENs to heading 8507, HTSUS, in relevant part, provide:

> Electric . . . storage batteries . . . are characterised by the fact that the electrochemical action is reversible so that the [storage battery] may be recharged. They are used to store electricity and supply it when required. A direct current is passed through the [storage battery] producing certain chemical changes (charging); when the terminals of the [storage battery] are subsequently connected to an external circuit these chemical changes reverse and produce a direct current in the external circuit (discharging). This cycle of operations, charging and discharging, can be repeated for the life of the [storage battery].
>
> [Storage batteries] consist essentially of a container holding the electrolyte in which are immersed two electrodes fitted with terminals for connection to an external circuit. In many cases the container may be subdivided, each subdivision (cell) being an [storage battery] in itself; these cells are usually connected together in series to produce a higher voltage. A number of cells so connected is called a battery. A number of [storage batteries] may also be assembled in a larger container. [Storage batteries] may be of the wet or dry cell type.

When a tariff term is not defined by the HTSUS or the legislative history, its correct meaning is its common, or commercial, meaning. *See Rocknel Fastener, Inc. v. United States*, 267 F.3d 1354, 1356 (Fed. Cir. 2001) ("To ascertain the common meaning of a term, a court may consult 'dictionaries, scientific authorities, and other reliable information sources' and 'lexicographic and other materials.'" (quoting *C.J. Tower & Sons of Buffalo, Inc. v. United States*, 673 F.2d 1268, 1271, 69 C.C.P.A. 128 (C.C.P.A. 1982))); *see also Simod Am. Corp. v. United States*, 872 F.2d 1572, 1576 (Fed. Cir. 1989)).

The Oxford English Dictionary defines "battery," in relevant part, as: "[a]n apparatus consisting of a series of cells, each containing the essentials for producing voltaic electricity, connected together. Also used of any such apparatus for producing voltaic electricity, whether of one cell or more." Battery, OXFORD ENG. DICTIONARY, https://www.oed.com/dictionary/battery_n?tab=meaning_and_use-paywall&tl=true (last accessed August 13, 2024). The Cambridge Dictionary provides a simpler definition: "a device that produces electricity to provide power for electronic devices, cars, etc." Battery, CAMBRIDGE DICTIONARY, https://dictionary.cambridge.org/dictionary/english/battery

(last accessed August 13, 2024). The Encyclopedia Britannica's definition explains the differences between these two definitions, by stating the term "battery" describes: "any of a class of devices that convert chemical energy directly into electrical energy. Although the term *battery*, in strict usage, designates an assembly of two or more galvanic cells capable of such energy conversion, it is commonly applied to a single cell of this kind." Battery, ENCYCLOPEDIA BRITANNICA, https://www.britannica.com/technology/battery-electronics (last accessed August 15, 2024); *see also* MCGRAW-HILL, ENCYCLOPEDIA OF SCIENCE AND TECHNOLOGY 673 (11th ed., 2012) (defining "battery" as: "an electrochemical device that stores chemical energy which can be converted into electrical energy, thereby providing a direct-current voltage source. Although the term 'battery' is properly applied to a group of two or more electrochemical cells connected together electrically, both single-cell and multicell devices are called battery"). Moreover, a "storage battery," also known as a "secondary battery" or "accumulator," is: "rechargeable because it delivers current as a result of a chemical reaction that is easily reversible." MCGRAW-HILL, ENCYCLOPEDIA OF SCIENCE AND TECHNOLOGY 673 (11th ed., 2012). Therefore, an "electric storage battery" of heading 8507, HTSUS, is a rechargeable device, comprised of one or more cells, that converts chemical energy into voltaic electrical energy for powering another device.

Notwithstanding the fact that the lithium-ion cells described in the aforementioned rulings are intended to be incorporated into other energy storage devices or systems, they are nevertheless rechargeable devices that convert chemical energy into voltaic electrical energy for distribution to another device. As such, they are in their condition as imported electric storage batteries of heading 8507, HTSUS, and "lithium-ion batteries" of subheading 8507.60. This comports with the description of the legal text found in EN 85.07, which states, in relevant part: "each subdivision (cell) . . . [is] an [electric storage battery] in itself." The EN also provides that "a number of cells so connected is called a battery," both statements are reconcilable because the term "battery" is used for both single cell and multicell batteries. As such, the subject lithium-ion battery cells are themselves electronic storage batteries under heading 8507, HTSUS, specifically a lithium-ion battery of subheading 8507.60.00, HTSUS, pursuant to Note 2(a) to Section XVI, HTSUS.

HOLDING:

By application of GRIs 1 (Note 2(a) to Section XVI) and 6, the subject lithium-ion battery cells are properly classified under heading 8507, HTSUS, and specifically under subheading 8507.60.00, HTSUS, which provides "Electric storage batteries, including separators therefor, whether or not rectangular (including square); parts thereof: Lithium-ion batteries." The general column one rate of duty, for merchandise classified under this subheading is 3.4%.

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

Pursuant to U.S. Notes 20(r) and (s) to Subchapter III, Chapter 99, HTSUS, products of China classified under subheading 8507.60.00, HTSUS, unless specifically excluded, are subject to an additional 7.5% ad valorem rate

of duty. At the time of importation, an importer must report the Chapter 99 subheading, i.e., 9903.88.15, in addition to subheading 8507.60.00, HTSUS, noted above, for products of China.

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

EFFECT ON OTHER RULINGS:

NY N335569, dated October 12, 2023, is hereby REVOKED.
NY N335325, dated September 28, 2023, is hereby REVOKED.
NY N335323, dated September 28, 2023, is hereby REVOKED.
NY N319771, dated June 22, 2021, is hereby REVOKED.
HQ H155376, dated June 22, 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

cc: Bryan Poellot
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AGENCY INFORMATION COLLECTION ACTIVITIES:

New Collection of Information; Russian Diamonds and Seafood E.O. 14114

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 December 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 1651–0NEW 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: Russian Diamonds and Seafood E.O. 14114.

OMB Number: 1651–0NEW.

Form Number: 3461, 7501, and other entry related forms.

Current Actions: New Collection of Information.

Type of Review: New Collection of Information.

Affected Public: Businesses.

Abstract: On December 22, 2023, President Biden issued Executive Order (E.O.) 14114, amending section 1 of E.O. 14068, issued April 15, 2021, to create subsections (a)(i)(A)–(D). Section 1(d) states," "The Secretary of Homeland Security, with the concurrence of the Secretary of the Treasury, shall prescribe rules and regulations to collect, including through an authorized electronic data interchange system as appropriate, any documentation or information as may be necessary to enforce subsections (a)(i)(B)–(D) and (c) of this section as expeditiously as possible."[1]

On December 22, 2023, the Department of Treasury's Office of Foreign Assets Control (OFAC) issued a determination defining the scope of E.O. 14114 as it relates to Russian Seafood. This determination authorized CBP's collection of additional data elements required to enforce the E.O.[2]

The E.O. prohibits the importation and entry into the United States, including importation for admission into a U.S. foreign trade zone, of salmon, cod, pollock, or crab that was produced wholly or in part in the Russian Federation or harvested in waters under the jurisdiction of the Russian Federation or by Russia-flagged vessels,

[1] *https://www.federalregister.gov/documents/2023/12/26/2023–28662/taking-additional-steps-with-respect-to-the-russian-federations-harmful-activities.*

[2] *https://ofac.treasury.gov/faqs/1156#:~:text=The%20Seafood%20Determination%20prohibits%20the,product%20in%20 a%20third%20country.*

even if such salmon, cod, pollock, or crab has been incorporated or substantially transformed into another product outside of the Russian Federation.

On February 8, 2024, OFAC issued two determinations "Prohibitions Related to Imports of Certain Categories of Diamonds" pursuant to E.O. 14068 and "Prohibitions Related to Imports of Diamond Jewelry and Unsorted Diamonds of Russian Federation Origin and Diamond Jewelry and Unsorted Diamonds Exported From the Russian Federation" pursuant to E.O. 14068, defining the scope of E.O. 14114 as it relates to Russian Diamonds and Diamond Jewelry. The determinations took effect on March 1, 2024, and September 1, 2024.

The E.O. prohibits importation of these products if they were mined, extracted, produced, or manufactured wholly or in part in the Russian Federation regardless of whether such products have been incorporated or substantially transformed into another product with a country of origin that is not the Russian Federation.

The E.O. authorizes CBP's collection of additional data elements to enforce the E.O.[3]

CBP determined the following data elements are:

(1) Seafood:

a. Country of Harvest—of the product, including the country of harvest of any ingredient or component that was incorporated or substantially transformed into the final product.

b. Vessel Name—that harvested the product, including the name of the vessel that harvested any ingredient or component that was incorporated or substantially transformed into the final product. [Conditional on method of harvest being vessel]

c. Vessel Flag—country flag the vessel is registered in. [Conditional on method of harvest being vessel]

d. Vessel International Maritime Organization (IMO) number—The unique seven-digit vessel number issued to each vessel. [Conditional on method of harvest being vessel]

e. Self-Certification Statement—The document the importer providers verifying the imported goods do not contain Russian inputs. The certification for seafood must contain the following language on official importer letterhead and signed by a representative of the importer:

• Certification Statement—"I certify that any fish, seafood, or preparations thereof in this shipment were not harvested in waters under the jurisdiction of the Russian Federation or by Russia-flagged

[3] *https://ofac.treasury.gov/faqs/added/2024-02-23*.

vessels, notwithstanding whether such product has been incorporated or substantially transformed into another product outside of the Russian Federation."

f. Method of Harvest—Manner in which the product was gathered. This can include vessel, harvest capture fisheries, hatchery-based aquaculture, and small vessel harvest.

(2) Diamonds and Diamond Jewelry

A. Country of Mining—Where the diamonds were mined, extracted, produced, or manufactured wholly or in part.

B. Self-Certification Statement—The document the importer providers verifying the imported goods do not contain Russian inputs. The certification for diamonds must contain the following language on official importer letterhead and signed by a representative of the importer:

• (1) *Certification Statement: For non-industrial diamonds:* I certify that the non-industrial diamonds in this shipment were not mined, extracted, produced, or manufactured wholly or in part in the Russian Federation, or exported from the Russian Federation, notwithstanding whether such products have been substantially transformed into other products outside of the Russian Federation.

• (2) *Certification Statement: For diamond jewelry and unsorted diamonds:* I certify that the diamond jewelry and unsorted diamonds in this shipment were not mined, extracted, produced, or manufactured wholly or in part in the Russian Federation, or exported from the Russian Federation, notwithstanding whether such products have been substantially transformed into other products outside of the Russian Federation.

For the purposes of E.O. 14068, as amended by E.O. 14114, the Office of Foreign Assets Control published regulations defining the HTS numbers that require the self-certification statement in FAQ 1027 on February 23, 2024.

These new data elements will be added to the CBP Form 7501 Entry Summary and CBP Form, 3461 Entry/ Immediate Delivery and CBP Form 3461 ALT for submission to ACE Cargo Release, and other relevant entry forms. The declaration of origin components, including the ability to report the breakdown of Russian or non-Russian jewelry, is done on a line level in the entry forms.

All items imported into the United States are subject to examination before entering the commerce of the United States. There are two procedures available to enable the release of imported merchandise, including "entry" pursuant to 19 U.S.C. 1484, and "immediate delivery" pursuant to 19 U.S.C. 1448(b). Under both procedures, CBP Forms 3461, Entry/Immediate Delivery, and 3461 ALT are the source

documents in the packages presented to Customs and Border Protection (CBP). The information collected on CBP Forms 3461 and 3461 ALT allow CBP officers to verify that the information regarding the consignee and shipment is correct and that a bond is on file with CBP.

CBP Form 7501, *Entry Summary,* is used to identify merchandise entering the commerce of the United States, and to document the amount of duty and/or tax paid. CBP Form 7501 is submitted by the importer, or the importer's agent, for each import transaction. The data on this form is used by CBP as a record of the import transaction; to collect the proper duty, taxes, certifications, and enforcement information; and to provide data to the U.S. Census Bureau for statistical purposes. CBP Form 7501 must be filed within 10 working days from the time of entry of merchandise into the United States. Collection of the data on this form is authorized by 19 U.S.C. 1484 and provided for by 19 CFR 141.61 and 19 CFR 142.11.

Type of Information Collection: CBP Form 3461 (Seafood filers).

Estimated Number of Respondents: 27.

Estimated Number of Annual Responses per Respondent: 260.

Estimated Number of Total Annual Responses: 7,012.

Estimated Time per Response: 4.5 minutes.

Estimated Total Annual Burden Hours: 526.

Type of Information Collection: CBP Form 3461 (Diamond filers).

Estimated Number of Respondents: 46.

Estimated Number of Annual Responses per Respondent: 326.

Estimated Number of Total Annual Responses: 14,975.

Estimated Time per Response: 5 minutes.

Estimated Total Annual Burden Hours: 1,247.

Type of Information Collection: CBP Form 7501 Entry Summary (Seafood filers).

Estimated Number of Respondents: 520.

Estimated Number of Annual Responses per Respondent: 256.

Estimated Number of Total Annual Responses: 133,220.

Estimated Time per Response: 4.5 minutes.

Estimated Total Annual Burden Hours: 9,992.

Type of Information Collection: CBP Form 7501 Entry Summary (Diamond filers).

Estimated Number of Respondents: 45.

Estimated Number of Annual Responses per Respondent: 319.

Estimated Number of Total Annual Responses: 14,377.

Estimated Time per Response: 5 minutes.

Estimated Total Annual Burden Hours: 1,198.

Dated: October 16, 2024

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

U.S. Court of Appeals for the Federal Circuit

SHAMROCK BUILDING MATERIALS, INC., Plaintiff-Appellant v. UNITED STATES, Defendant-Appellee

Appeal No. 2023–1648

Appeal from the United States Court of International Trade in No. 1:20-cv-00074-TCS, Senior Judge Timothy C. Stanceu.

Decided: October 23, 2024

PATRICK D. GILL, Sandler, Travis & Rosenberg, P.A., New York, NY, argued for plaintiff-appellant. Also represented by DONALD CAMERON, JR., NICHOLAS DUFFEY, MARY HODGINS, JULIE MENDOZA, BRADY MILLS, R. WILL PLANERT, Morris Manning & Martin LLP, Washington, DC.

NICO GURIAN, Commercial Litigation Branch, Civil Division, Department of Justice, New York, NY, argued for defendant-appellee. Also represented by AIMEE LEE, JUSTIN REINHART MILLER, MARCELLA POWELL, MATHIAS RABINOVITCH; VALERIE SORENSEN-CLARK, International Trade Litigation, United States Customs and Border Protection, New York, NY.

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

TARANTO, *Circuit Judge*.

Shamrock Building Materials, Inc. imported into the United States from Mexico steel tubing having a thin interior coating mainly composed of epoxy, melamine, and silicone additives. The United States Customs and Border Protection (Customs) classified the conduit under heading 7306 of the Harmonized Tariff Schedule of the United States (HTSUS), which covers "[o]ther tubes, pipes . . . of iron or nonalloy steel." Shamrock protested, urging classification under heading 8547 of the HTSUS, which covers "[e]lectrical conduit tubing . . . of base metal *lined with insulating material*." (Emphasis added.) Customs rejected the protests. Shamrock filed an action in the Court of International Trade (Trade Court), which granted summary judgment to the United States, upholding the classification under heading 7306. *Shamrock Building Materials, Inc. v. United States*, 619 F. Supp. 3d 1337 (Ct. Int'l Trade 2023) (*Shamrock*). On Shamrock's appeal, we now affirm.

I

A

Shamrock imports electrical metallic tubing and intermediate metal conduit produced by Conduit S.A. de C.V. (doing business as RYMCO) in Mexico. *Id.* at 1341; J.A. 143. Both types of conduit are at issue here, and both are hollow concentric tubes of steel, sold in ten-foot lengths, though they have different wall thicknesses. *Shamrock*, 619 F. Supp. 3d at 1341. Pieces of the conduit can be connected by threaded steel couplings "to form a 'raceway' for the routing of electrical wiring" in commercial and residential buildings "while protecting the wires within from external forces." *Id.*

The conduit is coated on the outside with zinc (which helps prevent rust) and, what is central here, on the inside with a compound that is composed principally of epoxy resin, melamine resin, and silicone additives (other ingredients not having been disclosed by the coating's manufacturer, Pinturas Diamex, S.A., which sold it to RYMCO). *See id.*; J.A. 144 ¶¶ 2–3, 910:6–11, 941:3–42:9, 954:12–55:6, 1412 ¶¶ 2–3, 1591–92, 1803 ¶ 8, 1804 ¶ 11. The interior coating, which was measured to be between 10 and 60 microns in thickness, functions at least in part to facilitate the installation of electrical wires within the conduit by protecting them from abrasion and tears resulting from friction created when pulling wires through the conduit. *See Shamrock*, 619 F. Supp. 3d at 1341; J.A. 1455 ¶ 7, 1803 ¶ 9. Shamrock has emphasized that installation function in marketing. A brochure used to advertise one of the conduits at issue states: "Smooth interior coating insulates wall to provide easy installation of wire." J.A. 1589. It is undisputed, based on testing for this case, that the coating also provides a nonzero amount of resistance to electrical current flow. *See Shamrock*, 619 F. Supp. 3d at 1345.[1] But the parties dispute the relevance of that resistance amount to the HTSUS classification question in this case. They also dispute the relevance of the facts, found by the Trade Court, that "[t]he parties are unaware of any customers who purchased the conduit from Shamrock specifically 'because the interior coating provides electrical insulation'" and that the above-noted marketing brochure, while noting the benefit to

[1] *See id.* at 1345 ("Plaintiff's witness measured the resistivity of the coating inside the conduit to be between 120 milliohms and 1.2 ohms, depending on the testing method, and defendant's witness measured the resistivity as much less than that."); *id.* at 1345 n.5 ("Using a two-point test, plaintiff's witness measured 0.2 ohms of resistivity on uncoated pipe and between 0.7 and 1.2 ohms of resistivity on the coated pipe. Using a four-point test, plaintiff's witness measured the resistivity of the uncoated pipe to be 2.5 milliohms and the coated pipe to be 120 milliohms. Defendant's witness measured the resistivity of the lining to be between 3.419 and 14.043 milliohms.") (citations omitted). The Trade Court noted the absence of any substantial evidence that the coating impedes heat flow, at least in the intended use. *Id*. at 1345–46.

installation, "does not advertise the interior coating as providing insulation from electrical current." *Id.* at 1341, 1344.

B

Shamrock made 201 entries of conduit into the United States between June and October 2018. *Id.* at 1339. Between April and July 2019, Customs classified the conduit under heading 7306 of the HTSUS, which is within chapter 73 ("[a]rticles of iron or steel") of the HTSUS, itself within Section XV (including "ARTICLES OF BASE METAL"). *Id.* at 1339, 1342–43. (There is no dispute here about what HTSUS language is at issue, which is from the 2018 editions. *Id.* at 1340 n.2.) Specifically, Customs classified the conduit, according to its wall thickness, either under subheading 7306.30.1000, HTSUS, which covers

> [o]ther tubes, pipes, and hollow profiles . . . welded, of circular cross section, of iron or nonalloy steel . . . [h]aving a wall thickness of less than 1.65 mm

or under subheading 7306.30.5028, HTSUS, which covers

> [o]ther tubes, pipes and hollow profiles . . . welded, of circular cross section, of iron or nonalloy steel . . . [h]aving a wall thickness of 1.65 mm or more . . . [w]ith an outside diameter not exceeding 114.3 mm . . . [g]alvanized . . . *[i]nternally coated or lined with a non-electrically insulating material* suitable for use as electrical conduit (emphasis added).[2]

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[2] More fully, subheading 7306.30.1000 reads:

> 7306. Other tubes, pipes and hollow profiles (for example, open seamed or welded, riveted, or similarly closed), of iron or steel:
> ***
> 7306.30. Other, welded, of circular cross section, of iron or nonalloy steel:
> 7306.30.1000. Having a wall thickness of less than 1.65mm.

Subheading 7306.30.5028 reads more fully:

> 7306. Other tubes, pipes and hollow profiles (for example, open seamed or welded, riveted, or similarly closed), of iron or steel:
> ***
> 7306.30. Other, welded, of circular cross section, of iron or nonalloy steel:
> ***
> 7306.30.5028. Having a wall thickness of 1.65 mm or more:
> ***
> Other
> ***
> Other:
> With an outside diameter not exceeding 114.3 mm:
> Galvanized:
> ***
> Internally coated or lined with a non-electrically insulating material, suitable for use as electrical conduit.

Those classifications produced a 25 percent import duty because of the tariffs imposed on steel starting in 2018 under Section 232 of the Trade Expansion Act of 1962, *as amended*, 19 U.S.C. § 1862—without which no duty would have been assessed. *See Shamrock*, 619 F. Supp. 3d at 1343.

Shamrock timely filed protests before Customs under 19 U.S.C. § 1514, arguing that the conduit should have been classified under heading 8547 of HTSUS, which is within Chapter 85 ("[e]lectrical machinery and equipment and parts thereof"), itself within Section XVI (including "ELETRICAL EQUIPMENT; PARTS THEREOF"). *Shamrock*, 619 F. Supp. 3d at 1339, 1343. Specifically, Shamrock argued that the conduit should be classified under subheading 8547.90.0020, which covers

> [e]lectrical conduit tubing and joints therefor, of base metal lined with insulating material . . . [c]onduit tubing.[3]

That classification would have resulted in a duty of 4.6 percent or zero. *See Shamrock*, 619 F. Supp. 3d at 1343.[4]

Customs denied Shamrock's protests, under 19 U.S.C. § 1515, on November 7 and December 9, 2019, affirming its classification under heading 7306. *Id.* at 1339. Within the time allowed by 28 U.S.C. § 2636(a), and invoking 28 U.S.C. § 1581(a), Shamrock sued the United States in the Trade Court to challenge the protest denials (and hence the classifications) by filing its summons on April 6, 2020 (then following up with a complaint on May 20, 2020). *See id.* at 1340; J.A. 28–29; 28 U.S.C. § 2632(b) (suit to challenge protest denial under 19 U.S.C. § 1515 initiated by filing summons). Shamrock and the United States filed cross-motions for summary judgment. *See Shamrock*, 619 F. Supp. 3d at 1339–40. The parties disagreed about the interpreta-

[3] More fully, subheading 8547.90.0020 reads:

> 8547. Insulating fittings for electrical machines, appliances or equipment, being fittings wholly of insulating material apart from any minor components of metal (for example, threaded sockets) incorporated during molding solely for the purposes of assembly, other than insulators of heading 8546; electrical conduit tubing and joints therefor, of base metal lined with insulating material:
> ***
> 8547.90. Other
> ***
> 8547.90.0020. Electrical conduit tubing and joints therefor, of base metal lined with insulating material: Conduit tubing

[4] At the relevant time, goods within subheading 8547.90.0020 were subject to a general (Column 1) duty of 4.6 percent but would enter free of duty if they qualified for preferential treatment under the North American Free Trade Agreement Implementation Act (NAFTA). *Id.* at 1343 (citing General Note 12, HTSUS). According to Shamrock, Customs informed it on November 15, 2018, that the conduit qualified for the preferential treatment. *See* Complaint at 6–7 ¶¶ 36, 38, *Shamrock*, No. 1:20-cv-00074 (ECF # 10, May 20, 2020).

tion and applicability of heading 8547, specifically subheading 8547.90.0020—which defined the issue for decision, because there was and is no dispute that, if heading 8547 is inapplicable, then Customs' classification within heading 7306 must be approved.

The Trade Court held that heading 8547 does not apply. *Shamrock*, 619 F. Supp. 3d at 1339–48. The court adopted an interpretation of the phrase of heading 8547 that is in dispute—"electrical conduit tubing . . . of base metal lined with insulating material." *Id.* at 1344–46. That phrase, the court held, requires a level of impeding current flow (or heat) to the metal tube that is viewed as significant in the commercial context defined by the intended use to surround electricity-conducting wiring. *Id.* at 1346 ("The court interprets heading 8547, HTSUS in a common and commercial context to describe electrical conduit that performs an insulating function necessary or desirable for electrical wiring in applications for which the conduit is designed and for which it is marketed in commerce."); *id.* ("the insulating layer must function in a way that relates to the 'electrical conduit' function, i.e., it must impede electrical current or isolate the heat from the wire from the inside surface of the steel conduit").

Under that interpretation, the Trade Court ruled, Shamrock's conduit did not come within heading 8547. On the factual matters relevant under the adopted interpretation, Shamrock did not overcome the presumption of correctness of Customs' classification by carrying its burden of proving the classification to be incorrect. *Id.* at 1342, 1348. The court found that "the uncontested facts are inconsistent with a finding that the coating 'insulates' the interior wire so as to impede the transfer of electrical current or heat when the conduit is used for its intended purpose"; although "the coating inside the subject conduit provides some measurable resistance (or 'resistivity') to the flow of electric current when compared to the same pipe when uncoated," "the uncontested facts also demonstrate that the degree of resistivity is not significant in relation to the intended use of the conduit." *Id.* at 1345. "Notably," the court explained, Shamrock "does not contend that the coating provides significant protection from current flow or heat, and the brochure" promoting conduit at issue "does not make any such claims." *Id.* at 1345–46.

Based on the interpretation of heading 8547 and the facts found, the Trade Court held that Shamrock's electrical conduit "is not 'electrical conduit . . . of base metal lined with an insulating material' within the meaning of that term as used in the article description for heading 8547, HTSUS." *Id.* at 1346 (quoting heading 8547, HTSUS). The conduit at issue "is instead described by the terms of heading

7306." *Id.* (quoting heading 7306, HTSUS). The court granted summary judgment in favor of the United States on March 13, 2023, and entered judgment on that date. *Id.* at 1337, 1339, 1348; J.A. 1–2.

Shamrock timely appealed. This court has jurisdiction under 28 U.S.C. § 1295(a)(5).

II

A

We review the Trade Court's grant of summary judgment without deference. *CamelBak Products, LLC v. United States*, 649 F.3d 1361, 1364 (Fed. Cir. 2011). Proper classification of goods under the HTSUS requires two steps: "first ascertaining the meaning of specific terms in the tariff provisions and then determining whether the subject merchandise comes within the description of those terms." *Victoria's Secret Direct, LLC v. United States*, 769 F.3d 1102, 1106 (Fed. Cir. 2014) (quoting *Millenium Lumber Distribution Ltd. v. United States*, 558 F.3d 1326, 1328 (Fed. Cir. 2009)); *see R.T. Foods, Inc. v. United States*, 757 F.3d 1349, 1352 (Fed. Cir. 2014). The first step involves an issue of law we decide de novo, the second an issue of fact whose resolution by the Trade Court we review only for clear error. *Victoria's Secret*, 769 F.3d at 1106; *see R.T. Foods*, 757 F.3d at 1352; *Orlando Food Corp. v. United States*, 140 F.3d 1437, 1439 (Fed. Cir. 1998).

Under 28 U.S.C. § 2639(a)(1), the Customs classification decision at issue here "is presumed to be correct" and "[t]he burden of proving otherwise shall rest upon the party challenging such decision." *See, e.g., Universal Electronics Inc. v. United States*, 112 F.3d 488, 491 (Fed. Cir. 1997); *Millenium Lumber*, 558 F.3d at 1328. The statutory presumption of correctness applies only to factual issues. *See Goodman Manufacturing, L.P. v. United States*, 69 F.3d 505, 508 (Fed. Cir. 1995) (presumption "not relevant" where there is no factual dispute). It is a "procedural device that is designed to allocate, between the two litigants to a lawsuit, the burden of producing *evidence* in sufficient quantity. Specifically, the importer must produce evidence (the burden of production portion of the burden of proof) that demonstrates by a preponderance (the burden of persuasion portion of the burden of proof) that Customs' classification decision is incorrect." *Universal Electronics*, 112 F.3d at 492; *see also, e.g., Timber Products Co. v. United States*, 515 F.3d 1213, 1219 (Fed. Cir. 2008); *Libas, Ltd. v. United States*, 193 F.3d 1361, 1365 (Fed. Cir. 1999).

B

The HTSUS is composed of headings, each of which "set[s] forth general categories of merchandise," and "has one or more subheadings" that "provide a more particularized segregation of the goods *within* each category." *E.g., Orlando Food Corp.*, 140 F.3d at 1439 (emphasis added); *Schlumberger Technology Corp. v. United States*, 845 F.3d 1158, 1163 (Fed. Cir. 2017); *Otter Products, LLC v. United States*, 834 F.3d 1369, 1375 (Fed. Cir. 2016); *Wilton Industries, Inc. v. United States*, 741 F.3d 1263, 1266 (Fed. Cir. 2013); *see also* U.S. Int'l Trade Comm., Preface to the 30th Edition: Guide to the HTS and Statistical Reporting, at 2 n.5 (Jan. 1, 2018) (explaining that a subheading "cover[s] a subset of the heading's product scope"); *Sigma-Tau HealthScience, Inc. v. United States*, 838 F.3d 1272, 1280–81 (Fed. Cir. 2016) (relying on this structural relationship).

The headings and subheadings are enumerated in chapters, each of which has its own section and chapter notes. *R.T. Foods*, 757 F.3d at 1353. Congress also prescribed, among other things, "General Rules of Interpretation" (GRI) for HTSUS. *Id.* Classification analysis begins with GRI 1, which states that "for legal purposes, classification shall be determined according to the terms of the headings and any relative section or chapter notes." *See Orlando Food*, 140 F.3d at 1440. "Absent contrary legislative intent, HTSUS terms are to be construed according to their common and commercial meanings, which are presumed to be the same. A court may rely upon its own understanding of the terms used and may consult lexicographic and scientific authorities, dictionaries, and other reliable information sources." *Carl Zeiss, Inc. v. United States*, 195 F.3d 1375, 1379 (Fed. Cir. 1999) (internal citation omitted). After consulting the headings and relevant section or chapter notes, we may also consult the relevant Explanatory Notes. *Kahrs International, Inc. v. United States*, 713 F.3d 640, 644–45 (Fed. Cir. 2013) (citation omitted). In contrast to "section or chapter notes," which are binding, Explanatory Notes "are not legally binding or dispositive," but they often help resolve an interpretive dispute because they "are generally indicative of the proper interpretation of the various HTSUS provisions." *Id.*; *see Sigma-Tau*, 838 F.3d at 1280–81. Other GRIs lay down other classification rules (such as GRI 3's preference for the specific over the general, *see Orlando Food*, 140 F.3d at 1440–41), but the principles just described control the decision in the present case.

III

The only question here is whether heading 8547 applies to the conduit at issue. The note to section XV, where heading 7306 resides, excludes articles classified under section XVI, where heading 8547 resides. HTSUS, Section XV, Note 1(f) at XV-1 ("This section does not cover: . . . [a]rticles of section XVI (machinery, mechanical appliances and electrical goods) . . . ."). It is not disputed here that if heading 8547 applies to the conduit, heading 7306 does not apply and that, if heading 8547 does not apply, heading 7306 does. *See Shamrock*, 619 F. Supp. 3d at 1343–44.

In this case, the dispute before us reduces to a dispute about the interpretation of heading 8547. We interpret the key language of the heading as requiring commercially significant insulation of the conduit against current flow (and perhaps heat flow) from an electricity-conducting wire inside the conduit, and we see no material difference between that interpretation and the interpretation set forth and applied in the Trade Court's opinion. *See, e.g., Shamrock*, 619 F. Supp. 3d at 1346. Shamrock disputes that interpretation, but if we adopt it, as we do, no further issue needs to be decided for us to affirm the judgment before us.

That is because, on appeal, Shamrock does not make a procedural argument that, even under that interpretation, the Trade Court erred in deciding the case on summary judgment rather than proceeding to a trial. And it has not shown any basis for setting aside the Trade Court's determination that Shamrock did not present evidence that would allow a finding that the coating provided *commercially significant* dampening of current or heat flow between a conducting wire and the metal conduit. Indeed, Shamrock admitted that it is "unaware of 'any customers that have stated' that they purchase the electrical conduit exclusively because of it[s] electrical insulating properties rather than its protective insulating properties." J.A. 1805 ¶ 14. The only marketing brochure in the record mentions an installation benefit and "[p]hysical and mechanical protection," but not in-use protection against current or heat flow. J.A. 1589; *see also id.* (brochure noting that conduit affirmatively provides "system grounding," which the government expert testified means that "the conduit and interior coating must be a good conductor of electricity," J.A. 1499 ¶ 28). Finally, even if litigation-prompted testing could substitute for marketplace evidence, the Trade Court determined that the testing here could not be found to do so if the standard was one of commercial significance, and Shamrock has not shown error in that determination. *See Shamrock*, 619 F. Supp. 3d at 1345.

We therefore turn to the dispute about the correct interpretation of heading 8547—specifically, about the phrase, "electrical conduit tubing . . . of base metal lined with insulating material." We explain our conclusion about the proper interpretation in steps.

First: We reject Shamrock's suggestion that heading 8547 covers any lining that contains, among its ingredients, materials (such as epoxy resins or silicone) that standing alone are recognized as insulating materials. The natural reading of "lined with insulating material" is that the "lin[ing]" (considered as a unit) must be a "material" that is "insulating." Otherwise, in Shamrock's apparent view, the heading would cover a material that, while containing insulating compounds, also contains highly conducting material, for example, so that the lining as a whole is anything but insulating. *See* J.A. 308 (testimony of Dr. Jeffrey T. Gotro, expert witness for Shamrock, confirming that even materials that are composed mostly of constituents with insulating properties, like epoxy, can nonetheless be "conductive" and "fail to insulate against electricity" when combined with other materials, such as "metallic filler[s]").

Second: The term "insulate" (in its several word forms) can be used to cover protection of various kinds—*e.g.*, against rust-causing oxygen, current or heat flow, sound, and perhaps abrasion. But heading 8547, understood in context, does not cover all kinds of "insulating." The "insulating" that counts for heading 8547 is best understood to mean protection against the passage of current (and/or heat) from an electricity-conducting wire through the lining to the metal tubing.

That understanding is immediately suggested by the opening words of the heading 8547 phrase in dispute. What is being lined is "electrical conduit tubing." That language, indicating an intended use, suggests that the identified property of the lining be tied to the use—here, of insulating electricity-conducting wires inside the conduit. *See Shamrock*, 619 F. Supp. 3d at 1346. Moreover, the parties agree that headings 8547 and 7306 create a structural dichotomy: For the steel conduit at issue, if it comes within heading 8547, it is outside heading 7306, and vice versa. Appellant's Br. at 7, 44; Appellee's Br. at 17. The fairest inference is that the "insulating" property of heading 8547 is the property of being "electrically" insulating.

That conclusion is confirmed by relevant explanatory notes—which can be, and here are, persuasive, though they are not binding. Explanatory Note 85.47 and Explanatory Note 73.06 "draw a distinction between electrical conduit tubing that is 'insulated' and electrical conduit tubing that is 'uninsulated,'" with the former covered by heading 8547 and the latter by heading 7306. *Shamrock*, 619 F. Supp. 3d at 1345. The language used in the explanatory notes to character-

ize the two headings—"insulated" versus "uninsulated"—confirms that "insulating" in heading 8547 means electrically insulating (though the word "electrically" is not used), because metal tubes lined or coated with non-electrically insulating material fall within heading 7306. *Compare* Explanatory Note 73.06 (excluding "[i]nsulated electrical conduit tubing (heading 85.47)" from heading 7306), *with* Explanatory Note 85.47 (explaining that "uninsulated metal tubing, often used for the same purpose [*i.e.*, permanent electrical installations], is excluded" from heading 8547). *See also Shamrock*, 619 F. Supp. 3d at 1345. In addition, Explanatory Note 85.47 excludes "[m]etal tubing simply coated with varnish to prevent corrosion," thus excluding one form of insulation, namely from oxygen or other corrosive elements or compounds.

Third: As to how to identify what is electrically insulating within heading 8547, the most sensible standard is one tied to the intended purpose of the commercial product: the provision of a commercially significant degree of electrical insulation when an electricity-conducting wire is in use in the conduit. Both parties view electrical resistance as an appropriate lens through which to assess insulating properties. *See* J.A. 157 ¶¶ 105–108, 858, 1223–24, 1496–97 ¶ 17, 1522. Shamrock has suggested that any positive number in electrical-resistance tests, no matter how close to zero, should suffice for a lining to be electrically insulating, but it offers no persuasive basis for such a conclusion. Resistance appears in degrees, on a continuous scale, and a standard is needed to identify how much is enough for a product to be electrically insulating.

Compositional makeup affects a lining's insulating properties, as does thickness. *See* J.A. 318 (testimony of Shamrock witness, Dr. Gotro); J.A. 1222 (testimony of government expert, Dr. Athanasios Meliopoulos); J.A. 1592 (letter from Pinturas Diamex, S.A., manufacturer of the coating material at issue here). But those facts do not resolve how much resistance is required. The most appropriate standard, we conclude, is what the commercial marketplace deems significant when the product is used as intended (when a conducting wire is in use in the conduit). That interpretation fits the established preference for "common and commercial meanings," *Carl Zeiss*, 195 F.3d at 1379, and aligns with our recognition that intended use can identify meaning even of an *eo nomine* classification, *GRK Canada Ltd. v. United States,* 761 F.3d 1354, 1358–59 (Fed. Cir. 2014), and that "how the subject articles are regarded in commerce" and "how the subject articles are described in sales and marketing literature" can "guide the court's assessment of whether articles fall within the scope of an *eo nominee* provision," *CamelBak*, 649 F.3d at 1364–65,

1368; *Sigma-Tau*, 838 F.3d at 1279. And it may be implemented by facts from the marketplace, such as promotions of the products at issue, including perhaps comparisons to the amount of resistance provided by products clearly outside heading 8547, such as metal tubing simply coated with varnish to prevent corrosion or coated with non-electrically insulating material covered by heading 7306. Explanatory Note 85.47.

One final point: Shamrock cites several prior administrative rulings by Customs, such as HQ 966525, HQ 966526, Ruling N306508, Ruling N290590, and Ruling NY I84073, that classify lined electrical conduit (or other electrical products) in heading 8547 without speaking to whether and how to assess the degree of the electrically insulating property of the relevant lining material. *See, e.g.*, J.A. 1335–41, 1344–50, 1356–57, 1360, 1364. But the cited rulings do not provide any analysis of how to interpret "lined with insulating material" or determine what degree of "insulating" function, compared to "non-electrically insulating material[s]," is required. In this circumstance, we do not find the earlier rulings to warrant deference under *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944); *see also Loper Bright Enterprises v. Raimondo*, 144 S. Ct. 2244, 2259, 2267 (2024), or otherwise to alter our conclusion.

CONCLUSION

For the foregoing reasons, we affirm the Court of International Trade's grant of summary judgment in favor of the United States.

AFFIRMED

U.S. Court of International Trade

Slip Op. 24–116

KAPTAN DEMIR CELIK ENDUSTRISI VE TICARET A.S., Plaintiff, and ICDAS CELIK ENERJI TERSANE VE ULASIM SANAYI, A.S., Plaintiff-Intervenor, v. UNITED STATES, Defendant, and REBAR TRADE ACTION COALITION, Defendant-Intervenor.

Before: Gary S. Katzmann, Judge
Court No. 23–00131

[The court remands the Final 2020 Review for Commerce's further explanation or reconsideration of both of the determinations that Kaptan challenges]

Dated: October 21, 2024

David L. Simon, Law Office of David L. Simon, PLLC, of Washington, D.C., argued for Plaintiff Kaptan Demir Celik Endustrisi ve Ticaret A.S. With him on the brief was *Mark B. Lehnardt*.

Jessica R. DiPietro, *Leah N. Scarpelli*, and *Matthew M. Nolan*, ArentFox Schiff LLP, of Washington, D.C., for Plaintiff-Intervenor Icdas Celik Enerji Tersane ve Ulasim Sanayi, A.S.

Kelley M. Geddes, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, D.C., argued for Defendant the United States. With her on the briefs were *Brian M. Boynton*, Principal Deputy Assistant Attorney General, *Patricia M. McCarthy*, Director, *L. Misha Preheim*, Assistant Director. Of counsel on the briefs was *W. Mitch Purdy*, Attorney, Office of the Chief Counsel for Trade Enforcement and Compliance, U.S. Department of Commerce, of Washington, D.C.

Maureen E. Thorston, Wiley Rein LLP, of Washington, D.C., argued for Defendant-Intervenor Rebar Trade Action Coalition. With her on the brief were *Alan H. Price*, *John R. Shane*, and *Stephanie M. Bell*.

OPINION AND ORDER

Katzmann, Judge:

In 2020, the government of Turkey exempted Plaintiff Kaptan Demir Celik Endustrisi ve Ticaret A.S. ("Kaptan")—a Turkish producer of steel concrete reinforcing bar ("rebar")[1]—from a tax it normally imposes on certain transactions involving the exchange of foreign currency. Meanwhile, Nur Gemicilik ve Ticaret A.S. ("Nur"), a shipbuilding company affiliated with Kaptan, enjoyed rent-free industrial use of state-owned land. The U.S. Department of Commerce

[1] "'Rebar,' which is a portmanteau of 'reinforcing' and 'bar,' refers to rods of steel that are embedded into concrete as a means of strengthening the resulting structure." *Kaptan Demir Celik Endustrisi ve Ticaret A.S. v. United States* ("*Kaptan I Remand*"), 47 CIT __, __ n.1, 666 F. Supp. 3d 1334, 1336 n.1 (2023) (citations omitted).

("Commerce"), in the 2020 administrative review of its countervailing duty order on rebar from Turkey, determined both of these boons to be countervailable subsidies benefitting Kaptan. *See Steel Concrete Reinforcing Bar From the Republic of Turkey: Final Results of Countervailing Duty Administrative Review and Rescission, in Part; 2020*, 88 Fed. Reg. 34129 (Dep't Com. May 26, 2023), P.R. 156 ("*Final 2020 Review*") and accompanying memorandum, Mem. from J. Maeder to L. Wang, re: Issues and Decision Memorandum for the Final Results of the Countervailing Duty Administrative Review of Steel Concrete Reinforcing Bar from the Republic of Turkey; 2020 (Dep't Com. May 22, 2023), P.R. 152 ("IDM"). Commerce calculated the value of these putative subsidies and issued equivalent *ad valorem* countervailing duties on Kaptan's imports of rebar into the United States. *See Final 2020 Review* at 34130.

Kaptan, in a Motion for Judgment on the Agency Record,[2] now challenges two aspects of the *Final 2020 Review*. *See Pl.'s Mot. for J. on the Agency R.*, Nov. 13, 2023, ECF No. 29 ("Pl.'s Br."). First, Kaptan challenges Commerce's determination that the foreign currency exchange tax exemption is "specific"—which, as explained below, is a statutory requirement for countervailability. Second, Kaptan challenges Commerce's estimation of the value of the government-owned land that Nur used for free. Defendant the United States ("the Government") and Defendant-Intervenor Rebar Trade Action Coalition ("RTAC"), a group of U.S.-based rebar producers, oppose Kaptan's motion. *See* Gov't Br.; Def.-Inter.'s Br.

The court remands both challenged aspects of the *Final 2020 Review* for Commerce's further explanation or reconsideration.

BACKGROUND

The court assumes familiarity with Kaptan's challenges to prior Commerce determinations in relation to the countervailing duty order on Turkish rebar and subsequent administrative reviews thereof, including the background recounted in *Kaptan Demir Celik Endustrisi ve Ticaret A.S. v. United States* ("*Kaptan I*"), 47 CIT __, 633 F.

[2] Plaintiff-Intervenor Icdas Celik Enerji Tersane ve Ulasim Sanayi A.S. ("Icdas") is also a Turkish producer-importer of rebar that is subject to countervailing duties pursuant to the *Final 2020 Review*. Icdas has filed a Motion for Judgment on the Agency Record of its own, requesting that "[t]o the extent that Commerce recalculates Kaptan's rate as a result of this litigation, it must redetermine the "all-others" rate applied to Icdas in accordance with the statute." Pl.-Inter.'s Mot. for J. on the Agency R. at 3, Nov. 13, 2023, ECF No. 30 ("Pl.-Inter.'s Br."). This request is effectively unopposed, *see* Def.'s Resp. to Pl.'s Mot. for J. on the Agency R. at 19, Jan. 29, 2024, ECF No. 33 ("Gov't Br."); Def.-Inter.'s Resp. to Pl.'s Mot. for J. on the Agency R. at 25–26, Jan. 29, 2024, ECF No. 31 ("Def.-Inter.'s Br."), and the court accordingly instructs Commerce to recalculate Icdas's rate as necessary to reflect any potential changes made to Kaptan's on remand.

Supp. 3d 1276 (2023), and in *Kaptan I Remand*, 47 CIT __, 666 F. Supp. 3d 1334. A summary of the background most relevant to this particular case is below.

I. Legal and Regulatory Framework

The Tariff Act of 1930, as amended, provides for the imposition of countervailing duties on imported merchandise where Commerce finds that "the government of a country or any public entity within the territory of a country is providing, directly or indirectly, a countervailable subsidy with respect to the manufacture, production, or export of" that merchandise. 19 U.S.C. § 1671(a)(1); *see also id.* §§ 1671e, 1675(1) (providing for Commerce's issuance of a countervailing duty order and conduct of annual administrative reviews thereof). Countervailable subsidies must be "specific," and may include financial contributions in the form of a foreign government's "foregoing or not collecting revenue that is otherwise due, such as granting tax credits or deductions from taxable income." *Id.* § 1677(5)(D)(ii). This, in turn, includes cases where "goods or services are provided for less than adequate remuneration," which "shall be determined in relation to prevailing market conditions for the good or service being provided or the goods being purchased in the country which is subject to the investigation or review." *Id.* § 1677(5)(E)(iv).

Commerce's regulations provide a more detailed framework for the measurement of "adequate remuneration":

> The Secretary will normally seek to measure the adequacy of remuneration by comparing the government price to a market-determined price for the good or service resulting from actual transactions in the country in question. Such a price could include prices stemming from actual transactions between private parties, actual imports, or, in certain circumstances, actual sales from competitively run government auctions. In choosing such transactions or sales, the Secretary will consider product similarity; quantities sold, imported, or auctioned; and other factors affecting comparability.

19 C.F.R. § 351.511(a)(2)(i).

II. History of Relevant Administrative Proceedings

Commerce issued a countervailing duty order on rebar from Turkey in 2014. *See Steel Concrete Reinforcing Bar From the Republic of Turkey: Countervailing Duty Order*, 79 Fed. Reg. 65926 (Dep't Com. Nov. 6, 2014) ("*Original Order*"). The original Turkish producers in-

dividually examined for the *Original Order* were Habas Sinai ve Tibbi Gazlar Istihsal Endustrisi A.S. and Icdas. Commerce added Kaptan as a mandatory respondent[3] in the 2014 administrative review of the *Original Order*, *see Steel Concrete Reinforcing Bar From the Republic of Turkey: Final Results and Partial Rescission of Countervailing Duty Administrative Review; 2014*, 82 Fed. Reg. 26907, 26908 (Dep't Com. June 12, 2017), and ordered the assessment of countervailing duties on Kaptan's U.S. imports of rebar following the 2018 administrative review. *See Steel Concrete Reinforcing Bar from the Republic of Turkey: Final Results of Countervailing Duty Administrative Review and Rescission, in Part; 2018*, 86 Fed. Reg. 53279 (Dep't Com. Sept. 27, 2021) ("*Final 2018 Review*").

Kaptan challenged the *Final 2018 Review* in Commerce's proceeding below and in litigation before the U.S. Court of International Trade ("USCIT"), specifically contesting "Commerce's determination that subsidies received by Nur . . . were properly attributed to Kaptan on the basis of a cross-owned input supplier relationship as defined by 19 C.F.R. § 351.525(b)(6)(iv)." *Kaptan I Remand*, 666 F. Supp. 3d at 1338. Last year, the court entered judgment sustaining Commerce's determination on remand that certain subsidies conveyed by the Turkish government to Nur were not properly classified as indirect subsidies to Kaptan. *See id.* at 1351. RTAC and other defendant-intervenors appealed from that judgment, and that matter is pending before the U.S. Court of Appeals for the Federal Circuit ("Federal Circuit"). *See Kaptan Demir Celik Endustrisi ve Ticaret A.S. v. United States* ("*Kaptan I Appeal*"), No. 24–1431 (Fed. Cir. docketed Feb. 2, 2024).

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

> If the administering authority determines that it is not practicable to determine individual countervailable subsidy rates under paragraph (1) because of the large number of exporters or producers involved in the investigation or review, the administering authority may —
>
> (A) determine individual countervailable subsidy rates for a reasonable number of exporters or producers by limiting its examination to —
>
> (i) a sample of exporters or producers that the administering authority determines is statistically valid based on the information available to the administering authority at the time of selection, or
>
> (ii) exporters and producers accounting for the largest volume of the subject merchandise from the exporting country that the administering authority determines can be reasonably examined; or
>
> (B) determine a single country-wide subsidy rate to be applied to all exporters and producers.
>
> The individual countervailable subsidy rates determined under subparagraph (A) shall be used to determine the all-others rate under section 1671d(c)(5) of this title.

19 U.S.C. § 1677f-1(e)(2).

In the 2020 administrative review, which is the subject of this case, Commerce again calculated non-zero countervailing duties to be assessed on Kaptan's imports of subject rebar into the United States. *See Final 2020 Review* at 34130. Commerce published the preliminary results of its review on December 1, 2022. *See Steel Concrete Reinforcing Bar From the Republic of Turkey: Preliminary Results of Countervailing Duty Administrative Review; 2020*, 87 Fed. Reg. 73750 (Dep't Com. Dec. 1, 2022), P.R. 134 ("*Preliminary 2020 Review*") and accompanying memorandum, Mem. from J. Maeder to A. Elouaradia, re: Decision Memorandum for the Preliminary Results of Countervailing Duty Administrative Review of Steel Concrete Reinforcing Bar from the Republic of Turkey; 2020 (Dep't Com. Nov. 22, 2022), P.R. 131 ("PDM").

As relevant here, Commerce found that Kaptan received subsidies of two types from government entities in Turkey between January 1 and December 31, 2020 (the "period of review"). *See* PDM at 11. One was an Kaptan's total exemption from Turkey's then-current 0.2% Banking and Insurance Transactions Tax ("BITT") on foreign exchange transactions (the "BITT Exemption"). *See id.* (referencing Article 33 of Law Number 6802 ("Turkish Law 6802"),[4] a provision of Turkish law that is referenced in the record, and which in turn refers to an "industrial registration certificates," the possession of which by certain entities is seemingly required under Law Number 6948 ("Turkish Law 6948")).[5] The other was a subsidy conferred by a Turkish state entity to Kaptan through Kaptan's affiliate Nur, a shipbuilding company, in the form of an ongoing "lease and investment agreement with the local government in the Surmene district to use a state-controlled area of land free of rent." *Id.* at 13. Commerce explained as follows:

> A benefit exists under section 771(5)(E)(iv) of the Act to the extent that the [Turkish government] provides land for [less than adequate remuneration]. To compute the benefit, we com-

[4] During the agency proceeding below, the Turkish government submitted a series of provisions of Turkish law that are relevant to the BITT Exemption and eligibility therefor. *See* Letter from Gov't of Turkey to G. Raimondo, Sec'y of Com., re: Sec II Questionnaire Response at Exs. 31– 32 (May 16, 2022), P.R. 49–89, C.R. 51–80, 86–95.

A complete amended text of Article 33 of Turkish Law 6802 does not appear in the Turkish government's submission and is therefore absent from the record. But the relevant text of that provision is reproduced in a discernible form in a separate document that the Turkish government did submit in Exhibit 31 of its questionnaire response, which is a "President's Decree" numbered 1149 and dated June 17, 2019 ("Turkish Presidential Decree 1149"). The terms of that decree amend Turkish Law 6802 to exempt from the BITT, among a total of five exemption categories, "[f]oreign exchange sales to enterprises holding industrial registration certificates." *Id.*

[5] The terms "industrial registry certificate" and "industrial registration certificate" appear to be interchangeable.

> puted the amount Nur should have paid for its rent-free land during the [period of review]. Specifically, we multiplied the area of land provided to Nur (in square meters) by the monthly cost per square meter benchmark rate to derive a benefit for each month of the [period of review]. The land benchmark is based on Colliers International's *Real Estate Market Turkey Review*. The petitioner placed population density information on the record showing that the area in Surmene, Trabzon, where the land in question is located, is most similar in population density to Cerkezkoy, Tekirdag. Consistent with the final results of prior administrative reviews, we adjusted the land benchmark by limiting the rental rates contained in Colliers International's Real Estate Market Turkey Review to only include rental prices from Cerkezkoy, Tekirdag. Next, we summed the monthly benefits to find the total benefit in accordance with section 771(6)(A) of the Act, and then divided the benefit amount by Kaptan's and Nur's total sales (less any intercompany sales) during the [period of review]. On this basis, we preliminarily calculate a net countervailable subsidy rate of 0.86 percent *ad valorem* for Kaptan.

Id. at 13–14 (footnotes omitted) (citing Letter from Wiley Rein, LLP to G. Raimondo, Sec'y of Com., re: RTAC Benchmark Submission at Ex. 1 (Oct. 31, 2022), P.R. 122 (the "Colliers report")).

Kaptan submitted a case brief challenging both of these determinations, *see* Letter from David L. Simon, PLLC to G. Raimondo, Sec'y of Com., re: Respondent's Case Brief at 4–11 (Jan. 10, 2023), P.R. 139, C.R. 126 ("Kaptan's Case Br."), to which Commerce responded point-by-point in the IDM. *See IDM* at 6–12. Commerce made no changes to the *Final 2020 Review* in response to the points Kaptan raised in its case brief, finding that "the Colliers report constitutes the best benchmark on the record" and that "the BITT exemptions are specific and countervailable." *Id.* at 8, 12.

III. Procedural History

Kaptan timely challenged the *Final 2020 Review*, filing a complaint against the United States with the USCIT. *See* Compl., June 21, 2023, ECF No. 4. The following month, Icdas and RTAC were entered as Plaintiff- and Defendant-Intervenors, respectively. *See* Order, July 25, 2023, ECF No. 22; Order, July 25, 2023, ECF No. 23. Kaptan and Icdas filed their respective motions for judgment on the agency record pursuant to USCIT Rule 56.2 on November 13, 2023. *See* Pl.'s Br.; Pl.-Inter.'s Br. The Government and RTAC responded on January 29,

2024, *see* Gov't Br.; Def.-Inter.'s Br., and Kaptan and Icdas each replied in turn. *See* Pl.'s Reply, Feb 19, 2024, ECF No. 35 ("Pl.'s Reply"); Pl.-Inter.'s Reply, Feb. 19, 2024, ECF No. 34.

Kaptan, the Government, and RTAC participated in oral argument on June 12, 2024. In advance of that argument, the court issued written substantive questions to the participating parties and ordered written responses. *See* Letter, May 8, 2024, ECF No. 43. All participating parties timely complied with this order. *See* Def.-Inter.'s Resp. to Qs. for Oral Arg., May 29, 2024, ECF No. 44 ("Def.-Inter.'s OAQ Resp."); Pl.'s Resp. to Qs. for Oral Arg., May 29, 2024, ECF No. 46 ("Pl.'s OAQ Resp."); Def.'s Resp. to Qs. for Oral Arg., May 29, 2024, ECF No. 48 ("Gov't OAQ Resp."). At oral argument the court invited the participating parties to submit supplemental briefs; only Kaptan responded with a substantive submission. *See* Pl.'s Post-Arg. Subm., June 20, 2024, ECF No. 51.

JURISDICTION AND STANDARD OF REVIEW

Jurisdiction lies under 28 U.S.C. § 1581(c). 19 U.S.C. § 1516a(b)(1)(B)(i) supplies the standard of review, which is that "[t]he court shall hold unlawful any determination, finding, or conclusion found . . . to be unsupported by substantial evidence on the record, or otherwise not in accordance with law . . . ." Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Broadcom Corp. v. Int'l Trade Comm'n*, 28 F.4th 240, 249 (Fed. Cir. 2022) (internal quotation marks and citation omitted). To be supported by substantial evidence, a determination must account for "whatever in the record fairly detracts from its weight," including "contradictory evidence or evidence from which conflicting inferences could be drawn." *Suramerica de Aleaciones Laminadas, C.A. v. United States*, 44 F.3d 978, 985 (Fed. Cir. 1994) (quoting *Universal Camera Corp. v. N.L.R.B.*, 340 U.S. 474, 487–88 (1951)).

Separately, Commerce is required to provide "an explanation of the basis for its determination that addresses relevant arguments, made by interested parties who are parties to the investigation or review." 19 U.S.C. § 1677f(i)(3)(A); *see also Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983); *Timken U.S. Corp. v. United States*, 421 F.3d 1350, 1357 (Fed. Cir. 2005) (holding that section 1677f(i) codifies the *State Farm* standard).

DISCUSSION

Kaptan argues that Commerce (1) erroneously determined that the BITT Exemption is a domestic subsidy that is specific as a matter of law under 19 U.S.C. § 1677(5A)(D)(i), and that Commerce (2) errone-

ously chose the Colliers report over the C&W report as a benchmark for the government land that Nur used rent-free. For the reasons explained below, the court remands for Commerce's reconsideration or further explanation of both determinations.

I. Commerce's Determination That the BITT Exemption Is Specific as a Matter of Law, as Currently Explained, Is Unsupported by Substantial Evidence.

Kaptan first argues that Commerce improperly determined that the BITT Exemption is a subsidy that is specific as a matter of law, and thus countervailable, under 19 U.S.C. § 1677(5A)(D)(i). This determination, Kaptan states at the outset, is "unsupported by substantial evidence on the administrative record and otherwise not in accordance with law." Pl.'s Br. at 18.[6]

Kaptan is correct that Commerce's determination of the BITT Exemption's de facto specificity, as currently explained in the IDM, lacks support in the record. The record contains a series of provisions of Turkish law that, read together, do not support the specificity as a matter of law of the subsidy that Kaptan received in the form of the BITT Exemption.

To summarize the (U.S.) law governing the countervailing duties at issue in this case will require disassembling a nesting doll of recursive statutory definitions. First, the outer shell: If a foreign government provides "a countervailable subsidy with respect to the manufacture, production, or export of a class or kind of merchandise imported, or sold (or likely to be sold) for importation, into the United States," and the U.S. International Trade Commission determines that imports of that merchandise materially injure or threaten to materially injure an industry in the United States, then Commerce

[6] This statement does not isolate a precise statutory standard of review—as between "unsupported by substantial evidence on the record" and "otherwise not in accordance with law," 19 U.S.C. § 1516a(b)(1)(B)(i)—against which Kaptan requests that the court assess Commerce's determination that the BITT Exemption is specific as a matter of law. *See* Pl.'s Br. at 18. Greater precision on this matter would have been desirable, as these are distinct standards of review. *See Tension Steel Indus. Co. v. United States*, 40 CIT 661, 668, 179 F. Supp. 3d 1185, 1193 (2016); *Dorbest Ltd. v. United States*, 30 CIT 1671, 1676, 462 F. Supp. 2d 1262, 1268 (2006).

But Kaptan does seem to acknowledge in passing that it seeks substantial-evidence review on this particular challenge. *See* Pl.'s Br. at 18 ("Commerce's conclusion that the BITT exemptions are de jure specific is unsupported by record evidence"); *id.* at 23 ("Commerce's determination that BITT exemptions are *de jure* specific is wholly contradicted by record evidence and is otherwise based on irrelevant and unproved speculation."). And the court concludes that this is indeed the relevant standard. Commerce's task in the proceeding below was to make a finding of fact, limited to record evidence, about certain features of Turkish law. *See Rebar Trade Action Coal. v. United States*, 40 CIT 1304, 1308 (2016). This was not the kind of direct ruling on a question of U.S. law that might be subject to otherwise-not-in-accordance-with-law review.

may "impose[] upon such merchandise a countervailing duty, in addition to any other duty imposed, equal to the amount of the net countervailable subsidy." 19 U.S.C. § 1671(a). Read in isolation, this provision is tautological: Commerce may countervail countervailable subsidies with countervailing duties. But what is a countervailable subsidy? 19 U.S.C. § 1677(5)(A) provides the answer: "A countervailable subsidy is a subsidy described in this paragraph which is specific as described in paragraph (5A)." *Id.* Paragraph (5A), in turn, provides (as relevant here) that "[a] subsidy is specific . . . if it is determined to be specific pursuant to subparagraph (D)." *Id.* § 1677(5A)(A). And subparagraph (D), in turn, provides that "[i]n determining whether a subsidy . . . is a specific subsidy, in law or in fact, to an enterprise or industry within the jurisdiction of the authority providing the subsidy, the following guidelines shall apply:". *Id.* § 1677(5A)(D).

For the purposes of this case, the referenced guidelines are the innermost statutory figurine. They delineate two categories of specific subsidies: those that are specific as a matter of law ("de jure"), and those that are specific as a matter of fact ("de facto"). *See id.* § 1677(5A)(D)(i), (iii). A subsidy is specific as a matter of law "[w]here the authority providing the subsidy, or the legislation pursuant to which the authority operates, expressly limits access to the subsidy to an enterprise or industry . . . ." *Id.* § 1677(5A)(D)(i). And a subsidy is specific as a matter of fact if at least one of four enumerated factors pertains:

> (I) The actual recipients of the subsidy, whether considered on an enterprise or industry basis, are limited in number.
>
> (II) An enterprise or industry is a predominant user of the subsidy.
>
> (III) An enterprise or industry receives a disproportionately large amount of the subsidy.
>
> (IV) The manner in which the authority providing the subsidy has exercised discretion in the decision to grant the subsidy indicates that an enterprise or industry is favored over others.

Id. § 1677(5A)(D)(iii). As the Federal Circuit recently explained, "[t]he statutory language is clear that specificity can be either de jure or de facto. The de jure specificity inquiry is separate from the de facto inquiry and the two are based on different factors." *Gov't of Quebec v. United States*, 105 F.4th 1359, 1374 (Fed. Cir. 2024) (emphasis and citation omitted).

Putting it all back together: Commerce may impose a countervailing duty in an amount equal to the calculated value of a countervail-

able subsidy provided by a foreign government. A subsidy is not countervailable unless it is specific. And a subsidy is specific when either (1) the law of the subsidy-providing government limits the subsidy to a specific "enterprise or industry," or (2) such a limitation is apparent from observable facts about the subsidy's distribution.

Here, Commerce found that the BITT Exemption is a subsidy that is specific as a matter of law. IDM at 12. For this finding to be supported by substantial evidence, then, the record must demonstrate that Turkish law "expressly limits" the BITT Exemption "to an enterprise or industry." 19 U.S.C. § 1677(5A)(D)(i).

The record lacks substantial evidence to support this conclusion. The provisions of Turkish law in the record, on which Commerce relied, do not appear to expressly limit the BITT Exemption to an "enterprise or industry." *Id.* Their express terms instead appear to support a conclusion of broad, economy-wide eligibility for the subsidy.

The terms of the Turkish law implementing the BITT Exemption provide that companies that possess an industrial registry certificate are subject to a 0% BITT tax rate for foreign exchange transactions. *See* Turkish Presidential Decree 1149 (amending Turkish Law 6802).[7] And Turkish law further requires a broad range of Turkish companies to obtain an industrial registry certificate. The law subjects to this requirement "places that produce or obtain a material continuously and in series by changing the characteristics, shape, precision or composition of a substance or by processing these substances with the help of machinery, equipment, looms, tools or other means and forces or only by manual labor . . ." Turkish Law 6948 at Art. 1. It also enumerates "[e]stablishments that carry out continuous and serial repairs and plants that produce electricity or other energy, large construction sites such as shipbuilding and enterprises that produce information technology and software . . ." as entities that must obtain a certificate. *Id.* The sole exceptions the provision explicitly carves out are "[h]andicrafts and domestic crafts and small repair shops." *Id.*

This is not a narrow or industry-specific list of companies. It instead appears that under the provisions of Turkish law in the record, virtually every company of a certain size must possess an industrial

[7] As Commerce pointed out, *see* IDM at 12, Turkish Law 6802 (as amended by Turkish Presidential Decree 1149) supplements the industrial registry certificate criterion with four additional independently sufficient criteria for eligibility for the BITT Exemption. But because (as explained below) so many enterprises in the Turkish economy appear to be required to possess an industrial registry certificate, the certificate criterion alone nixes a determination of de jure specificity (as currently explained). If anything, the existence of the remaining four criteria would seem to marginally broaden, not "further limit[]," the universe of BITT-exempt enterprises. IDM at 12.

registry certificate. And because every company that complies with the legal requirement to possess an industrial registry certificate is eligible for the BITT Exemption, *see* Turkish Law 6802,[8] legal eligibility for the BITT Exemption appears to be broad and non-enterprise- or industry-specific.

The Government argues that the relevant "enterprise or industry" here for the purpose of satisfying 19 U.S.C. § 1677(5A)(D)(i) is the category of "enterprises or industries that both conducted foreign business transactions and satisfied one of the additional conditions established by law." Gov't OAQ Resp. at 6. RTAC, meanwhile, suggests the category of "industrial enterprises." Def.-Inter.'s Br. at 11. But these categories are implausibly far-reaching. It is hard to discern what, if anything, they would exclude. If "an enterprise or industry" could be taken to refer to the set of all "industrial enterprises," then section 1677(5A)(D)(i) would allow *any* legal condition on eligibility for a subsidy to establish that subsidy's specificity as a matter of law. But the mere fact that eligibility for a subsidy is limited does not automatically mean that the limitation delineates an enterprise or industry. If it did, "enterprise or industry" would be an empty term. As the court recently observed in a case involving a distinction between de facto and de jure specificity, "converting the language of the criteria into subsector descriptors is insufficient to demonstrate that a subsidy may not operate throughout the economy." *Hyundai Steel Co. v. United States*, 48 CIT __, __, 701 F. Supp. 3d 1398, 1412 (2024); *see also PPG Indus., Inc. v. United States*, 928 F.2d 1568, 1577 (Fed. Cir. 1991) ("The statute does not mandate that 'specific' means no more than 'identifiable.'").

It is accordingly unapparent from the record that this is a scenario "[w]here the authority providing the subsidy, or the legislation pursuant to which the authority operates, expressly limits access to the subsidy to an enterprise or industry." 19 U.S.C. § 1677(5)(A)(D)(i). Indeed, the BITT Exemption by its terms appears to provide "government assistance that is both generally available and widely and evenly distributed throughout the jurisdiction of the subsidizing authority," which "is not an actionable subsidy." *Statement of Administrative Action accompanying the Uruguay Round Agreements Act*,

[8] The Government argues that "the universe of companies that may benefit from the program is necessarily limited to companies that make foreign exchange transactions, further limiting the group of enterprises that may benefit from it." Gov't Br. at 9. Commerce similarly stated that "the universe of companies that may benefit from the program is necessarily limited to companies that make foreign exchange transactions, which inevitably limits the universe of companies that may benefit from it." IDM at 12. But this purported additional criterion appears to be trivially satisfied for present purposes, as a company that does not transact foreign currency is not subject to the tax that the BITT Exemption exempts.

H.R. Doc. No. 103–316, vol. 1 (1994), *reprinted in* 1994 U.S.C.C.A.N. 4040, 4230 ("SAA").[9] Unlike the Government or RTAC, Commerce did not venture to explain what the applicable "enterprise or industry" would even be in this case, alluding only vaguely to a "limit[ed] universe" of companies eligible for the BITT Exemption. IDM at 12. Nor did Commerce explain why the industrial registry certificate criterion would "inherently favor a given enterprise or industry or address whether the criteri[on is] economic in nature." *Hyundai Steel Co. v. United States*, 47 CIT __, __, 659 F. Supp. 3d 1327, 1342 (2023).

Commerce instead premised its specificity determination on the notion that that even if Turkish law establishes broad eligibility for the BITT exemption, "[t]his does not demonstrate that all enterprises eligible actually apply and obtain industrial registry certificates." IDM at 12. "Evidence on the record," Commerce explained, "does not address whether all companies that make foreign exchange transactions receive the benefit under the law, which would show that the BITT exemptions are generally available." *Id.*

This type of analysis, however, is out of place in a determination of whether a subsidy is specific as a matter of law. The relevant question here is whether the provisions of Turkish law in the record "expressly limit[] access to the subsidy to an enterprise or industry," 19 U.S.C. § 1677(5A)(D)(i), not whether the implementation of that law results in the subsidy's distribution to a limited number of recipients. This latter question belongs in a de facto analysis under section 1677(5A)(D)(iii). *See BGH Edelstahl Siegen GmbH v. United States*, 47 CIT __, __, 663 F. Supp. 3d 1378, 1383 n.9 (2023) ("That a limited number of enterprises or industries may ultimately benefit from the program may support a finding of de facto specificity, but it does not support a finding of express or de jure specificity."). In other words, a determination of specificity as a matter of law pursuant to section 1677(5A)(D)(i) is not supported by substantial evidence if it rests only on factors that are unrelated to the construal of the law of the foreign jurisdiction. It may be that such extrinsic factors could establish a subsidy's specificity, but only de facto specificity. *See Gov't of Quebec*, 105 F.4th at 1374.

Here, Commerce did not analyze the BITT Exemption's possible specificity as a matter of fact. It invoked only section 1677(5A)(D)(i) as a basis for its specificity determination. *See* IDM at 11. Accordingly, because the provisions of Turkish law that Commerce cites do not constitute "substantial evidence on the record" for de jure specificity,

[9] 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).

the court remands for a redetermination of whether the BITT Exemption is countervailable. In conducting this redetermination, Commerce may consider (as RTAC suggests) whether evidence in the record supports a determination of de facto specificity under section 1677(5A)(D)(iii). *See* Def.-Inter.'s Br. at 12. Alternatively, Commerce may attempt on remand to further explain why the BITT Exemption is specific as a matter of law.

II. Commerce Did Not Properly Explain its Rejection of the C&W Report

As explained above, Commerce used a report prepared by Colliers International ("Colliers") as a benchmark to value state-owned land in the Turkish city of Trabzon, Surmene, that Kaptan's shipbuilder affiliate Nur[10] used for free during the period of review. *See* PDM at 11–14. Kaptan had submitted a competing report, prepared by Cushman & Wakefield ("C&W"). *See* Letter from David L. Simon, PLLC to G. Raimondo, Sec'y of Com., re: Kaptan Benchmark Submission at Ex. 1 (Oct 31, 2022), P.R. 121, CR 114–17 (the "C&W report"). But Commerce declined to consider the C&W report on the stated basis that it "is not a usable benchmark." IDM at 9.

Kaptan challenges both the selection of the Colliers report and the rejection of the C&W report. Pl.'s Br. at 24. Kaptan argues that "[t]he C&W benchmark . . . has the same or superior quality information in terms of its public nature, credibility, and underlying data," and that "Commerce improperly ignored relevant factors affecting comparability when finding the [Colliers] benchmark to be usable." *Id.*

For the reasons explained below, Commerce's explanation of its selection of the Colliers report is not in accordance with law. Remand is accordingly required on this issue as well: Commerce must either further explain or reconsider its choice of a benchmark to value the land that Nur used free of charge.

In the administrative proceeding below, Kaptan raised two main objections to Commerce's use of the Colliers report. *See* Kaptan's Case Br. at 4–11. Kaptan first challenged the underlying reliability of the Colliers report's data. *See id.* at 4. According to Kaptan, Commerce relied on those data despite a lack of external confirmation of their reliability. Kaptan noted that the report references "Colliers International" as its source, and that it does not indicate "whether the reported rates [therein] are based upon public listings, private offers, actual leases, or guesses based upon leases entered in prior years and

[10] Unlike in prior litigation related to the 2018 administrative review, Kaptan does not here challenge an underlying determination by Commerce that subsidies received by Nur are attributable to Kaptan. *See generally Kaptan I Remand*, 47 CIT __, 666 F. Supp. 3d 1334; *see also* Pl.'s OAQ Resp. at 4.

adjusted upwards for inflation." *Id.* at 5. Kaptan further asserted that "there is no statement" in the report "regarding the experience and qualifications of the individuals compiling the data," and that the report presents, "in miniature font," a disclaimer that "no warranty is given as to the accuracy of . . . the forecasts, figures, or conclusions contained in this report . . . ." *Id.*

Kaptan next challenged the Colliers report's alleged usage of land near the populous and economically productive Istanbul metropolitan area[11] as a benchmark for assessing the value of the land used by Nur in distant Trabzon—which, Kaptan asserted (and continues to assert), is a less populous and productive area than the area surrounding Istanbul. *See id.* at 6–11. In Kaptan's framing, "[t]he benchmark used in the Preliminary Results to value the Nur property is like using a turnkey industrial site in Bayonne, New Jersey . . . to value unimproved land on the shore of Lake Superior an hour outside Duluth, Minnesota." *Id.* at 10.

Commerce responded to the substance of the first objection but not the second. In the IDM, Commerce addressed first objection as follows:

> Regarding Kaptan's argument that the Colliers report is unusable as a benchmark, Kaptan first claims that the Colliers report is not a reliable data source because it disclaims liability for its accuracy and cites to itself as the data source. We find that this argument is unpersuasive because disclaimer of liability is not at issue, and the fact that the Colliers report is based on numbers compiled by Colliers does not disqualify the data, but rather strengthens the case to use the Colliers report as it is not using secondary sources or compiling sets of data from other sources.

IDM at 9 (footnote omitted). Without evaluating the merits of this response, the court observes that it at least directly addresses Kaptan's concerns regarding the Colliers report's disclaimer of liability and reference to internally collected data.

The same cannot be said about Commerce's treatment of the Kaptan's second, methodological objection. Commerce did not directly address Kaptan's argument regarding the Colliers report's use of land value comparables within Turkey. Instead of confronting possible

[11] Commerce "adjusted the land benchmark by limiting the rental rates contained in Colliers International's Real Estate Market Turkey Review to only include rental prices from Cerkezkoy, Tekirdag." PDM at 13–14. Kaptan asserts that Cerkezkoy "is an industrial/transportation hub just outside Istanbul" and that "it is part of the greater Istanbul area." Pl.'s Br. at 37, 39 (internal quotation marks and citations omitted); *see also* Kaptan's Case Br. at 10. Commerce did not raise any issue of Cerkezkoy's geographic proximity to Istanbul below, and neither the Government nor RTAC does so now.

issue about the Colliers report's "distortive" nature, Commerce insisted that the Colliers report was the only viable choice—notwithstanding any possible problems with its own viability:

> Kaptan also argues that the Colliers report provides data that are distortive and not comparable to the land area used by Nur, Kaptan's affiliate. We disagree. Kaptan points to the fact that Commerce has limited the data in the Colliers report to only include one province which has the most similar population density to the land where Nur is located and claims that Commerce has not considered any other factors such as the geographical location of the land within the country of Turkey in terms of its proximity to a commercial hub, or any other factors which would affect comparability. This argument is predicated on Kaptan's assumption that there are multiple data sources Commerce could choose from. However, the only usable data source on the record is the Colliers report, and is thus the only source Commerce may consider.[] We made the adjustment to the data in this report to use a comparable benchmark for industrial land based on population density information, but we did not opine as to the remaining factors because the record did not contain multiple data sources to choose from. We therefore chose Colliers as the best benchmark on the record and limited our comparability analysis based on the most relevant and quantifiable metric available on the record, which is population density. As we will discuss below, the only other benchmark to assess the rental value of land on the record is Kaptan's submission, which, as discussed below, is not a usable benchmark.

Id. (footnotes omitted).

Commerce thus declined to respond to Kaptan's objection to the use of the Colliers report as a benchmark. This was error. "When confronted with a colorable claim that the data that Commerce is considering is aberrational, Commerce must examine the data and provide a reasoned explanation as to why the data it chooses is reliable and non-distortive." *Mittal Steel Galati S.A. v.* United States, 31 CIT 1121, 1135, 52 F. Supp. 1295, 1308 (2007). Commerce was aware that Kaptan had raised a concern with the possibly distortive nature of the Colliers report's geographic focus. *See* IDM at 7. And this concern was a colorable one: in theory, at least, the estimated value of foregone rent for Nur's use of the Trabzon land could be inaccurately high if based on a non-representative sample of higher-priced land rentals in a different area of Turkey. But rather than "provide an explanation of

the basis for its determination that addresses relevant arguments, made by interested parties who are parties to the investigation or review," 19 U.S.C. § 1677f(i)(3)(A), Commerce resorted to a process of elimination in which it struck the C&W report and then selected the Colliers report by default. Under the Government's framing, which is that Commerce "found the [C&W] report unusable only after considering various factors detracting from its credibility," Gov't Br. at 15, Commerce was also required to address the "usability" of the Colliers report by considering the "detracting" factors that Kaptan raised in its case brief.

Commerce, of course, "is entitled to broad discretion regarding the manner in which it develops the record . . . ." *Stupp Corp. v. United States*, 5 F.4th 1341, 1350 (Fed. Cir. 2021). It is furthermore "not necessary that there could be only one conclusion; even if two inconsistent conclusions could have been drawn, the determination could still be supported by substantial evidence." *Dupont Teijin Films USA, LP v. United States*, 407 F.3d 1211, 1215 (Fed. Cir. 2005). And as RTAC points out, *see* Def.-Inter.'s Br. at 18, the court may not "reweigh the evidence or to reconsider questions of fact anew." *Trent Tube Div., Crucible Materials Corp. v. Avesta Sandvik Tube AB*, 975 F.2d 807, 815 (Fed. Cir. 1992); *see also Downhole Pipe & Equip., L.P. v. United States*, 776 F.3d 1369, 1376–77 (Fed. Cir. 2015). But here, Commerce did not "weigh" the relative merits of the Colliers and C&W reports with regard to the comparability established by their respective geographical sampling methods. *See* 19 C.F.R. § 351.511(a)(2)(i); *see also Ozdemir Boru San. ve Tic. Ltd. Sti. v. United States*, 41 CIT __, __, 273 F. Supp. 3d 1225, 1252 (2017) (explaining that "Commerce must consider relevant record evidence in determining the comparability of land parcels it uses in creating a reasonable benchmark that lacks distortive pricing"). Commerce simply stated that the C&W report was "unusable," and that the Colliers report was therefore the only acceptable choice.

This might have passed muster if Commerce had based its determination of the C&W report's per se unusability on a sound legal basis. It is within Commerce's discretion, for example, to flatly decline to consider submissions by parties that carry certain fundamental defects. These defects include untimely filing, *see QVD Food Co. v. United States*, 658 F.3d 1318, 1324 (Fed. Cir. 2011), or else a submis-

sion's failure to meet any of the other criteria enumerated in 19 U.S.C. § 1677m(e).[12]

But neither Commerce, the Government, nor RTAC has shown that the aspects of the C&W report that Commerce identified as disqualifying falls into any of these defined categories. *See* Gov't Br. at 15 (stating generally that Commerce "found the report unusable only after considering various factors detracting from its credibility"); Def.-Inter.'s Br. at 23 (arguing only that "the agency was in the position of having only one usable benchmark source: the Colliers International data . . . ."). Commerce noted that the C&W report "is business proprietary information in its entirety," that it was commissioned by Kaptan for the purpose of litigation, and that "prices in the study may have been partially based on prices provided by nonprivate entities." IDM at 9–10. These assertions, if valid, might indeed weigh against Commerce's use of the C&W report on reliability grounds. *Cf., e.g., Sandt Tech., Ltd. v. Resco Metal & Plastics Corp.*, 264 F.3d 1344, 1350–51 (Fed. Cir. 2001) ("Documentary or physical evidence that is made contemporaneously with the inventive process provides the *most reliable* proof that the inventor's testimony has been corroborated." (emphasis added)). But even if they did, they would not lift Commerce's statutory burden under 19 U.S.C. § 1677f(i)(3)(A) to respond to Kaptan's objections to the use of the Colliers report.[13] Commerce must consider the parties' submissions as part of an even-handed assessment of "factors affecting comparability." 19 C.F.R. §

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[12] This subsection provides as follows:

> In reaching a determination under section 1671b, 1671d, 1673b, 1673d, 1675, or 1675b of this title the administering authority and the Commission shall not decline to consider information that is submitted by an interested party and is necessary to the determination but does not meet all the applicable requirements . . . , if—
>
> (1) the information is submitted by the deadline established for its submission,
> (2) the information can be verified,
> (3) the information is not so incomplete that it cannot serve as a reliable basis for reaching the applicable determination,
> (4) the interested party has demonstrated that it acted to the best of its ability in providing the information and meeting the requirements established by the administering authority or the Commission with respect to the information, and
> (5) the information can be used without undue difficulties.

Id.

[13] The court raised an analogous concern twenty-five years ago in *Rautaruukki Oy v. United States*, 23 CIT 257 (1999), which Kaptan cites for the proposition that Commerce's "automatic exclusion" of the C&W report was unlawful. Pl.'s OAQ Resp. at 7–8. Kaptan quotes the following passage from that case:

> Commerce claims it did not disregard the expert testimony. The agency, however, apparently observed the evidence only to the extent necessary to conclude that it was "subjective" and did not need to be considered. This was not a fair treatment of the material submitted.

Rautaruukki, 23 CIT at 260.

351.511(a)(2)(i). Commerce may not use the substantive flaws it identifies in one submission as a basis for declining to address possible flaws in the other.

The court accordingly remands this aspect of the *Final 2020 Review* for Commerce to fully address the arguments presented by Kaptan regarding possible deficiencies in the Colliers report, and, if appropriate, to reconsider its selection of the Colliers report over the C&W report as a benchmark.

CONCLUSION

For the reasons explained above, the court remands the *Final 2020 Review* for Commerce's reconsideration or further explanation of the two issues that Kaptan raises in its Motion for Judgment on the Agency Record. The court does not compel a result for either issue on remand. It is hereby

ORDERED that upon consideration of Plaintiff-Intervenor's Motion for Judgment on the Agency Record, Nov. 13, 2023, ECF No. 30, the U.S. Department of Commerce is instructed to reconsider the rate applied to Icdas Celik Enerji Tersane ve Ulasim Sanayi, A.S. based on any changes to the margin calculated for mandatory respondents, and it is further

ORDERED that Commerce shall file its remand redetermination with the court within ninety days of the date of this opinion. The timeline for filings and comments regarding the second remand redetermination shall proceed according to USCIT Rule 56.2(h).

SO ORDERED.

Dated: October 21, 2024
New York, New York

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

Slip Op. 24–117

SENECA FOODS CORP., Plaintiff, v. UNITED STATES, Defendant.

Before: Gary S. Katzmann, Judge
Court No. 22–00243
PUBLIC VERSION

[All eight of Commerce's denials are sustained. Judgment on the agency record will enter for Defendant.]

Dated: October 21, 2024

James M. Smith, Covington & Burling LLP, of Washington, D.C., argued for Plaintiff Seneca Foods Corporation. With him on the briefs were *Thomas Brugato*, *Kwan Woo (Kwan) Kim*, and *Edward J. Thomas III*.

Tara K. Hogan, Assistant Director, U.S. Department of Justice, Washington, D.C., argued for Defendant United States. With her on the briefs were *Brian M. Boynton*, Principal Deputy Assistant Attorney General and *Patricia M. McCarthy*, Director. Of Counsel on the brief were *Tristan De Vega*, Attorney, and *Kenneth Kessler*, Senior Counsel, Office of the Chief Counsel for Industry and Security, U.S. Department of Commerce, of Washington, D.C.

OPINION

Katzmann, Judge:

This case involves Commerce's discretion in evaluating requests for exclusion from Section 232 national security tariffs. Plaintiff Seneca Foods Corporation ("Seneca") is the nation's largest vegetable canner and the last food company in the U.S. that still makes its own cans. From 2020 to 2022, it faced one key impediment: Seneca struggled to find sufficient tin mill products ("TMP"), consisting of steel, in order to manufacture its cans. After trying and failing to source TMP domestically, Seneca placed import orders with foreign producers of TMP in 2021 and 2022. But foreign steel came at a higher cost. In 2018, the President imposed 25 percent tariffs on imports of specific steel articles from all countries except Canada and Mexico. *See Adjusting Imports of Steel into the United States*, Pres. Proc. No. 9705, 83 Fed. Reg. 11625 (Mar. 8, 2018). That tariff was imposed pursuant to the President's authority under Section 232 of the Trade Expansion Act of 1962, 19 U.S.C. § 1862.

In October 2021, January 2022, and March 2022, Seneca submitted eight requests to the U.S. Department of Commerce ("Commerce") for exclusion from the 25 percent tariff, arguing that TMP was not produced in the United States in a sufficient and reasonably available amount. Commerce denied all eight requests in April and July of

2022.[1] Seneca then initiated this action challenging Commerce's denials as arbitrary and capricious under the Administrative Procedure Act, 5 U.S.C. § 706(2). On October 18, 2023, the court remanded all eight denials to Commerce for further explanation and reconsideration. *See Seneca Foods Corp. v. United States* ("*Seneca I*"), 47 CIT__, __, 663 F. Supp. 3d 1325, 1331 (2023), ECF No. 50.

Commerce again denied all eight of Seneca's exclusion requests on remand. *See Remand Results* (Dep't Com. Apr. 1, 2024), ECF No. 58–2. Seneca now renews its claims against Defendant the United States ("the Government") and requests that the court "(i) declare that Commerce's denials were arbitrary and capricious or otherwise unlawful under the APA; (ii) declare that Seneca was entitled to the requested exclusions from Section 232 tariffs retroactive to the date of filing; [and] (iii) instruct Commerce to grant the denied exclusions." Pl.'s Cmts. on Remand Redetermination at 32, May 1, 2024, ECF No. 62 ("Pl.'s Cmts").

The court sustains the Remand Results. None of the eight renewed denials was arbitrary and capricious or otherwise unlawful under the APA. Judgment on the agency record will enter for the Government.

BACKGROUND

The court presumes familiarity with the history of this litigation. *See Seneca I*, 663 F. Supp. 3d at 1329–35. The essential facts and points of law are recounted here as relevant to the court's review of the Remand Results.

[1] Of the eight requests filed by Seneca:

- Five requests, filed in October 2021, were denied in April 2022. *See* Bureau of Indus. & Sec., Dep't of Com., *Steel Section 232 Remedy Exclusion Request, No. 257423* (Apr. 9, 2022), P.R. 1; Bureau of Indus. & Sec., Dep't of Com., *Steel Section 232 Remedy Exclusion Request, No. 257428* (Apr. 9, 2022), P.R. 50; Bureau of Indus. & Sec., Dep't of Com., *Steel Section 232 Remedy Exclusion Request, No. 257708* (Apr. 9, 2022), P.R. 100; Bureau of Indus. & Sec., Dep't of Com., *Steel Section 232 Remedy Exclusion Request, No. 257709* (Apr. 9, 2022), P.R. 149; Bureau of Indus. & Sec., Dep't of Com., *Steel Section 232 Remedy Exclusion Request, No. 257712* (Apr. 9, 2022), P.R. 198 (together, the "October 2021 Requests").
- One request, filed in January 2022, was denied in April 2022. Bureau of Indus. & Sec., Dep't of Com., *Steel Section 232 Remedy Exclusion Request, No. 275504* (Apr. 30, 2022), P.R. 247 (the "January 2022 Request").
- Two requests, filed in March 2022, were denied in July 2022. *See* Bureau of Indus. & Sec., Dep't of Com., *Steel Section 232 Remedy Exclusion Request, No. 283368* (July 9, 2022), P.R. 293; Bureau of Indus. & Sec., Dep't of Com., *Steel Section 232 Remedy Exclusion Request, No. 283369* (July 9, 2022), P.R. 342 (together, the "March 2022 Requests").

I. Legal Background

Section 232 of the Trade Expansion Act of 1962 empowers the President to impose tariffs on specific imported goods if the Secretary of Commerce determines that they are brought into the United States in "such quantities or under such circumstances as to threaten or impair the national security." 19 U.S.C. § 1862. Through Presidential Proclamation 9705, the President invoked Section 232 to impose a 25 percent tariff on certain steel articles imported into the United States from all countries except Canada and Mexico. *See Proclamation*, 83 Fed. Reg. 11625. The President also authorized Commerce to create and administer a process "to provide relief from the [tariffs] for any steel article determined not to be produced in the United States in a sufficient and reasonably available amount or of a satisfactory quality" or "upon specific national security considerations." *Id.* at 11627.

The relief process begins with the filing of an exclusion request by a "directly affected individual[] or organization[] located in the United States." 15 C.F.R. pt. 705, supp. 1(c)(1). The request must clearly identify and establish one of the two bases for exclusion: either (1) that the article "is not produced in the United States in a sufficient, reasonably available amount, and of a satisfactory quality," or (2) that "specific national security considerations" justify the article's exclusion. *Id.* pt. 705, supp. 1(c)(5)(i). Relevant here, an article "[n]ot produced in the United States in a sufficient and reasonably available amount" means that the article is not available "immediately" in the United States to meet the requester's specified business activities, with "immediately" defined as eight weeks or, if not possible, a date earlier than the time required for the requester to obtain the entire quantity of the product from the requester's foreign supplier. *Id.* pt. 705, supp. 1(c)(6)(i).

Following the exclusion request, a domestic steel producer may file an objection that refutes "the specific basis identified in, and the support provided for, the submitted exclusion request." *Id.* pt. 705, supp. 1(d)(4). In its objection, the domestic steel producer must "identify how it will be able to produce and deliver the quantity of steel . . . needed" as part of its obligation to "clearly identify, and provide support for, its opposition to the proposed exclusion." *Id.* pt. 705, supp. 1(d)(4). The "burden is on that supplier to demonstrate that the exclusion should be denied because of failure to meet the specified criteria." *Submissions of Exclusion Requests and Objections to Submitted Requests for Steel and Aluminum*, 83 Fed. Reg. 46026, 46029 (Dep't Com. Sept. 11, 2018). The requester and objector may file a rebuttal and surrebuttal, respectively. 15 C.F.R. pt. 705, supp.

1(f)–(g). It is further "incumbent on both the exclusion requester, and objecting producers, to provide supplemental evidence supporting their claimed delivery times." *Id.* pt. 705, supp. 1(d)(4). Such additional evidence may include confidential or proprietary business information ("CBI"). 15 C.F.R. pt. 705, supp. 1(b)(5)(iii). All filings in the process— from the exclusion request to the surrebuttal—are submitted via online forms made available through Commerce's "232 Exclusions Portal." *Id.* pt. 705, supp. 1(d)–(h). Each online form requires the filer to certify that the information submitted is "complete and correct to the best of [the filer's] knowledge." *See* P.R. 17–18, 29, 35, 47.[2]

Commerce's Bureau of Industry and Security ("BIS") then evaluates all filings to determine whether the steel article meets one of the two bases for exclusion. To determine whether the potentially excluded steel article is produced in the United States in a sufficient and reasonably available amount or of a satisfactory quality, BIS solicits a memorandum from the International Trade Administration ("ITA") that presents factual findings and recommends granting or denying the exclusion request in full or in part. *See* P.R. 1. BIS then issues a determination with an explanation that is "responsive to any of the objection(s), rebuttal(s) and surrebuttal(s) for that submitted exclusion request." 15 C.F.R. pt. 705, supp. 1(h)(2)(i). BIS may accept and adopt the ITA's recommended findings if BIS finds that there are no overriding national security concerns that compel a grant of the exclusion request. *See* P.R. 1.

If the objector thereafter refuses to fulfill the requester's orders of the steel article in a sufficient and reasonably available amount or in a satisfactory quality, "the requester may submit a new request with documentation evidencing this refusal." *Section 232 Steel and Aluminum Tariff Exclusions Process: Interim Final Rule*, 85 Fed. Reg. 81060, 81065 (Dep't Com. Dec. 14, 2020) ("*Interim Final Rule*"). That new exclusion request restarts the entire process described above. If the objector continues to contest the new exclusion request, Commerce allows "the exclusion requester to document in the rebuttal the past activity with that objector." *Id.*

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[2] P.R. refers to the Public Record, which contains the eight public administrative records relevant to this case. *See* Pub. Admin. R., December 2, 2022, ECF No. 25. C.R. refers to the Confidential Record, which includes both public and business proprietary information ("BPI") submitted by the parties in the course of the agency proceedings. *See* Confidential Admin. R., Dec. 2, 2022, ECF No. 24.

Seneca has also made public certain information that it had treated as business proprietary given the "passage of time." Pl.'s Resps. to Letter at 4 n.1, July 7, 2023, ECF No. 45. Citations to this now-public information, which does not appear in the Public Record as filed, will refer to the Confidential Record.

Finally, "[c]ompanies are able to receive retroactive relief on granted requests dating back to the date of the request's submission on unliquidated entries." 15 C.F.R. pt. 705 supp. 1(h)(2)(iii)(A). That means that once Commerce grants an exclusion, a requester can obtain relief from U.S. Customs and Border Protection dating back to the submission date for "unliquidated entries and for entries that are liquidated but where the liquidation is not final and the protest period has not expired." *AM/NS Calvert LLC v. United States*, 47 CIT __, __, 654 F. Supp. 3d 1324, 1335 (2023) (quoting Cargo Systems Messaging Service, CSMS #42566154, Section 232 and Section 301—Extensions Requests, PSCs, and Protests (CBP May 1, 2020)).

II. Factual Background

As mentioned above, Plaintiff Seneca is the largest vegetable canner in the United States and the only U.S. food company that continues to manufacture its own cans. *Seneca I*, 663 F. Supp. 3d at 1331. Before 2014, Seneca had relied entirely on domestic producers of tin mill products to manufacture its cans. *Id.* But in 2014, Seneca began to source tin mill products from foreign countries, citing increasing supply shortfalls from the few U.S. suppliers with fully integrated operations. *Id.*

In October 2021, January 2022, and March 2022, Seneca filed with Commerce a total of eight requests for the exclusion of certain steel articles from tariffs imposed under Section 232 of the Trade Expansion Act of 1962. *Seneca I*, 663 F. Supp. 3d at 1328, 1331. Seneca's requests sought exemptions for imported tin-free steel ("TFS") from Japan and China and prime electrolytic tinplate ("ETP") from China and Turkey. *Id.* at 1331. Domestic steel producer U.S. Steel Corporation ("USS") objected to all eight requests, and Seneca and USS proceeded to file rebuttals, surrebuttals, and additional evidence as relevant to each request. *Id.* at 1331–32. As part of its rebuttal materials, and as relevant to each request, Seneca placed on the various administrative records three emails or email chains intended to show the course of dealing between Seneca and USS: (1) one from November 2020, *see* P.R. 41, (2) another from November 2021, *see* C.R. 43–44, and (3) a third from February 2022 to April 2022, *see* C.R. 338–42. As part of its surrebuttal materials, USS placed on the record BPI reflecting an estimate of how long it would take to produce the steel in each of Seneca's requests. *See* C.R. 49–50.

Commerce initially denied Seneca's six exclusion requests submitted in October 2021 and January 2022, finding that USS was able to deliver steel products meeting Seneca's quantity, quality, and timeli-

ness standards. *Seneca I*, 663 F. Supp. 3d at 1334. Commerce also denied Seneca's final two March 2022 Requests, but in the underlying ITA memoranda declined to issue a complete analysis of the quantity, quality, and timeliness criteria. *Id.* at 1334–35.

On August 19, 2022, Seneca challenged Commerce's denials in a timely action before the U.S. Court of International Trade ("USCIT"). Compl. at 1, Aug. 9, 2022, ECF No. 6. Seneca complained that Commerce's denials of the October 2021 and January 2022 Requests were arbitrary and capricious under the APA, arguing that Commerce "(1) failed to meaningfully consider relevant factors when making its determinations, (2) failed to follow its own published interpretation of its regulations that evidence of past unavailability is relevant to the resolution of new exclusion requests, (3) failed to adequately explain the basis for its determinations, and (4) failed to meaningfully consider the evidence before it." *Id.* at 31–32. Seneca also claimed that Commerce's denials of the March 2022 Requests were arbitrary and capricious on account of Commerce's inadequate explanation of the bases for its decisions, which amounted to inconsistent treatment of these requests as compared to Seneca's prior requests. *Id.* at 32–33. USS filed a motion to intervene in the case, which the court denied. *See Seneca Foods Corp. v. United States*, 46 CIT __, __, 607 F. Supp. 3d 1295, 1301 (2022).

On October 18, 2023, the court issued an opinion concluding that Commerce's denials of Seneca's October 2021 and January 2022 Requests were arbitrary and capricious under the APA. *Seneca I*, 663 F. Supp. 3d 1325. The court stated that "the denials of the October 2021 Requests and of the February 2022 Requests were both too threadbare in addressing whether USS would be able to meet 100 percent of Seneca's demand, and Commerce's reasoning for crediting USS's statements was not otherwise reasonably discernible." *Id.* at 1336. As for Commerce's denials of the March 2022 Requests, the Government requested a voluntary remand, which Seneca did not oppose. *Id.* at 1342. The court granted that request without reaching the merits. *Id.* The court accordingly remanded all eight denials for Commerce's reconsideration or further explanation. *Id.* at 1340–42.

Commerce filed the *Remand Results* on April 1, 2024. On remand, Commerce reviewed Seneca's eight exclusion requests anew and denied each one for the second time. For the October 2021 Requests, Commerce concluded that USS had satisfied the availability criteria based on its representations of capacity to meet Seneca's demand quicker than the import delivery timeframe required by Seneca's foreign supplier. *Id.* at 3–7. Interpreting the November 2021 emails as referring to contractual sales only, Commerce determined that the

email evidence did not foreclose the availability of spot sales and thus did not contradict USS's certification that it could timely produce Seneca's requested product volume. *Id.* at 5, 7. Commerce also excluded the November 2020 email from its analysis. The agency reasoned that the November 2020 email fell outside of the 90-day sales correspondence window typically considered by the agency, referenced a period of time long before the request was filed, and was too vaguely worded to conclusively refer to the steel products at issue. *Id.* at 2. For the January 2022 and March 2022 Requests, Commerce again credited USS's certifications. The agency concluded that the November 2021 emails, while purportedly showing unavailability in February 2022, did not show unavailability by USS's averred delivery date. *See id.* at 8–10. Commerce also considered but declined to weigh the February 2022–April 2022 emails, which were deemed irrelevant because they were dated four months after Seneca placed its purchase order with the foreign supplier. *Id.* at 10–11. The chart below summarizes Seneca's exclusion requests and the evidence submitted in support of each.

Table 1: Summary of Evidence Submitted for Each Exclusion Request

Shorthand	Request Number(s)	Import Delivery Timeframe Considered by Commerce	Emails Submitted as Support for Seneca's Request	Emails That Commerce Considered
October 2021 Requests	257423; 257428	April 9, 2022 (170 days)	November 2020 email; November 2021 emails	November 2021 emails
October 2021 Requests	257708; 257709; 257712	October 16, 2022 (360 days)	November 2020 email; November 2021 emails	November 2021 emails
January 2022 Requests	275504	January 18, 2023 (360 days)	November 2021 emails	November 2021 emails
March 2022 Requests	283368; 283369	March 10, 2023 (360 days)	November 2021 emails; February –April 2022 emails	November 2021 emails; February–April 2022 emails

Commerce also separately addressed two issues intertwined with all of the requests. First, Commerce stated that "[a]side from addressing the specific arguments in this case, Commerce does not otherwise consider spot sales versus contract sales in its analysis for whether the objector can meet the timeliness or quantity criteria." *Id.* at 11. Second, Commerce explained that it "does not generally give considerable weight to the evidence of history or interactions of requestors and objectors in its analysis unless it is clearly related to a denial of a prior request for the same product, or clearly indicative of the parties' future dealings." *Id.* at 12. And because there may be other, non-capacity reasons why companies would turn down an opportunity to supply steel, certain prior circumstances do not necessarily

"impact a company's ability to produce and supply a product domestically for any company or the same company in the future. Commerce therefore finds it irrelevant that U.S. Steel has not sold to Seneca for more than two years." *Id.*

III. Procedural History

Seneca filed its complaint on August 19, 2022. *See* Compl. The court issued its decision with respect to Commerce's initial denials on October 18, 2023. *See Seneca I*, 663 F. Supp. 3d. Pursuant to the court's order, Commerce filed a remand redetermination on April 1, 2024. *See* ECF No. 58. On May 1, 2024, Seneca filed its comments on Commerce's redetermination, to which Commerce filed a response on June 14, 2024. *See* Pl.'s Cmts.; Def.'s Resp., June 14, 2024, ECF No. 66.

The court issued questions in advance of oral argument, *see* Letter re: Qs. for Oral Arg., July 5, 2024, ECF No. 70, to which the parties filed responses, *see* Def.'s Resp. to OAQs, Jul. 18, 2024, ECF No. 71; Pl.'s Resp. to OAQs, Jul. 18, 2024, ECF No. 72. The court also issued supplemental questions for the parties' consideration at oral argument, which was held on June 22, 2024. *See* Letter re: Supp. Qs. For Oral Arg., Jul. 22, 2024, ECF No. 74. The court invited the parties to file post-oral argument submissions by July 29, 2024, *see* Oral Arg., July 22, 2024, ECF No. 75, and both parties made such submissions. *See* Pl.'s Post-Arg. Subm., July 29, 2024, ECF No. 80; Def.'s Post-Arg. Subm., July 29, 2024, ECF No. 79.

JURISDICTION AND STANDARD OF REVIEW

Jurisdiction lies under 28 U.S.C. § 1581(i), which defines the USCIT's residual jurisdiction over civil actions arising under federal laws providing for "tariffs, duties, fees, or other taxes on the importation of merchandise for reasons other than the raising of revenue." 28 U.S.C. § 1581(i)(1)(B).[3] In § 1581(i) cases, the court applies the standard of review set forth by the APA and will "hold unlawful and set aside [agency] action, findings, and conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," *Canadian Lumber Trade All. v. United States*, 517 F.3d 1319, 1331 (Fed. Cir. 2008) (citing 5 U.S.C. § 706(2)), which includes compliance with the court's remand order, *see SMA Surfaces, Inc. v. United States*, 47 CIT __, __, 658 F. Supp. 3d 1325, 1328 (2023).

[3] In *Seneca I*, the court stated that jurisdiction existed under § 1581(i)(2). The citation to that subsection, which defines limitations on the USCIT's residual jurisdiction, is a typographical error. The proper citation is to § 1581(i)(1).

Agencies are required to have "engaged in reasoned decisionmaking." *Judulang v. Holder*, 565 U.S. 42, 53 (2011). They must "examine the relevant data" and "articulate a satisfactory explanation" for their ultimate decisions. *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). And those decisions must be supported by a "rational connection between the facts found and the choice made." *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962). But when agency action has "relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise," it is arbitrary and capricious under the APA. *State Farm*, 463 U.S. at 43; *see also* 5 U.S.C. § 706(2). The court's review of agency action is "narrow" and does not "substitute [the court's] judgment for that of the agency." *State Farm*, 463 U.S. at 43.

DISCUSSION

Seneca argues that Commerce's renewed denials of Seneca's requests are arbitrary and capricious for (1) disregarding or failing to address record evidence of USS's inability to supply steel, (2) acting contrary to Commerce's regulations and prior practice, and (3) failing to consider course-of-dealing evidence in evaluating Section 232 exclusion requests. *See* Pl.'s Cmts. at 1–3.

None of these contentions prevails. Commerce's renewed denials rely on an improved, discernable path detailing the agency's consideration of the record evidence. The reasoned explanation on this record satisfies Commerce's APA obligations.[4] Commerce's eight denials in the Remand Results are sustained.

I. Commerce's Denials Were Supported by Record Evidence

Seneca first argues that Commerce improperly disregarded record evidence in making its determinations. Seneca's case for the unavailability of steel from USS rests largely on three emails, which, according to Seneca, compelled Commerce to have granted all eight exclusion requests:

[4] Seneca does not challenge the reasonableness of Commerce's "entire system" governing exclusion requests as applied to all requesters and limits its arguments to the records presented in this case. *See* Pl.'s OAQ Resp. at 6.

- An email on November 13, 2020, sent internally within Seneca, stating: "[USS is] not offering anything now at any price. They say if they have available production in any month, they will contact us and see if we have interest. They just don't want to commit to anything right now." P.R. 41.
- Emails on November 29, 2021 between Seneca and USS. The subject is "2022 STEEL AVAILABILITY." Seneca first states: "When we talked a couple months ago, you advised USS has no tinplate or TFS to offer us for 2022. You did say that if your production efficiencies are good, some availability may free up later in the year. I understood that was kind of a long shot. Has anything changed on the availability of ETP or TFS?" USS responds: "Right now for Feb I don't have anything as of yet, if that changes I'll let you know." C.R. 43.
- An email chain from February 2022 to April 2022 between Seneca and USS. In this exchange, Seneca requests a large order (3,000 tons) of a particular steel product. USS offers a small fraction [[ ]] of Seneca's requested quantity. USS's initial timing is for [[ ]], but due to delayed responses as well as USS's shifts in timing, the parties appear to settle on a [[ ]] timeline. C.R. 340–42.

The court leaves Commerce's interpretation and treatment of these emails undisturbed.

To reach its determinations, Commerce is permitted to rely on parties' factual statements to determine their ability to meet their obligations as long as that reliance constitutes "reasoned decision-making." *Judulang*, 565 U.S. at 53; *see also State Farm*, 463 U.S. at 43; 5 U.S.C. § 706(2). "It is the [agency's] task to evaluate the evidence it collects . . . Certain decisions, such as the weight to be assigned a particular piece of evidence, lie at the core of that evaluative process." *U.S.* Steel Grp. v. United States, 96 F.3d 1352, 1357 (Fed. Cir. 1996). And "the burden of creating an adequate record lies with [the interested parties] and not with Commerce." *QVD Food Co. v. United States*, 658 F.3d 1318, 1324 (Fed. Cir. 2011).

In each of its objections to Seneca's exclusion requests, USS certified that it would be able to meet 100 percent of requested demand. *See* P.R. 28, 78, 127, 176, 225, 274, 325, 370. The problem with Commerce's denials in *Seneca I*, the court explained, was not that the

agency accepted USS's representations but rather that it failed to make apparent its rationale for crediting USS's representations despite Seneca's email submissions. *See* 663 F. Supp. 3d at 1338–39. Commerce was directed to "articulate on remand—and potentially reconsider—why it credits USS's statements about spot sale capacity in light of Seneca's representations and email evidence." *Id.* at 1339. Commerce has done so on remand.

First, Commerce decided not to give any weight to the November 2020 email because it was too dated to be probative of USS's steel availability in October 2021. That decision was reasonable. One criterion for Commerce's consideration of exclusion requests is whether the "the amount that is needed by the [requester] is not available *immediately* in the United States to meet its specified business activities." 15 C.F.R. pt. 705 supp. 1(c)(6)(i) (emphasis added).[5] The email was dated eleven months before the exclusion request and stated that USS did not have capacity "right now." The agency then referenced "the ever-changing nature of steel and aluminum production schedules and industry" as reason to doubt that an eleven-month-old email accurately represented USS's production capabilities. *Remand Results* at 2. The November 2020 email therefore did not compel the agency to conclude that USS could not have supplied all of Seneca's steel needs in October 2021.

Commerce next concluded that the November 2021 emails were not probative of USS's ability to supply steel to Seneca via spot sales. Commerce based its interpretation of the November 2021 emails on two other portions of record evidence. First, USS certified in the records of all five October 2021 Requests that USS was offering "spot sales—not contract sales—for 2022," that Seneca's rebuttal focused only "on contract volumes and failed to mention that [USS] has recently offered [Seneca] spot sale volumes," and that "Seneca ha[d] not pursued this option." P.R. 46–47. In the record for the January 2022 Request, USS similarly stated that it could supply spot shipments beyond the quantity requested by Seneca. C.R. 297. Second, other statements by Seneca support Commerce's interpretation that its prior interactions with USS were focused on contract volume rather than spot volume:

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[5] As explained above, *see supra* Introduction part I, the term "immediately" refers to the longer of (i) eight weeks or (ii) the time required for the requester to obtain the entire quantity of identical product from a foreign supplier, running from the date of the exclusion request. *Id.*

- "If USS is able to contract for 2022 volumes, it will mark a significant departure from recent years, as the last time that USS agreed to supply contracted volumes was for deliveries in 2018." P.R. 37.
- "Unfortunately, all indications received thus far suggest that USS will not supply Seneca with any contracted volume for next year. Like last year, Seneca a few days ago engaged USS for volumes to be delivered in 2022, but USS offered nothing." P.R. 37–38.
- "Unfortunately, in our experience, Seneca cannot look to USS as a dependable source of steel supply. No contract volumes have been made available to Seneca by USS since our orders for deliveries during 2018." P.R. 38.

These references to the record suffice to establish "a rational connection between the agency's factfindings" that Seneca's email does not undermine USS's certification of spot availability and the agency's ultimate action of denying the exclusion requests. *In re Gartside*, 203 F.3d 1305, 1312 (Fed. Cir. 2000).

Commerce's interpretation is lawful. To the extent that Seneca asks the court to credit its version of events, the court is not compelled to do so here. It is true that the November 2021 emails make no mention of spot or contract sales. *See* C.R. 43. And as the court has previously noted, Seneca repeatedly complained of the lack of any additional volume, not just the lack of contractual volume. *See Seneca I*, 663 F. Supp. 3d at 1337 (citing P.R. 20–22, 33–34, 36–37). But in judicial review of agency action, the court may not reweigh the evidence before the agency or substitute the agency's reasoned decisionmaking with its own. *See Nippon Steel Corp. v. Int'l Trade Comm'n*, 345 F.3d 1379, 1381–82 (Fed. Cir. 2003); *In re Section 301 Cases*, 47 CIT __, __, 628 F. Supp. 3d 1235, 1248 (2023). Because Commerce's determination is rational and adequately supported, it must be sustained, even though it might be possible to draw "two inconsistent conclusions from the evidence." *Corephotonics, Ltd. v. Apple Inc.*, 84 F.4th 990,

1001 (Fed. Cir. 2023) (quoting *Consolo v. Fed. Mar. Comm'n*, 383 U.S. 607, 620 (1966)).[6,7]

Finally, Commerce determined that the February 2022–April 2022 emails were not relevant to the March 2022 Requests because the emails were dated four months after Seneca had placed its orders from foreign suppliers. That also passes muster. In the March 2022 Requests, Commerce was tasked with determining whether USS would have been able to supply the requested quantities of TFS and ETP within the timeframe needed by Seneca's Chinese and Turkish suppliers. *See Remand Results* at 10. It is true that Seneca's initial email expresses broad interest in a variety of steel products and that it shows the difficulty of placing a particular order with USS on a short timeframe. But the email chain simply does not pertain to the particular orders that later went fulfilled by foreign suppliers. So it is far from definitive that the email establishes either that USS had no steel products available[8] or that USS was unable to timely produce

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[6] While this language usually describes the substantial evidence standard, "in their application to the requirement of factual support the substantial evidence test and the arbitrary or capricious test are one and the same." *United Steel v. Pension Ben. Guar. Corp.*, 707 F.3d 319, 325 (D.C. Cir. 2013) (quoting *Ass'n of Data Processing Serv. Orgs., Inc. v. Bd. of Governors of the Fed. Reserve Sys.*, 745 F.2d 677, 683 (D.C. Cir. 1984)).

[7] As mentioned above, Commerce stated that "[a]side from addressing the specific arguments in this case, Commerce does not otherwise consider spot sales versus contract sales in its analysis for whether the objector can meet the timeliness or quantity criteria." *Remand Redetermination* at 11. Seneca takes issue with that analysis, contending that "Commerce later contradicts itself by claiming that the distinction between contract sales and spot sales is irrelevant to its analysis and that it affords no substantive weight to a distinction that its own analysis introduces." Pl.'s Cmts. at 18.

That argument misreads Commerce's point. All that Commerce makes clear is that its ultimate goal is to determine whether USS can produce the steel articles at all, whether by spot or contract. *See Remand Redetermination* at 11. Exclusion is warranted if an item "is *not produced* in the United States in a sufficient, reasonably available amount . . . ." 15 C.F.R. pt. 705, supp. 1(c)(5)(i) (emphasis added). This condition does not appear, on its face, to permit exclusion merely on account of a buyer's preference for contact sales over spot sales.

The terms of sale can still be relevant to the core availability inquiry if there is evidence suggesting that they are relevant to the domestic producer's ability to produce steel. Here, the spot-versus-contract distinction was relevant because the parties disputed whether the November 2021 emails showed USS's inability to supply any steel (regardless of spot or contract) or just some steel (conditional on contract). And resolving that factual dispute was clearly relevant to the broader inquiry of whether USS can produce steel, whether by spot or contract.

[8] Seneca maintains that this email chain was about "*any and all* products." Pl.'s Cmts. at 14. That interpretation is not persuasive, let alone compelled by the record evidence: Seneca's Vice President for Strategic Sourcing states that Seneca would "be interested in about any spec" that can be offered. He then follows up with a particular spec, "116RS," and tonnage, "3,000 tons," [[

]] C.R. 341.

the quantity requested by Seneca in that email chain.[9] The agency was not required to reach that speculative conclusion.

Commerce reasonably relied on USS's certifications, and none of Seneca's attached emails compelled Commerce to conclude otherwise. In *Seneca I*, Commerce erred by failing to address countervailing evidence and only cursorily acknowledging the seemingly supportive emails. Its reasoned decisionmaking has now been made clear on remand. Ultimately, and as noted above, "the burden of creating an adequate record lies with [the interested parties] and not with Commerce." *QVD Food*, 658 F.3d at 1324. USS bore a burden to "identify how it will be able to produce and deliver the quantity of steel . . . needed" as part of its obligation to "clearly identify, and provide support for, its opposition to the proposed exclusion." 15 C.F.R. pt. 705, supp. 1(d)(4). But Seneca also bore a burden to establish that the steel article was "not produced in the United States in a sufficient, reasonably available amount, and of a satisfactory quality." *Id.* pt. 705, supp. 1(c)(5)(i). Seneca's eight requests hinge collectively on three short email chains, each suffering from various deficiencies as to relevance. Commerce weighed what the parties submitted to it. Lacking additional evidence, Seneca "simply ask[s] too much of the court to wade into fact finding on a sparse record." *SMA Surfaces, Inc. v. United States*, 47 CIT __, __, 617 F. Supp. 3d 1263, 1279 (2023) (internal quotation marks and citation omitted). The court therefore affirms the factual sufficiency of Commerce's denials of all eight exclusion requests.

II. Commerce's Denials Did Not Contravene Regulations and Prior Practice

Seneca next argues that Commerce's denials of Seneca's requests are arbitrary and capricious because aspects of the decisionmaking underlying the denials departed from the agency's own regulations and prior practice. *See* Pl.'s Cmts. at 19. Commerce generally may not "appl[y] different standards" to "similarly situated" entities without "a reasoned explanation and substantial evidence." *Euzebio v. McDonough*, 989 F.3d 1305, 1322 (Fed. Cir. 2021) (internal quotation marks and citation omitted). And "though past agency decisionmaking may not be precedential in the same way as case law through stare decisis, it remains of great importance . . . nearly seventy years of Supreme Court and Federal Circuit precedent recognize an agency's duty to address departure from prior norms and policies." *DAK Ams. LLC v. United States*, 44 CIT __, __, 456 F. Supp. 3d 1340,

[9] [[

]]

1355–56 (2020) (citations and footnote omitted), *aff'd*, 829 F. App'x 529 (Fed. Cir. 2020). Here, though, none of Seneca's three identified bases for this asserted agency practice–related error is availing.

Seneca first cites three unrelated denials by Commerce of steel exclusion requests under Section 232 as evidence of a past agency practice that Commerce has contravened here. Those three requests were filed on July 29, 2022, by the same requester, Borusan Mannesmann Pipe U.S. Inc. ("Borusan"), in relation to varying steel products and quantities. See ECF No. 62, at 68–85.[10] In those requests, objector Zekelman Industries ("Zekelman") certified that it could supply 100 percent of Borusan's requested volume. Borusan attached email correspondence between itself and Zekelman from May 2022. Commerce reasoned, in relation to all three requests, that Zekelman's showing was insufficient:

> Zekelman's response indicated it does not currently have the capacity to provide the requested product. SME analysis confirms the requested product and the product detailed in the emails provided by Borusan match. The email evidence provided by Borusan contradicts Zekelman's claim that it can provide the requested quantity. As such, Zekelman does not meet the quantity criterion.

ECF No. 62, at 70, 76, 82.[11]

Commerce's reasoning as to Zekelman's objections to the three Borusan requests does not control the outcome here. Seneca has not shown how the Zekelman-specific reasoning Borusan denials, which relied on the same piece of evidence and functionally operate as a single instance of Commerce's practice, are evidence of an established agency practice that Commerce has contravened here. *See In re Section 301 Cases*, 570 F. Supp. 3d at 1347 (defining an "agency practice" from which unexplained deviation is unlawful as "the existence of 'a uniform and established procedure . . . that would lead a party, in the absence of notification of a change, reasonably to expect adherence to the established practice or procedure.'" (quoting *Ranchers– Cattlemen Action Legal Found. v. United States*, 23 CIT 861, 884–85, 74 F. Supp.

[10] *See also* Request No. 312626, *U.S. Dep't of Com.*, https://232app.azurewebsites.net/Forms/ ExclusionRequestItem/312626 (last visited Oct. 16, 2024); Request No. 312627, *U.S. Dep't of Com.*, https://232app.azurewebsites.net/Forms/ExclusionRequestItem/312627 (last visited Oct. 16, 2024); Request No. 312628, *U.S. Dep't of Com.*, https://232app.azurewebsites.net/Forms/ExclusionRequestItem/312628 (last visited Oct. 16, 2024).

[11] Commerce nevertheless denied each of Borusan's exclusion requests because it found that "at least one objector" besides Zekelman "meets the quality, quantity, and timeliness criteria." *Id.* at 68, 74, 80.

2d 1353, 1374 (1999))). The Zekelman-specific reasoning in the Borusan denials is better understood as evidence of Commerce's "exercise of discretion on a case-by-case and fact-specific basis." *Id.* (internal quotation marks and citation omitted). Commerce exercised its discretion there and here on a fact-specific basis, and the Borusan requests are not similar enough to suggest error in this case.[12]

Second, Seneca argues that when Commerce evaluates timeliness, the proper starting point should be the dates on which Seneca placed the purchase orders with the foreign suppliers rather than the dates of the exclusion requests. *See* Pl.'s Cmts. at 24. Questions involving the timing of administrative proceedings "generally implicate Commerce's procedural, not policymaking, discretion." *Goodluck India Ltd. v. United States*, 43 CIT __, __, 670 F. Supp. 3d 1353, 1371 (2023). The court's limited task in such a circumstance is to review whether Commerce abused that discretion. *See Stupp Corp. v. United States*, 5 F.4th 1341, 1349 (Fed. Cir. 2021). But Seneca cites no regulation, agency practice, or other authority to suggest that Commerce's choice of a starting date is an abuse of discretion. As the Government explains, some requesters are like Seneca and submit their exclusion requests after purchase orders with foreign suppliers, and other requesters file the exclusion request first. Commerce's choice of setting the starting point at the filing date keeps the timeliness inquiry consistent across all scenarios. *See* Def.'s Resp. at 16. Seneca's choice of starting point may be reasonable, but so is Commerce's. Under arbitrary-and-capricious review, Commerce's approach is lawful.

Third, Seneca contends that Commerce erred in its calculation of timeliness by double counting the shipping time in its equation. *See* Pl.'s Cmts. at 25. In its form, Commerce collects information from requesters in two fields:

> 2.d. Estimate the number of days required to take delivery of the product covered by this Exclusion Request, from the time the purchase order is issued by your organization[.]

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[12] Regarding the January 2022 Request, Seneca relatedly argues that Commerce should have evaluated the timeliness and quantity criteria separately when reviewing the attached November 2021 email as opposed to reviewing the email for only the timeliness prong. *See* Pl.'s Cmts. at 23.

It is unclear why that distinction matters here. Commerce must find that both the timeliness and quantity promised by an objector are insufficient to the foreign alternative. So failure of either means failure of the whole exclusion request. The timeliness and quantity inquiries are two sides of the same "sufficient and reasonably available amount" criterion, which is defined to mean "that the amount that is needed by the end user requesting the exclusion is not available immediately in the United States to meet its specified business activities." 15 C.F.R. pt. 705 supp. 1(c)(6)(i).

> 2.f. Estimate the number of days required to ship the product covered under this Exclusion Request, from the foreign port of departure to the Exclusion Requester's loading dock[.]

P.R. 6. Commerce then "determines the Requestor's import delivery time by adding the numbers in 2[.]d and 2[.]f of the exclusion request form, plus any appropriate adjustments based on evidence provided in any submitted documentation." *Id.* Seneca contends that adding those two values double-counts the time of shipping from a foreign port to the requester's loading dock if the terms of purchase include the seller's delivery to the buyer under CIF or DDP shipping terms.[13] *See* Pl.'s Resp. to OAQs at 9–10. If the requester "take[s] delivery" in the United States, then adding 2.d and 2.f would indeed double-count the shipping time. USS also appeared to acknowledge as much when it certified to Commerce that it could deliver Seneca's requested steel within Seneca's 2.d estimate, rather than the sum of Seneca's 2.d and 2.f estimates. *See* P.R. 28, 78, 127, 176, 225, 274, 321, 370. Defendant states that its method is "standardized" and notes that the requester may use the narrative portions of the form to provide information about shipping times. Def.'s Post-Arg. Subm. at 2.

As an initial matter, Seneca has forfeited this issue. Commerce's formula was made apparent in its initial set of denials, *see, e.g.*, P.R. 5 (reciting the formula and stating that Seneca reports 170 days for import delivery time). But Seneca did not raise it in the Complaint or in the first round of USCIT briefing. *See Dorbest Ltd. v. United States*, 604 F.3d 1363, 1375–77 (Fed. Cir. 2010).

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[13] CIF, or "cost, insurance, and freight," is "[a] mercantile-contract term allocating the rights and duties of the buyer and the seller of goods with respect to delivery, payment, and risk of loss, whereby the seller must (1) clear the goods for export, (2) arrange for transportation by water, (3) procure insurance against the buyer's risk of damage during carriage, and (4) pay the costs of shipping to the port of destination." *Cost, Insurance, and Freight*, Black's Law Dictionary (12th ed. 2024).

DDP, or "delivered duty paid," is "[a] mercantile-contract term allocating the rights and duties of the buyer and the seller of goods with respect to delivery, payment, and risk of loss, whereby the seller must (1) clear the goods for export, (2) bear the costs of carriage, (3) pay the buyer's import duties, and (4) make the goods available to the buyer on board the carrier at the destination." *Delivered Duty Paid*, Black's Law Dictionary (12th ed. 2024).

Even assuming Seneca's preservation of its assertion of error, and assuming further that Commerce's erred in double-counting,[14] such error would be harmless here. The APA requires that "due account shall be taken of the rule of prejudicial error." 5 U.S.C. § 706; *see also Intercargo Ins. Co. v. United States*, 83 F.3d 391, 394 (Fed. Cir. 1996) ("It is well settled that principles of harmless error apply to the review of agency proceedings."). On these particular facts, Commerce's analysis in the *Remand Results* would have remained unaffected whether Seneca's foreign supplier time was estimated at 120 (for TFS) and 270 (for ETP) versus 170 (for TFS) and 360 (for ETP). Commerce credited USS's certified statements, which relied exclusively on the more conservative estimates in stating that USS could timely produce Seneca's requested product. And insofar as Commerce's analysis in the *Remand Results* hinged on timeliness instead of quantity, it was Seneca's emails, and their relative timing to the filing dates, that were problematic. The differential on the backend of USS's allotted timeframe was not dispositive.

Fourth, Seneca argues that Commerce departed from its regulations by concluding on remand that it "does not generally give considerable weight to the evidence of history or interactions of requestors and objectors in its analysis unless it is clearly related to a denial of a prior request for the same product, or clearly indicative of the parties' future dealings." *Remand Results* at 12. Seneca states that this reasoning contradicts Commerce's statements that the "rebuttal process allows the exclusion requester to document in the rebuttal the past activity with the objector." *Interim Final Rule*, 85 Fed. Reg. at 81065. But Seneca's quotation is selective; the two sets of statements are easily reconcilable.

In the interim final rule Commerce expressly acknowledged Seneca's concern, shared with at least one commenter on the rule, that the current process "could lead to the negation of exclusion requests in situations where one company files an objection that claims that it in theory could make that product in sufficient quantity or quality."

[14] The Government appears to suggest that the use of formula which adds 2.d and 2.f, "plus any appropriate adjustments based on evidence provided in any submitted documentation," creates a default rule whereby Commerce assumes that requesters take delivery outside the United States unless there exists some positive indication to the contrary. In theory, that would push the burden of rebutting that assumption onto requesters, and Commerce would issue the "appropriate adjustment[]" by excluding 2.f upon a sufficient showing.

That system would possibly be permissible if it ensured the provision of some notice to requesters that the 2.d and 2.f values would be added. But Commerce's formula does not appear in the rules on the steel exclusion request process. *See* 15 C.F.R. pt. 705 supp. 1. Instead, Commerce publishes notice of its formula in the final ITA memorandum recommending the grant or denial of the exclusion request. By that point, the exclusion request has been decided and any notice to a requester is provided too late.

Id. The agency's solution to that issue is outlined below:

> (1) The requester files an initial exclusion request, and an objector is allowed to object with a certification that it can supply the requested steel articles.
>
> (2) Commerce decides the initial exclusion request. Of course, in so doing, it can grant the request on the basis that the objector's certification is unwarranted.
>
> (3) But if the first exclusion request is denied because the agency reasonably credits the objector's certification, then the requester should place an order with the objector. That way, "the exclusion requester will be able to determine definitively whether an objector is in fact able" to supply the steel article. *Id.* at 81065.
>
> (4) If the objector cannot supply the steel article, the requester can file a new exclusion request for the same steel article. "If the same objector objects to the new exclusion request, the rebuttal process allows the exclusion requester to document in the rebuttal the past activity with that objector." *Id.* at 81066.

Here, Commerce stated that it generally did not weigh course-of-dealing evidence "unless it is clearly related to a denial of a prior request for the same product," which is relevant to step 4 of the process outlined above, or "clearly indicative of the parties' future dealings," which is relevant to determining the veracity of the objector's prospective certifications in steps 2 and 4. *Remand Results* at 12. Commerce, then, did not unlawfully contradict a prior statement in articulating its course-of-dealing practice in the *Remand Results*.[15]

Fifth, and somewhat relatedly, Seneca suggests that these exclusion requests are at step 4 rather than step 2. *See* Pl.'s Cmts. at 27–28. Seneca points to a set of exclusion requests for prime ETP that it filed in 2018, to which USS objected and which Commerce denied. *See* ECF No. 62, at 91–92. But Seneca never mentioned the 2018 requests on the agency record; nor did it mention the argument that this set of exclusion requests was somehow a follow-on of the 2018 requests. Because the agency did not have the opportunity to address that argument in the first instance, it is unexhausted for purposes of judicial review. *See Sandvik Steel Co. v. United States*, 164 F.3d 596,

[15] Because Commerce did not include this reasoning in its initial determinations, the court did not consider it in *Seneca I*. *See* 663 F. Supp. 3d at 1340 n.9; *see also SEC v. Chenery Corp.*, 332 U.S. 194, 199 (1947).

599 (Fed. Cir. 1998); *see also* 28 U.S.C. § 2637(d).[16] The absence of any reference to the 2018 requests goes to the argument's merits, too. Seneca's exclusion requests shortly followed ETP orders from foreign suppliers. There is no evidence on this agency record suggesting that those ETP orders were related to the 2018 requests, or that USS violated its 2018 certification that it could supply steel to Seneca. Commerce accordingly had no obligation to consider Seneca's argument on this score.

The court concludes that Commerce's denials of Seneca's requests were, in most part, consistent with the agency's own regulations and reasonable practice. The one seeming error, which is ultimately harmless, concerns Commerce's formula for estimating requesters' delivery times. Commerce could have done more to clarify the meaning of fields 2.d and 2.f, and would do well to provide such clarity with regard to future requests.

III. Commerce's Denials Reasonably Focused on Prospective Evidence of Steel Production

Seneca's final argument appears to question one aspect of Commerce's Section 232 exclusion request policy. Seneca contends that Commerce's approach, even if in line with Commerce's own regulations and practice, gives short shrift to course-of-dealing evidence suggesting that the objector will not supply steel. Commerce's "purely prospective methodology," Seneca argues, "provides no 'relief' at all when on-the-ground market realities contradict objectors' theoretical projections of future availability. . . . Turning a blind eye to an undisputed record of past and present dealings while focusing on hypothetical future dealings renders the entire exclusion process arbitrary." Pl.'s Cmts. at 30.[17]

To be clear, Commerce stated that it "will consider sales correspondence, submitted as evidence, absent additional accompanying information, only if such correspondence occurred within 90 days of the submission of the exclusion request." P.R. 6. That cutoff is reasonable. The Proclamation authorizes Commerce to "provide relief" from du-

[16] Seneca states that the 2018 decisions are on the agency's "public docket," were mentioned in the Complaint initiating this litigation, and included in a letter sent to Commerce as it was reconsidering the denials on remand. *See* Pl.'s OAQ Resp. at 9–10. Of course, none of that is on the actual agency record, let alone raised in the first instance.

[17] Seneca states that it understands that Commerce's evaluation is not solely prospective and clarifies that it is making the following contention: "if Commerce's current regulations and guidance regarding past dealings with objectors had been properly applied, Commerce would have dismissed U.S. Steel's objections and approved Seneca's requests." Pl.'s OAQ Resp. at 5. *But see* Pl.'s Cmts. at 30 (calling Commerce's methodology "purely prospective"). In any event, the court addresses this challenge, as raised in Plaintiff's comments, for completeness. *See id.* at 28–31.

ties "for any steel article determined not to be produced in the United States in a sufficient and reasonably available amount" but leaves it to the agency to set the timeframe of permissible evidence. *Proclamation*, 83 Fed. Reg. at 11627. Commerce's prospective focus is consistent with the tariff's stated purpose and expected effect, ex ante, of enabling "domestic steel producers to use approximately 80 percent of existing domestic production capacity and thereby achieve long-term economic viability through increased production." *Id.* at 11625. And to that end, Commerce will consider evidence of past dealings that are "clearly indicative of the parties' future dealings." *Remand Results* at 12. Seneca asks for Commerce's consideration of older course-of-dealing evidence, but nothing compels Commerce to do so.[18]

More to the point, requesters like Seneca are not without administrative recourse when faced with potentially unreliable domestic producers. A requester can submit an initial request after executing foreign purchase orders, undergo the multistep process outlined above if a domestic objector promises but later fails to supply steel, and receive relief from Commerce that is retroactive to the entries associated with the initial request. *See* 15 C.F.R. pt. 705 supp. 1(h)(2)(iii)(A) ("Companies are able to receive retroactive relief on granted requests dating back to the date of the request's submission on unliquidated entries."); *see also* Def.'s Resp. at 16, 20–21. Seneca argues that this remedy is insufficient because the retroactive relief would relate back to the renewed exclusion request (step 4) rather

[18] Seneca argues that the APA requires the consideration of older evidence, but the two cases that Seneca cites for that proposition are inapposite. First, in *American Petroleum Institute v. EPA*, the court held that the petitioner could challenge the EPA's prediction methodology in the years following its initial adoption because the "reasonableness of adopting a predictive methodology is not the same as the reasonableness of maintaining one in the face of experience; considering whether to maintain a methodology necessarily invites reflection on the success of earlier applications." 706 F.3d 464, 477 (D.C. Cir. 2013) (emphasis omitted). But that case does not control here, where Commerce informally adjudicates each request on its own record. The agency credits prior evidence in some cases, like in the Borusan requests, and not in others, like in this one. Commerce does not adhere to a rigid formula in determining whether to credit such evidence; that determination hinges ultimately on the administrative posture of the specific case.

Second, in *Bechtel v. FCC*, the court reasoned that while "changes of [agency] policy require a rational explanation, it is also true that changes in factual and legal circumstances may impose upon the agency an obligation to reconsider a settled policy or explain its failure to do so." 957 F.2d 873, 881 (D.C. Cir. 1992). In the rulemaking context, the court noted, sufficiently changed circumstances could include "a significant factual predicate of a prior decision" being removed. *Id.* (internal quotation marks and citation removed). But it is unclear what has changed since the passage of the Presidential Proclamation that would itself prompt Commerce to rethink the prospective focus of its analysis. So long as the tariffs are in place, the President can be presumed to adopt their stated rationale of encouraging domestic steel production. *See Cleveland-Cliffs Inc. v. United States*, 48 CIT __, __ n.13, 693 F. Supp. 3d 1341, 1360 n.13 (2024) (collecting authorities and noting that "[c]ourts have used inferences of presidential intent to ascertain the continuing effect of presidential proclamations even when the proclaiming president no longer holds office.").

than the initial exclusion request (step 2). *See* Pl.'s OAQ Resp. at 11. But so long as that renewed exclusion request is for the same "unliquidated entries" associated with the initial request, the rule's text suggests that Commerce can grant relief to the requester that is functionally the same as relating back to the initial request. Commerce would do well to clarify that point to requesters.

The court appreciates that the task of timing iterative exclusion requests with hurried business needs can be difficult for requesters. But Commerce's procedures, on their face, offered a valid remedy in this case that Seneca did not avail itself of. Having focused on prospective availability and having offered a reasonable administrative process for relief, Commerce has executed denials here that were not arbitrary and capricious.

CONCLUSION

For the foregoing reasons, it is hereby

ORDERED that Commerce's denials of the October 2021, January 2022, and March 2022 Requests in the *Remand Results* are sustained. Judgment on the agency record will enter for Defendant accordingly.

SO ORDERED.

Dated: October 21, 2024
New York, New Yor

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

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