U.S. Customs and Border Protection

DEPARTMENT OF THE TREASURY

19 CFR PART 102

CBP DEC. 22–25

RIN 1515–AE77

RULES OF ORIGIN FOR GOODS IMPORTED INTO THE UNITED STATES

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

ACTION: Final rule; technical corrections.

SUMMARY: This document sets forth technical corrections to U.S. Customs and Border Protection (CBP) regulations to reflect recent changes in the Harmonized Tariff Schedule of the United States. The affected provisions, which are based in part on specified changes in tariff classification, comprise a codified system used for determining: the country of origin for marking purposes for goods imported under the Agreement Between the United States of America, the United Mexican States, and Canada (USMCA); determining the country of origin of imported goods for the purposes specified in paragraph 1 of Annex 311 of the North American Free Trade Agreement (NAFTA) for outstanding pending NAFTA claims; determining whether an imported good is a new or different article of commerce under the United States-Morocco Free Trade Agreement and the United States-Bahrain Free Trade Agreement; and for determining the country of origin of textile and apparel products (other than those of Israel).

DATES: The final rule is effective on November 15, 2022.

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SUPPLEMENTARY INFORMATION:

Background

Section 102.20 of title 19 of the U.S. Customs and Border Protection (CBP) regulations (19 CFR 102.20) prescribes the tariff shift rules that are used to determine country of origin for certain purposes. CBP first promulgated these codified rules (referred to as "the part 102 rules") to fulfill the United States' commitment under Annex 311 of the North American Free Trade Agreement (NAFTA), which required the parties to establish rules for determining whether a good is a good of a NAFTA country. The NAFTA Implementation Act, Public Law 103–182, 107 Stat. 2057 (19 U.S.C. 3301 *et seq.*), was repealed by the United States-Mexico-Canada Agreement Implementation Act (USMCA), Public Law 116–113, 134 Stat. 11 (19 U.S.C. Chapter 29), as of July 1, 2020. On July 6, 2021, CBP published an interim final rule in the **Federal Register** (86 FR 35566) implementing certain portions of the USMCA, where CBP stated its decision to continue application of the current part 102 rules to determine the country of origin for marking purposes of imported goods under the USMCA. Thus, the part 102 rules remain in effect. Additionally, the part 102 rules are still applied for outstanding pending claims under NAFTA.

The part 102 rules are also used for several other trade agreements. For instance, as indicated in the scope provision for part 102 (§ 102.0), the rules set forth in §§ 102.1 through 102.21 also apply for purposes of determining whether an imported good is a new or different article of commerce under § 10.769 of the United States-Morocco Free Trade Agreement regulations and § 10.809 of the United States-Bahrain Free Trade Agreement regulations. Section 102.21 also provides the rules of origin for determination of country of origin of imported textile and apparel products for certain purposes, other than those that are products of Israel.

Need for Correction

Pursuant to section 1205 of the Omnibus Trade and Competitiveness Act of 1988 (codified at 19 U.S.C. 3005), the United States International Trade Commission (ITC) is required to keep the Harmonized Tariff Schedule of the United States (HTSUS) under continuous review and prepare investigations proposing modifications to the HTSUS to the President. In July 2015, the ITC issued "Recommended Modifications in the Harmonized Tariff Schedule to Conform with Amendments to the Harmonized System Recommended by the World Customs Organization, and to Address Other Matters: Proposed Commission Recommendations," Inv. No. 1205–11, USITC Publication No. 4556. The modifications proposed in the report were

effective on January 1, 2017, pursuant to Presidential Proclamation 9549. 81 FR 87401, 87406 (Dec. 2, 2016). In July 2016, the ITC issued "Commission Recommendations to the President to Modify the Tariff Nomenclature in Chapters 3, 44, and 63 of the Harmonized Tariff Schedule," Inv. No. 1205–12, USITC Publication No. 4621. The modifications proposed in the report were effective on January 1, 2018, pursuant to Presidential Proclamation 9687. 82 FR 61413, 61417 (Dec. 27, 2017). In April 2021, the ITC issued, "Recommended Modifications to the Harmonized Tariff Schedule, 2021," Inv. No. 1205–13, USITC Publication No. 5171. The modifications proposed in the report were effective on January 1, 2022, pursuant to Presidential Proclamation 10326. 86 FR 73593, 73597 (Dec. 28, 2021).

As a result of these modifications to the HTSUS, certain tariff provisions were added or removed, and certain goods were transferred, for tariff classification purposes, to different or newly-created tariff provisions. The changes to the HTSUS involved product coverage and/or numbering of certain headings and subheadings and were not intended to have any other substantive effect. Accordingly, this document makes technical corrections to §§ 102.20 and 102.21 in order for the regulations to conform the numbering in the tariff shift rules to the numbering in the current version of the HTSUS. This document also makes minor conforming changes to chapter notes 42, 64, 70, and 96, and adds a new chapter note 65. In addition, this document also corrects typographical errors that occurred in previous updates.

The following examples are offered to illustrate the need for technical corrections to §§ 102.20 and 102.21.

Example 1: Under current § 102.20(o), there is a tariff shift rule for subheading 8469.00, HTSUS. Under the 2017 amendments to the HTSUS, heading 8469, HTSUS, which covered "Typewriters other than printers of heading 8443; word processing machines," was deleted. The goods previously classified under this provision are now classified under subheading 8472.90. As a result, the terms of the tariff shift rule for subheading 8469.00 are being revised to reflect the fact that heading 8469, HTSUS, was deleted, as well as to indicate the transfer of goods to subheading 8472.90. In other words, instead of referring to the since-deleted heading 8469, the new tariff shift rules refer to heading 8472 or subheading 8472.90, as appropriate. Lastly, the rule, revised as described above, is now incorporated into the rule for goods of subheading 8471.60–8472.90.

Example 2: Pursuant to the existing terms of § 102.20(f), the tariff shift rules for subheading 2910.10–2910.90, HTSUS, permit a tariff shift to "dieldrin (ISO, INN) of subheading 2910.40 from any other

subheading, except from subheading 2910.90." The second part of the tariff shift rule for subheading 2910.10–2910.90, HTSUS, permits a tariff shift "to subheading 2910.90 from any other subheading, except from subheading 2910.40." Under the 2017 amendments to the HTSUS, new subheading 2910.50, HTSUS, was created to provide separately for endrin (ISO), which was previously provided for in subheading 2910.90, HTSUS. This new subheading was created to facilitate monitoring and control of products under the Stockholm Convention on Persistent Organic Pollutants. In order to maintain the original result of the tariff shift rules for subheading 2910.10–2910.90, HTSUS, the tariff shift rules in § 102.20(f) must be amended to reflect the transfer of endrin (ISO) previously classified in subheading 2910.90 to new subheading 2910.50, HTSUS, as follows: "[a] change to dieldrin (ISO, INN) of subheading 2910.40 from any other subheading, except from subheading 2910.50 through 2910.90." Similarly, the second part of the tariff shift rule for subheading 2910.10–2910.90, HTSUS, must also be amended to reflect the 2017 amendment that resulted in a transfer of endrin (ISO) from subheading 2910.90 to the newly created subheading 2910.50, HTSUS. Additionally, the second tariff shift rule for subheadings 2910.10 through 2910.90 must be amended to provide for "[a] change to subheading 2910.50 through 2910.90," with the addition of the phrase "outside that group" following the clause "from any other subheading." The first clause is expanded to include a change to subheadings 2910.50 through 2910.90 to reflect the transfer of endrin (ISO) to subheading 2910.50, HTSUS. The purpose of the additional language "outside that group" after the clause, "from any other subheading," is to clarify that the tariff shift rule is not triggered if there is a change to a good of subheadings 2910.50 through 2910.90, HTSUS, from a good of subheadings 2910.50 through 2910.90, HTSUS.

Example 3: Pursuant to the existing terms of § 102.21(e)(1), the tariff shift rule for subheadings 4202.32.40, HTSUS, through 4202.32.95, HTSUS, permits a tariff shift to these subheadings "from any other heading, provided that the change is the result of the good being wholly assembled in a single country, territory, or insular possession." Pursuant to the 2016 amendments to the HTSUS, the eight-digit subheading 4202.32.95, HTSUS, which provided, in relevant part, for "Articles of a kind normally carried in the pocket or in the handbag: With outer surface of sheeting of plastic or of textile materials: With outer surface of textile materials: Other: Other," was deleted. In its place, subheadings 4202.32.91 through 4202.32.99, HTSUS, were created to cover products that were previously classified in 4202.32.95, HTSUS. As subheading 4202.32.95, HTSUS, no

longer exists in the HTSUS, § 102.21(e)(1) must be amended to reflect the applicable renumbering of the tariff shift rule. Specifically, § 102.21(e)(1) must be amended to indicate that the tariff shift rule for subheadings 4202.32.40–4202.32.95, HTSUS, has been renumbered to subheadings 4202.32.40–4202.32.99, HTSUS. The new rule provides for "A change to subheading 4202.32.40 through 4202.32.99 from any other heading, provided that the change is the result of the good being wholly assembled in a single country, territory, or insular possession."

Example 4: Pursuant to the existing terms of § 102.21(e)(1), the tariff shift rule for subheading 7019.19.28, HTSUS, allows, in relevant part, that "[i]f the good is of staple fibers, a change to subheading 7019.19.28 from any other subheading, except from subheading 7019.19.30 through 7019.19.90, 7019.31.00 through 7019.39.50, and 7019.90, and provided that the change is the result of a spinning process." Pursuant to the 2022 amendments to the HTSUS, the six-digit subheading 7019.19.28, HTSUS, which provided for "Glass fibers (including glass wool) and articles thereof (for example, yarn, woven fabrics): Silvers, rovings, yarn and chopped strands: Other: Yarns: Colored: Other," was deleted. In its place, subheading 7019.13.28, HTSUS, was created, which provides for "Glass fibers (including glass wool) and articles thereof (for example, yarn, rovings, woven fabrics): Silvers, rovings, yarn and chopped strands and mats thereof: Other yarn, silvers: Yarns: Colored: Other," and covers products that were previously classified in 7019.19.28, HTSUS. As subheading 7019.19.28, HTSUS, no longer exists in the HTSUS, § 102.21(e)(1) must be amended to reflect the renumbering of the tariff shift rule. Similarly, amendments to § 102.21(e)(1) must be made to reflect the following: subheading 7019.19.90, HTSUS, was deleted and replaced with subheadings 7019.13.35, HTSUS, and 7019.19.91, HTSUS; subheading 7019.31.00, HTSUS, was deleted and replaced with subheadings 7019.14.00, HTSUS, and 7019.15.00, HTSUS; subheading 7019.32.00, HTSUS, was deleted and replaced with 7019.71.00, HTSUS; subheading 7019.39.10, HTSUS, was deleted and replaced with 7019.80.10, HTSUS; and subheading 7019.39.50, HTSUS, was deleted and replaced with 7019.80.90, HTSUS.

Inapplicability of Notice and Delayed Effective Date

The Administrative Procedure Act (APA) requirements in 5 U.S.C. 553 govern agency rulemaking procedures. Section 553(b) of the APA generally requires notice and public comment before issuance of a final rule. In addition, section 553(d) of the APA generally requires that a final rule have a thirty-day delayed effective date. The APA,

however, provides exceptions from the prior notice and public comment requirement and the delayed effective date requirements, when an agency for good cause finds that such procedures are impracticable, unnecessary, or contrary to the public interest.

Pursuant to 5 U.S.C. 553(b)(B), CBP has determined for good cause that it would be unnecessary and contrary to the public interest to delay publication of this rule in final form pending an opportunity for public comment because the technical corrections set forth in this document merely conform the tariff shift rules in the regulations to the current HTSUS and will facilitate trade by ensuring that country of origin determinations made using the regulations are consistent with the HTSUS. In addition, pursuant to 5 U.S.C. 553(d)(3), CBP has determined that there is good cause for this final rule to become effective immediately upon publication for the same reasons.

Executive Orders 12866

These amendments do not meet the criteria for a "significant regulatory action" as specified in Executive Order 12866. 58 FR 51735 (October 4, 1993).

Regulatory Flexibility Act

Because this document is not subject to the notice and public procedure requirements of 5 U.S.C. 553, it is not subject to the provisions of the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*).

Signing Authority

This regulation is being issued in accordance with 19 CFR 0.1(a)(1) pertaining to the Secretary of the Treasury's authority (or that of his/her delegate) to approve regulations related to customs revenue functions. Pursuant to Treasury Directive 28–03, CBP retains authority to sign a document making non-substantive technical corrections to a previously issued regulation. For this reason, the CBP Commissioner is the proper official to sign this document.

Chris Magnus, the Commissioner of CBP, having reviewed and approved this document, has delegated the authority to electronically sign this document to Robert F. Altneu, who is the Director of the Regulations and Disclosure Law Division for CBP, for purposes of publication in the **Federal Register**.

List of Subjects in 19 CFR Part 102

Canada, Mexico, Reporting and recordkeeping requirements, Trade agreements.

Amendments to the CBP Regulations

For the reasons set forth above, part 102 of title 19 of the Code of Federal Regulations (19 CFR part 102) is amended as set forth below:

PART 102—RULES OF ORIGIN

■ 1. The authority citation for part 102 continues to read as follows:

Authority: 19 U.S.C. 66, 1202 (General Note 3(i), Harmonized Tariff Schedule of the United States, 1624, 3592, 4513.

■ 2. In § 102.20, the table is amended by:

■ a. Removing the entries for: "0305.10", "0403.10", and "0407–0410" under paragraph (a); "1601–1605", "1704", and "2202.90" under paragraph (d); "2707.10–2707.99" (two entries) under paragraph (e); "2811.19", "2812.10–2813.90", "2844.40–2844.50", "2848", "2853", "2903.11–2903.39", "2903.81–2904.90", "2914.40–2914.70", "3002.10–3002.90", "3003.40", "3003.90", "3004.40", "3004.90", "3006.20–3006.60", "3103.10", "3204.19", "3402.11", "3402.12–3402.20", "3808.50", "3808.91", and "3824.71–3824.90" under paragraph (f); "6603.10" under paragraph (k); "6812.92–6812.93", "6812.99", " 6815.10–6815.99", "7019.31–7019.32", "7019.39", "7019.40–7019.59", and "7019.90" under paragraph (l); "8456.10–8456.90", "8469.00", "8517.70", "8519.50", "8519.92–8519.93", "8519.99", "8525.80", "8528.41", "8528.51", "8528.61", "8539.41–8539.49", and "8543.20–8543.30" under paragraph (o); "8801–8802" and "8803.10–8803.90" under paragraph (p); "9006.10–9006.69" under paragraph (q); "9401.90", "9403.90", and "9405.10–9405.60" under paragraph (s); and "9701.10–9701.90" under paragraph (t);

■ b. Revising the entries for "0307" and "0308" under paragraph (a); "1806.90", "1901.90", "1904.90", and "2106.90" under paragraph (d); "2707.10–2707.99" under paragraph (e); "2806.10– 2806.20", "2852", "2910.10–2910.90", "2918.11–2918.22", "2920.11–2926.90", "2929.10–2930.90", "2933.11–2934.99", "2937–2941", "3001.10–3001.90", "3004.50", "3808.92", "3808.93", "3808.94", "3808.99", "3821", "3822", and "3825.90" under paragraph (f); "3901–3915" under paragraph (g); "Chapter 42 Note" and "4201" under paragraph (h); "4412" under paragraph (i); "Chapter 64 Note" under paragraph (k); "6812.80", "6812.99", "Chapter Note 70" under paragraph (l); "8103.20–8113.00" under paragraph (n); "8471.60–8472.90", "8479.10–8479.89", ", "8486.10–8486.40",

"8486.90", "8517.11–8517.69", "8543.70", and "8548" under paragraph (o); "8708.40" under paragraph (p); and "9401.10–9401.80", "9402", "9403.10–9403.89", "9503", and "Chapter 96 Note" under paragraph (s); and

■ c. Adding entries in numerical order for "0309.10", "0309.90", "0403.20", "0407–0409", "0410.10", and "0410.90" under paragraph (a); "1601–1602.50", "1602.90", "1603–1605", "1704.10", "1704.90", "2202.91–2202.99", "2404.11", "2404.12", "2404.19", "2404.91", and "2404.92–2404.99" under paragraph (d); "2811.12–2811.19", "2812.11–2813.90", "2844.41–2844.44", "2844.50", "2853.10–2853.90", "2903.41–2903.69", "2903.82–2904.99", "2914.40–2914.61", "2914.62–2914.69", "2914.71–2914.79", "3002.12–3002.90", "3003.41–3003.49", "3003.60–3003.90", "3004.41–3004.49", "3004.60–3004.90", "3006.30–3006.60", "3006.93", "3103.11–3103.19", "3204.18–3204.19", "3402.31–3402.39", "3402.41–3402.50", "3808.52–3808.59", "3808.61–3808.91", "3826", and "3827.11–3827.90" under paragraph (f); "4441–4421" under paragraph (i); "Chapter 65 Note" under paragraph (k);, "6815.11–6815.19", "6815.20–6815.99", "7019.11–7019.13", "7019.14–7019.19", "7019.61", "7019.62", "7019.63–7019.66", "7019.69", "7019.71", "7019.72–7019.73", "7019.80", and "7019.90" under paragraph (l); "7419.20–7419.80" under paragraph (n); "8456.11–8456.90", "8485.10–8485.90", "8517.71–8517.79", "8524.11–8524.99", "8525.81–8525.89", "8528.42", "8528.52", "8528.62", "8539.41–8539.52", "8543.20–8543.40", and "8549" under paragraph (o); "8708.22", "8801–8806", and "8807.10–8807.90" under paragraph (p); "9006.30–9006.69" under paragraph (q); "9401.91–9401.99", "9403.91–9403.99", "9405.11–9405.69", and "9620.00" under paragraph (s); and "9702.21–9701.99" under paragraph (t).

The revisions and additions read as follows:

§ 102.20 Specific rules by tariff classification.

* * * * *

HTSUS	Tariff shift and/or other requirements
(a).....	Section I: Chapter 1 through 5
* * * *	* * *
0307	A change to heading 0307, other than a change to smoked goods of heading 0307, from any other chapter; or A change to smoked goods of heading 0307 from other goods of chapter 3 or from any other chapter, except from chapter 16; or

HTSUS	Tariff shift and/or other requirements
	A change to any good of heading 0307 from a smoked good of heading 0307.
0308	A change to heading 0308, other than a change to smoked goods of heading 0308, from any other chapter; or
	A change to smoked goods of heading 0308 from any other good of chapter 3 or from any other chapter, except from chapter 16; or
	A change to any good of heading 0308 from a smoked good of heading 0308.
0309.10	A change to subheading 0309.10 from any other subheading.
0309.90	A change to subheading 0309.90, from any other chapter; or
	A change to edible meals and flours from within chapter 3; or
	A change to a good of subheading 0309.90 from a smoked good of heading 0306, 0307 or 0308.
* * * *	* * *
0403.20	A change to subheading 0403.20 from any other heading.
* * * *	* * *
0407–0409	A change to heading 0407 through 0409 from any other chapter.
0410.10	A change to subheading 0410.10 from any other chapter; or
	A change to edible meals and flours of subheading 0410.10 from any product other than edible meals and flours of Chapter 2.
0410.90	A change to subheading 0410.90 from any other chapter.
* * * *	* * *
(d).....	Section IV: Chapters 16 through 24
1601–1602.50	A change to heading 1601 through 1602.50 from any other chapter, except from smoked products of heading 0306 through 0308.
1602.90	A change to subheading 1602.90 from any other chapter, except from smoked products of heading 0306 through 0308; or
	A change to subheading 1602.90 from any other subheading, except from Chapter 4, Chapter 17, heading 1006, head- ing 2009, wild rice of subheading 1008.90, subheading 1901.90 or subheading 2202.91 through 2202.92; or
	A change to subheading 1602.90 from Chapter 4 or subheading 1901.90, provided that the good contains no more than 50 percent by weight of milk solids; or
	A change to subheading 1602.90 from Chapter 17, provided that the good contains less than 65 percent by dry weight of sugar; or

HTSUS	Tariff shift and/or other requirements
	A change to subheading 1602.90 from heading 2009 or subheading 2202.91 through 2202.92, provided that a single juice ingredient of foreign origin, or juice ingredients from a single foreign country, constitute in single strength form no more than 60 percent by volume of the good.
1603–1605	A change to heading 1603 through 1605 from any other chapter, except from smoked products of heading 0306 through 0308.
* * * *	* * *
1704.10	A change to heading 1704.10 from any other heading.
1704.90	A change to subheading 1704.90 from any other heading, except from subheading 0306.93 or goods containing more than 20% by weight of edible insects of subheading 1602.90.
* * * *	* * *
1806.90	A change to subheading 1806.90 from any other subheading, except from goods containing more than 20% by weight of edible insects of subheading 1602.90.
* * * *	* * *
1901.90	A change to subheading 1901.90 from any other heading, except from goods containing more than 20% by weight of edible insects of subheading 1602.90.
* * * *	* * *
1904.90	A change to subheading 1904.90 from any other heading, except from heading 1006, wild rice of subheading 1008.90, or goods containing more than 20% by weight of edible insects of subheading 1602.90.
* * * *	* * *
2106.90	A change to a good of subheading 2106.90, other than to compound alcoholic preparations, from any other subheading, except from Chapter 4, Chapter 17, heading 2009, subheading 2404.91, subheading 3006.93, subheading 1602.90, subheading 1901.90, subheading 2202.91 or subheading 2202.99; or
	A change to subheading 2106.90 from Chapter 4 or subheading 1901.90, provided that the good contains no more than 50 percent by weight of milk solids; or
	A change to subheading 2106.90 from Chapter 17, provided that the good contains less than 65 percent by dry weight of sugar; or
	A change to subheading 2106.90 from heading 2009, subheading 2202.91 or subheading 2202.99, provided that a single juice ingredient of foreign origin, or juice ingredients from a single foreign country, constitute in single strength form no more than 60 percent by volume of the good; or
	A change to compound alcoholic preparations of subheading 2106.90 from any other subheading, except from subheading 2208.20 through 2208.50.
* * * *	* * *

HTSUS	Tariff shift and/or other requirements
2202.91–2202.99	A change to subheading 2202.91 through 2202.99 from any other subheading, except from Chapter 4 or heading 1901, 2009, or 2106; or
	A change to subheading 2202.91 through 2202.99 from Chapter 4 or heading 1901, provided that the good contains no more than 50 percent by weight of milk solids; or
	A change to subheading 2202.91 through 2202.99 from heading 2009 or subheading 2106.90, provided that a single juice ingredient of foreign origin, or juice ingredients from a single foreign country, constitute in single strength form no more than 60 percent by volume of the good.
* * * *	* * *
2404.11	A change to subheading 2404.11 from any other subheading, except from heading 2403 and except from subheading 2404.19.
2404.12	A change to subheading 2404.12 from any other subheading, provided that no more than 60 percent by weight of the good classified in this subheading is attributable to one substance or compound, except from subheading 3824.99.
2404.19	A change to subheading 2404.19 from any other subheading, except from heading 2403, subheading 2404.11, and sub-heading 3824.99.
2404.91	A change to subheading 2404.91 from any other subheading, except from subheading 2106.90, except from Chapter 4, Chapter 17, heading 2009, subheading 3006.93, subheading 1602.90, subheading 1901.90, subheading 2202.91 or subheading 2202.99; or
	A change to subheading 2404.91 from Chapter 4 or subheading 1901.90, provided that the good contains no more than 50 percent by weight of milk solids; or
	A change to subheading 2404.91 from Chapter 17, provided that the good contains less than 65 percent by dry weight of sugar; or
	A change to subheading 2404.91 from heading 2009, subheading 2202.91 or subheading 2202.90, provided that a single juice ingredient of foreign origin, or juice ingredients from a single foreign country, constitute in single strength form no more than 60 percent by volume of the good; except from subheading 2208.20 through 2208.50.
2404.92–2404.99	A change to subheading 2404.92 through 2404.99 from any other subheading, provided that no more than 60 percent by weight of the good classified in this subheading is attributable to one substance, except from subheading 3824.99.
* * * *	* * *
(e)	Section V: Chapters 25 through 27
* * * *	* * *
2707.10–2707.99	A change to subheading 2707.10 through 2707.99 from any other heading; or

HTSUS	Tariff shift and/or other requirements
	A change to phenols of subheading 2707.99 from any other subheading or from any other good of subheading 2707.99, provided that the good resulting from such change is the product of a chemical reaction; or
	A change to any other good of subheading 2707.99 from phenols of subheading 2707.99 or from any other subheading, provided that the good resulting from such change is the product of a chemical reaction; or
	A change to subheading 2707.10 through 2707.99 from any other subheading, including any subheading within that group, provided that the good resulting from such change is the product of a chemical reaction.
* * * *	* * *
(f).....	Section VI: Chapters 28 through 38
* * * *	* * *
2806.10–2806.20	A change to subheading 2806.10 through 2806.20 from any other subheading, including another subheading within that group.
* * * *	* * *
2811.12–2811.19	A change to subheading 2811.12 through 2811.19 from any other subheading, except from subheading 2811.12 or 2811.22.
* * * *	* * *
2812.11–2813.90	A change to subheading 2812.11 through 2813.90 from any other subheading, including another subheading within that group, except from subheading 2812.11 through 2812.19.
* * * *	* * *
2844.41–2844.44	A change to subheading 2844.41 through 2844.44 from any other subheading outside that group.
2844.50	A change to subheading 2844.50 from any other subheading.
* * * *	* * *
2852.00	A change to other metal oxides, hydroxides or peroxides of heading 2852 from any other good of heading 2852 or from any other heading, provided that the good is the product of a “chemical reaction”, as defined in Note 1, except from subheading 2825.90; or
	A change to other fluorides of heading 2852 from any other good of heading 2852 or from any other heading, except from subheading 2826.19; or
	A change to other chlorides of heading 2852 from any other good of heading 2852 or from any other heading, except from subheading 2827.39; or
	A change to other bromides or to bromide oxides from any other good of heading 2852 or from any other heading, except from subheading 2827.59; or
	A change to iodides or to iodide oxides of heading 2852 from any other good of heading 2852 or from any other heading, except from subheading 2827.60; or

HTSUS	Tariff shift and/or other requirements
	A change to other chlorates of heading 2852 from any other good of heading 2852 or from any other heading, except from subheading 2829.19; or
	A change to other perchlorates, bromotes, perbromates, iodates or periodates of heading 2852 from any other good of heading 2852 or from any other heading, except from subheading 2829.90; or
	A change to other sulphides or polysulphides, whether or not chemically defined, of heading 2852 from any other good of heading 2852 (except for sulphides or polysulphides of subheading 2852.90) or from any other heading, except from subheading 2830.90; or
	A change to other sulfates of heading 2852 from any other good of heading 2852 or from any other heading, except from heading 2520 or from subheading 2833.29; or
	A change to other nitrates of heading 2852 from any other good of heading 2852 or from any other heading, except from subheading 2834.29; or
	A change to other phosphates from any other good of heading 2852 or from any other heading, except from subheading 2835.29; or
	A change to polyphosphates other than those of sodium triphosphate (sodium tripolyphosphate) of subheading 2852.90 from any other good of heading 2852 or from any other heading, except from subheading 2835.39; or
	A change to other cyanides or to cyanide oxides of heading 2852 from any other good of heading 2852 or from any other heading, except from subheading 2837.19; or
	A change to complex cyanides of heading 2852 from any other good of heading 2852 or from any other heading, except from subheading 2837.20; or
	A change to fulminates, cyanates or thiocyanates of heading 2852 from any other good of heading 2852 or from any other heading; or
	A change to any other good of subheading 2852.90 from fulminates, cyanates, and thiocyanates of subheading 2852.90 or from any other subheading, provided that the good classified in subheading 2852.90 is the product of a "chemical reaction" as defined in Note 1; or
	A change to other chromates, dichromates or peroxochromates of heading 2852 from any other good of heading 2852 or any other heading, except from heading 2610, or from subheading 2841.50; or
	A change to double or complex silicates, including aluminosilicates, of subheading 2852.90 from any other good of heading 2852 or from any other heading, except from subheading 2842.10; or
	A change to other salts of inorganic acids or to peroxoacids, other than azides, of heading 2852 from any other good of heading 2852 or from any other heading, provided that the good classified in heading 2852 is the product of a "chemical reaction" as defined in Note 1, except from subheading 2842.90; or

HTSUS	Tariff shift and/or other requirements
	A change to other silver compounds of heading 2852 from any other good of heading 2852 or from any other heading, except from subheading 2843.29; or
	A change to phosphides, excluding ferrophosphorus, of subheading 2852.90 from any other good of heading 2852 or any other heading, except from subheading 2853.90; or
	A change to carbides of subheading 2852.90 from any other good of heading 2852 or any other heading, except from subheading 2849.90; or
	A change to hydrides, nitrides, azides, silicides and borides, other than compounds which are also carbides of heading 2849, of subheading 2852.90 from any other good of heading 2852 or any other heading, except from heading 2850; or
	A change to derivatives containing only sulpho groups, their salts and esters from any other good of heading 2852 or from any other heading, except from heading 2908; or
	A change to palmitic acid, stearic acid, their salts or their esters from any other good of heading 2852 or from any other heading, except from subheading 2915.70; or
	A change to oleic, linolenic or linolenic acids, their salts or their esters from any other good of heading 2852 or from any other heading, except from subheading 2916.15; or
	A change to benzoic acid, its salts or its esters from any other good of heading 2852 or from any other heading, except from subheading 3301.90 or subheading 2916.31; or
	A change to lactic acid, its salts or its esters from any other good of heading 2852 or from any other heading, except 2918.11; or
	A change to other organo-inorganic compounds of heading 2852 from any other good of heading 2852 or from any other heading, except from heading 2931; or
	A change to nucleic acids and their salts or other heterocyclic compounds of subheading 2852.90 from any other good of heading 2852 or any other heading, except from subheading 2934.92 through 2934.99; or
	A change to tanning extracts of vegetable origin or tannins and their salts, ethers, esters, and other derivatives of 2852.90 from any other good of heading 2852 or any other heading, except from subheading 3201.90; or
	A change to caseinate and other casein derivatives or casein glues of subheading 2852.90 from any other good of heading 2852 or any other heading, except from subheading 3501.90; or
	A change to albumins, albuminates, and other albumin derivatives of subheading 2852.90 from any other good of head- ing 2852 or any other heading, except from subheading 3502.90; or

HTSUS	Tariff shift and/or other requirements
	A change to peptones and their derivatives, other protein substances and their derivatives, not elsewhere specified or included, or hide powder of subheading 2852.90 from any other good of heading 2852 or any other heading, except from heading 3504; or
	A change to naphthenic acids, their water-insoluble salts, or their esters of subheading 2852.90 from any other good of heading 2852 or any other heading; or
	A change to prepared binders for foundry moulds or cores or chemical products and preparations of the chemical or al- lied industries of subheading 2852.90 from naphthenic acids, their water-insoluble salts, or their esters of subheading 2852.90 or any other subheading, provided that no more than 60 percent by weight of the good classified in this subheading is attributable to one substance or compound, except from other chemical products or preparations of the chemical or allied industries (including those consisting of mixtures of natural products), not elsewhere specified or included, of subheading 3827.11 through 3827.14 or 3827.31 through 3827.90; or
	A change to prepared binders for foundry moulds or cores or chemical products and preparations of the chemical or allied industries of subheading 2852.90 from any other subheading, provided that no more than 60 percent by weight of the good classified in this subheading is attributable to one substance or compound.
2853.10–2853.90	A change to subheading 2853.10 through 2853.90 from any other heading.
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2903.41–2903.69	A change to subheading 2903.41 through 2903.69 from any subheading outside that group; or
	A change to any other good of subheading 2903.41 through 2903.69 from any other subheading, including another subheading within that group.
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2903.82–2904.99	A change to aldrin (ISO), chlordane (ISO) or heptachlor (ISO) of subheading 2903.82 from any other subheading, except from subheading 2903.83 through 2903.89; or
	A change to any other good of subheading 2903.83 through 2903.89 from any other subheading outside that group, except from subheading 2903.82; or
	A change to subheading 2903.81 through 2904.99 from any other subheading within that group.
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2910.10–2910.90	A change to dieldrin (ISO, INN) of subheading 2910.40 from any other subheading, except from subheading 2910.50 through 2910.90; or
	A change to subheading 2910.50 through 2910.90 from any other subheading outside that group, except from subheading 2910.40; or
	A change to any other good of subheading 2910.10 through 2910.90 from any other subheading, including another subheading within that group.

HTSUS	Tariff shift and/or other requirements
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2914.40–2914.61	A change to subheading 2914.40 through 2914.61 from any other subheading, including another subheading within that group, except from subheading 3301.90.
2914.62–2914.69	A change to subheading 2914.62 through 2914.69 from any other subheading outside that group, except from subheading 3301.90.
2914.71–2914.79	A change to subheading 2914.71 through 2914.79 from any other subheading outside that group, except from subheading 3301.90.
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2918.11–2918.22	A change to subheading 2918.18 from any other subheading, except from subheading 2918.17 or 2918.19; or
	A change to any other good of subheading 2918.17 or 2918.19 from any other subheading outside that group, except from subheading 2918.18; or
	A change to subheading 2918.11 through 2918.22 from any other subheading, including another subheading within that group.
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2920.11–2926.90	A change to subheading 2920.11 through 2920.19 from any subheading outside that group; or
	A change to diethylamine and its salts of subheading 2921.12 through 2921.19 from any other good of subheading 2921.19 through 2921.19 or any other subheading; or
	A change to any other good of subheading 2921.12 through 2921.19 from diethylamine and its salts of subheading 2921.12 through 2921.19 or from any other subheading; or
	A change to anisidines, dianisidines, phenetidines, and their salts of subheading 2922.29 from any other good of subheading 2922.29 or any other subheading; or
	A change to any other good of subheading 2922.29 from anisidines, dianisidines, phenetidines, and their salts of subheading 2922.29 or from any other subheading; or
	A change to subheading 2924.12 from any other subheading, except from subheading 2924.19; or A change to subheading 2924.19 from any other subheading, except from subheading 2924.12; or A change to subheading 2925.21 through 2925.29 from any subheading outside that group; or
	A change to any other good of subheading 2920.11 through 2926.90 from any other subheading, including another subheading within that group.
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2929.10–2930.90	A change to subheading 2930.80 from any other subheading, except from subheading 2930.10 through 2930.90; or
	A change to dithiocarbonates (xanthates) of subheading 2930.90 from any other good of subheading 2930.10 through 2930.90 or from any other subheading;

HTSUS	Tariff shift and/or other requirements
	A change to any other good of subheading 2930.10 through 2930.90 from dithiocarbonates (xanthates) of subheading 2930.90 or from any other subheading, except from subheading 2930.80; or
	A change to any other good of subheading 2929.10 through 2930.90 from any other subheading, including another subheading within that group.
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2933.11–2934.99	A change to subheading 2933.11 through 2934.99 from any other subheading, including another subheading within that group, except for a change to subheading 2933.29 from heterocyclic compounds with nitrogen heteroatom(s) only of subheading 3002.12 through 3002.15, subheading 3822.11 through 3822.12 or subheading 3822.19 and except for a change to subheading 2934.99 from nucleic acids and their salts or other heterocyclic compounds of subheading 2852.90 or subheading 3002.12 through 3002.15, subheading 3822.11 through 3822.12 or subheading 3822.19.
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2937–2941	A change to heading 2937 through 2941 from any other heading, including another heading within that group, except a change to concentrates of poppy straw of subheading 2939.11 from poppy straw extract of subheading 1302.19 and except for a change to subheading 2937.90 from other hormones, prostagladins, thromboxanes and leukotrienes, natural or reproduced by synthesis, derivatives and structural analogues thereof, including chain modified polypeptides, used primarily as hormones of subheading 3002.13 through 3002.15.
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3001.10–3001.90	A change to subheading 3001.20 through 3001.90 from any other subheading, including another subheading within that group, except a change from subheading 3006.92.
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3002.12–3002.90	A change to subheading 3002.12 through 3002.15 from any other subheading outside that group, except a change from subheading 3006.92, subheading 3822.11 through 3822.12 or subheading 3822.19;
	A change to subheading 3002.20 through 3002.90 from any other subheading, except a change from subheading 3006.92; or
	A change to imines and their derivatives, and salts thereof, other than chlordimeform (ISO) of subheading 3002.12 through 3002.15, subheading 3822.11 through 3822.12 or subheading 3822.19 from any other subheading outside that group, except subheading 2925.21 through 2925.29;
	A change to compounds containing an unfused imidazole ring (whether or not hydrogenated) in the structure of subheading 3002.12 through 3002.15, subheading 3822.11 through 3822.12 or subheading 3822.19 from any other subheading outside that group, except from subheading 2933.29; or

HTSUS	Tariff shift and/or other requirements
	A change to nucleic acids and their salts or other heterocyclic compounds (other than those classified in subheading 2934.10 through 2934.91) of subheading 3002.12 through 3002.15, subheading 3822.11 through 3822.12 or subheading 3822.19 from any other subheading outside that group, except from subheading 2934.92 through 2934.99; or
	A change to hormones, prostaglandins, thromboxanes and leukotrienes, natural or reproduced by synthesis or derivatives, and structural analogues thereof, including chain modified polypeptides, used primarily as hormones (other than those classified in subheading 2937.11 through 2937.50) of subheading 3002.12 through 3002.15, subheading 3822.11 through 3822.12 or subheading 3822.19 from any other heading, except from heading 2937; or
	A change to other polyethers of subheading 3002.12 through 3002.15, subheading 3822.11 through 3822.12 or subheading 3822.19 from any other heading, except from heading 3907, provided that the domestic polymer content is no less than 40 percent by weight of the total polymer count.
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3003.41–3003.49	A change to subheading 3003.41 through 3003.49 from any other subheading outside that group, except from heading 1211, subheading 1302.11, 1302.14, 1302.19, 1302.20, 1302.39, or 3006.92, or alkaloids or derivatives thereof classified in Chapter 29.
3003.60–3003.90	A change to subheading 3003.60 through 3003.90 from any other subheading outside that group, provided that the domestic content of the therapeutic or prophylactic component is no less than 40 percent by weight of the total therapeutic or prophylactic content, or except from subheading 3006.92.
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3004.41–3004.49	A change to subheading 3004.41 through 3004.49 from any other subheading outside that group, except from heading 1211, subheading 1302.11, 1302.14, 1302.19, 1302.20, 1302.39, 3003.40, or 3006.92, or alkaloids or derivatives thereof classified in Chapter 29.
3004.50	A change to subheading 3004.50 from any other subheading, except from subheading 3003.60 through 3003.90, subheading 3006.92 or vitamins classified in Chapter 29 or products classified in heading 2936.
3004.60–3004.90	A change to subheading 3004.60 through 3004.90 from any other subheading outside that group, except from subheading 3003.60 through 3003.90 or 3006.92, and provided that the domestic content of the therapeutic or prophylactic component is no less than 40 percent by weight of the total therapeutic or prophylactic content.
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3006.30–3006.60	A change to subheading 3006.30 through 3006.60 from any other subheading, including another subheading within that group, except from subheading 3006.92, 3822.13 or 3825.30.

HTSUS	Tariff shift and/or other requirements
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3006.93	A change to subheading 3006.93 from any other subheading, except from subheading 3003.90 or 3006.92, and provided that the domestic content of the therapeutic or prophylactic component is no less than 40 percent by weight of the total therapeutic or prophylactic content; or
	A change to a good of subheading 3006.93, from any other subheading, except from Chapter 4, Chapter 17, heading 2009, subheading 1901.90, subheading 2202.91 or subheading 2202.99; or
	A change to subheading 3006.93 from Chapter 17, provided that the good contains less than 65 percent by dry weight of sugar.
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3103.11–3103.19	A change to subheading 3103.11 through 3103.19 from any other subheading outside that group.
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3204.18–3204.19	A change to subheading 3204.18 through 3204.19 from any other subheading outside that group, except from subheading 3204.11 through 3204.17.
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3402.31–3402.39	A change to subheading 3402.31 through 3402.39 from any other subheading outside that group, except from mixed alkylbenzenes of heading 3817.
3402.41–3402.50	A change to subheading 3402.41 through 3402.50 from any other subheading, including another subheading within that group.
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3808.52–3808.59	A change to insecticides from any other subheading, except from vegetable saps or extracts of pyrethrum or of the roots of plants containing rotenone of subheading 1302.19 or from subheading 3808.61 through 3808.91 or from any insecticide classified in Chapter 28 or 29; or
	A change to fungicides from any other subheading, except from fungicides classified in Chapter 28 or 29 or from subheading 3808.92; or
	A change to herbicides, anti-sprouting products and plant-growth regulators from any other subheading, except from herbicides, anti-sprouting products and plant-growth regulators classified in Chapter 28 or 29 or from subheading 3808.93; or
	A change to a mixture of herbicides, anti-sprouting products and plant-growth regulators from any other subheading, provided that the mixture is made from two or more active ingredients and a domestic active ingredient constitutes no less than 40 percent by weight of the total active ingredients; or
	A change to disinfectants from any other subheading, except from subheading 3808.94; or

HTSUS	Tariff shift and/or other requirements
	A change to any other good of subheading 3808.52 through 3808.59 from any other good of subheading 3808.52 through 3808.59 or from any other subheading, except from rodenticides and other pesticides classified in Chapter 28 or 29 or from subheading 3808.99; or
	A change to a mixture of subheading 3808.52 through 3808.59 from any other subheading outside that group, provided that the mixture is made from two or more active ingredients and a domestic active ingredient constitutes no less than 40 percent by weight of the total active ingredients, except from subheading 3808.99.
3808.61–3808.91	A change to subheading 3808.61 through 3808.91 from any other subheading outside that group, except from vegetable saps or extracts of pyrethrum or of the roots of plants containing rotenone of subheading 1302.19 or from any insecticide classified in Chapter 28 or 29 or subheading 3808.52 through 3808.59.
3808.92	A change to subheading 3808.92 from any other subheading, except from fungicides classified in Chapter 28 or 29, or subheading 3808.52 through 3808.59.
3808.93	A change to subheading 3808.93 from any other subheading, except from herbicides, anti-sprouting products or plant-growth regulators classified in Chapter 28 or 29 or subheading 3808.52 through 3808.59; or
	A change to a mixture of subheading 3808.93 from any other subheading, provided that the mixture is made from two or more active ingredients and a domestic active ingredient constitutes no less than 40 percent by weight of the total active ingredients.
3808.94	A change to subheading 3808.94 from any other subheading, except from disinfectants of subheading 3808.52 through 3808.59.
3808.99	A change to subheading 3808.99 from any other subheading, except from rodenticides or other pesticides classified in Chapter 28 or 29 or subheading 3808.52 through 3909.59; or
	A change to a mixture of subheading 3808.99 from any other subheading, provided that the mixture is made from two or more active ingredients and a domestic active ingredient constitutes no less than 40 percent by weight of the total active ingredients, except from rodenticides or other pesticides classified in Chapter 28 or 29 or subheading 3808.52 through 3808.59.
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3821	A change to heading 3821 from any other heading.
3822.00	A change to heading 3822 from any other heading, except from subheading 3002.12 through 3002.15, 3502.90, heading 3504, subheading 3822.11 through 3822.12, or subheading 3822.19.
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HTSUS	Tariff shift and/or other requirements
3825.90	A change to subheading 3825.90 from any other subheading, except from subheading 3824.84 through 3824.99, and provided that no more than 60 percent by weight of the good classified in this subheading is attributable to one substance or compound.
3826	A change to biodiesel and mixtures, not containing or containing less than 70 percent by weight of petroleum oils or oils obtained from bituminous materials of subheading 3826.00 from naphthenic acids, their water-insoluble salts, or their esters of subheading 3824.99 or any other subheading, provided that no more than 60 percent by weight of the good classified in this subheading is attributable to one substance or compound, except from other chemical products or preparations of the chemical or allied industries (including those consisting of mixtures of natural products), not elsewhere specified or included, of subheading 3827.11 through 3827.14 or 3827.31 through 3827.90; or
	A change to biodiesel and mixtures, not containing or containing less than 70 percent by weight of petroleum oils or oils obtained from bituminous materials of subheading 3826.00 from any other subheading, provided that no more than 60 percent by weight of the good classified in this subheading is attributable to one substance or compound.
3827.11–3827.90.	
	A change to subheading 3827.11 from other chemical products or preparations of the chemical or allied industries (including those consisting of mixtures of natural products), not elsewhere specified or included, of subheading 3827.11 or from any other subheading, provided that no more than 60 percent by weight of the good classified in this subheading is attributable to one substance or compound; or
	A change to other chemical products or preparations of the chemical or allied industries (including those consisting of mixtures of natural products), not elsewhere specified or included of subheading 3827.11 from any other good of subheading 3827.11 or from any other subheading, except from other chemical products or preparations of the chemical or allied industries (including those consisting of mixtures of natural products), not elsewhere specified or included, of subheading 2852.90, 3827.12 through 3827.14, 3827.31 through 3827.90, 3824.84 through 3824.99, or 3826.00.
	A change to subheading 3827.20 from any other subheading, provided that no more than 60 percent by weight of the good classified in this subheading is attributable to one substance or compound, except from other mixtures containing perhalogenated derivatives of acyclic hydrocarbons containing two or more different halogens of subheading 3827.12 through 3827.14, or 3827.31 through 3827.90; or

HTSUS	Tariff shift and/or other requirements
	A change to other mixtures of halogenated hydrocarbons of subheading 3827.12 from any other subheading, provided that no more than 60 percent by weight of the good classified in this subheading is attributable to one substance or compound, except from other chemical products or preparations of the chemical or allied industries (including those consisting of mixtures of natural products), not elsewhere specified or included, of subheading 2852.90, 3827.11, 3827.31 through 3827.90, 3824.84 through 3824.99, or 3826.00; or
	A change to other mixtures containing perhalogenated derivatives of acyclic hydrocarbons containing two or more different halogens of subheading 3827.12 from any other subheading, provided that no more than 60 percent by weight of the good classified in this subheading is attributable to one substance or compound, except from other mixtures containing perhalogenated derivatives of acyclic hydrocarbons containing two or more different halogens of subheading 3827.20, or 3827.31 through 3827.90; or
	A change to other mixtures of halogenated hydrocarbons of subheading 3827.31 through 3827.39 from any other subheading outside that group, provided that no more than 60 percent by weight of the good classified in this subheading is attributable to one substance or compound, except from other chemical products or preparations of the chemical or allied industries (including those consisting of mixtures of natural products), not elsewhere specified or included, of subheading 2852.90, 3827.11 through 3827.14, 3827.40 through 3827.90, or 3826.00, and except from subheading 3824.84 through 3824.99; or
	A change to other mixtures containing perhalogenated derivatives of acyclic hydrocarbons containing two or more different halogens of subheading 3827.12 from any other subheading, provided that no more than 60 percent by weight of the good classified in this subheading is attributable to one substance or compound, except from other mixtures containing perhalogenated derivatives of acyclic hydrocarbons containing two or more different halogens of subheading 3827.13 through 3827.20, or 3827.31 through 3827.90; or
	A change to other mixtures of halogenated hydrocarbons of subheading 3827.31 through 3827.39 from any other subheading outside that group, provided that no more than 60 percent by weight of the good classified in this subheading is attributable to one substance or compound, except from other chemical products or preparations of the chemical or allied industries (including those consisting of mixtures of natural products), not elsewhere specified or included, of subheading 2852.90, 3827.11 through 3827.14, 3827.31 through 3827.90, or 3826.00, and except from subheading 3824.90; or

HTSUS	Tariff shift and/or other requirements
	A change to other mixtures containing perhalogenated derivatives of acyclic hydrocarbons containing two or more different halogens of subheading 3827.31 through 3827.39 from any other subheading, provided that no more than 60 percent by weight of the good classified in this subheading is attributable to one substance or compound, except from other mixtures containing perhalogenated derivatives of acyclic hydrocarbons containing two or more different halogens of subheading 3827.12 through 3827.20 and 3827.40 through 3827.90; or
	A change to subheading 3827.13 from any other subheading, provided that no more than 60 percent by weight of the good classified in this subheading is attributable to one substance or compound, except from other chemical products or preparations of the chemical or allied industries (including those consisting of mixtures of natural products), not elsewhere specified or included, of subheading 2852.90, 3827.11 through 3827.12, 3827.14, 3827.31 through 3827.39, 3827.40 through 3827.90, 3824.84 through 3824.99, or 3826.00; or
	A change to subheading 3827.14 from any other subheading, provided that no more than 60 percent by weight of the good classified in this subheading is attributable to one substance or compound, except from other chemical products or preparations of the chemical or allied industries (including those consisting of mixtures of natural products), not elsewhere specified or included, of subheading 2852.90, 3827.11 through 3827.13, 3827.31 through 3827.90, 3824.94 through 3824.99, or 3826.00; or
	A change to subheading 3827.40 from any other subheading, provided that no more than 60 percent by weight of the good classified in this subheading is attributable to one substance or compound, except from other chemical products or preparations of the chemical or allied industries (including those consisting of mixtures of natural products), not elsewhere specified or included, of subheading 2852.90, 3827.11 through 3827.14, 3827.31 through 3827.39, 3827.51 through 3827.90, 3824.84 through 3824.99, or 3826.00; or
	A change to subheading 3827.51 through 3827.69 from any other subheading outside that group, provided that no more than 60 percent by weight of the good classified in this subheading is attributable to one substance or compound, except from other mixtures containing perhalogenated derivatives of acyclic hydrocarbons containing two or more different halogens of subheading 3827.12 through 3827.40 or 3827.90; or
	A change to mixtures of halogenated hydrocarbons of subheading 3827.90 from any other subheading, provided that no more than 60 percent by weight of the good classified in this subheading is attributable to one substance or compound, except from other chemical products or preparations of the chemical or allied industries (including those consisting of mixtures of natural products), not elsewhere specified or included of subheading 2852.90, 3827.11 through 3827.14, 3827.31 through 3827.69 or 3826.00, and except from subheading 3824.84 through 3824.90; or

HTSUS	Tariff shift and/or other requirements
	A change to other mixtures containing perhalogenated derivatives of acyclic hydrocarbons containing two or more different halogens of subheading 3827.90 from any other subheading, provided that no more than 60 percent by weight of the good classified in this subheading is attributable to one substance or compound, except from other mixtures containing perhalogenated derivatives of acyclic hydrocarbons containing two or more different halogens of subheading 3827.12 through 3827.69;
	A change to naphthenic acids, their water-insoluble salts or their esters of subheading 3824.99 from any other good of subheading 3824.84 through 3824.99 or from any other subheading; or
	A change to any other good of subheading 3824.84 through 3824.99 from naphthenic acids, their water-insoluble salts or their esters of subheading 3824.99 or from any other subheading, provided that no more than 60 percent by weight of the good classified in this subheading is attributable to one substance or compound, except from other chemical products or preparations of the chemical or allied industries (including those consisting of mixtures of natural products), not elsewhere specified or included, of subheading 3827.11 through 3827.14, or 3827.31 through 3824.90; or
	A change to any other good of subheading 3824.81 through 3824.99 from any other subheading, including another subheading within that group, provided that no more than 60 percent by weight of the good classified in this subheading is attributable to one substance or compound; or
	A change to any other good of subheading 3827.11 through 3827.90 from any other subheading, including another subheading within that group, provided that no more than 60 percent by weight of the good classified in this subheading is attributable to one substance or compound.
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(g).....	Section VII: Chapter 39 through 40
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3901–3915	A change to heading 3901 through 3915 from any other heading, including another heading within that group, except a change to 3907 from other polyethers of subheading 3002.12 through 3002.15, subheading 3822.11 through 3822.12 or subheading 3822.19, provided that the domestic polymer content is no less than 40 percent by weight of the total polymer content.
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(h).....	Section VIII: Chapters 41 through 43
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Chapter 42 Note: The country of origin of goods classified in subheadings 4202.12.40 through 4202.12.89, 4202.22.40 through 4202.22.80, 4202.32.40 through 4202.32.99, 4202.92.05, 4202.92.15 through 4202.92.30, and 4202.92.60 through 4202.92.97 shall be determined under the provisions of § 102.21.	
4201.00	A change to heading 4201 from any other heading.

HTSUS	Tariff shift and/or other requirements
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(i).....	Section IX: Chapters 44 through 46
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4412	A change to heading 4412 from any other heading, except from plywood of subheading 4418.73 through 4418.79; or
	A change to surface-covered plywood of heading 4412 from any other plywood that is not surface covered or is surface-covered only with a clear or transparent material which does not obscure the grain, texture, or markings of the face ply.
4441–4421	A change to plywood of subheading 4418.73 through 4418.79 from any other good of heading 4418 or from any other heading, except from heading 4412; or
	A change to any other good of subheading 4418.73 through 4418.79 from plywood of subheading 4418.73 through 4418.79 or from any other heading; or
	A change to any other good of heading 4413 through 4421 from any other heading, including another heading within that group.
* * * * * * *	
(k).....	Section XII: Chapters 64 through 67
Chapter 64 Note: For purposes of this chapter, the term "formed uppers" means uppers, with closed bottoms, which have been shaped by lasting, molding, or otherwise but not by simply closing at the bottom. The country of origin of goods classified in subheadings 6405.20.60, 6406.10.77, 6406.10.90, and 6406. 90.15 will be determined under the provisions of § 102.21.	
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Chapter 65 Note: The country of origin of goods classified in subheading 6505.00, other than hairnets, will be determined under the provisions of § 102.21.	
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(l).....	Section XIII: Chapters 68 through 70
* * * * * * *	
6812.80	A change to clothing, clothing accessories, footwear or headgear of subheading 6812.80 or from any other good of subheading 6812.80 or from any other subheading, except from subheading 6812.91; or
	A change to paper, millboard or felt of subheading 6812.80 from any other subheading or from any other good of subheading 6812.80, except from compressed asbestos fiber jointing of subheading 6812.80 or from subheading 6812.99; or
	A change to compressed asbestos fiber jointing, in sheets or rolls, of subheading 6812.80 from any other subheading or from any other good of subheading 6812.80, except from paper, millboard or felt of subheading 6812.80 or from subheading 6812.99; or

HTSUS	Tariff shift and/or other requirements
	A change to other fabricated asbestos fibers, mixtures with a basis of asbestos and magnesium carbonate, or to articles of such mixtures or of asbestos, whether or not reinforced, other than goods of heading 6811 or 6813 from any other heading; or
	A change to yarn or thread of subheading 6812.80 from any other subheading including from any other good of subheading 6812.80; or
	A change to cords or string, whether or not plaited, of subheading 6812.80 from any other subheading or from any other good of subheading 6812.80, except from yarn or thread of subheading 6812.80; or
	A change to woven or knitted fabric of subheading 6812.80 from any other subheading including from any other good of subheading 6812.80.
* * * * * * *	
6812.99	A change to yarn or thread of subheading 6812.99 from any other subheading including from any other good of subheading 6812.99; or
	A change to cords or string, whether or not plaited of subheading 6812.99 from any other subheading or from any other good of subheading 6812.99, except from yarn or thread of subheading 6812.99; or
	A change to woven or knitted fabric of subheading 6812.99 from any other subheading including from any other good of subheading 6812.99; or
	A change to paper, millboard, felt, or compressed asbestos fiber jointing, in sheets or rolls, of subheading 6812.99 from any other heading or from any subheading, except from subheading 6812.80 and 6812.99.
* * * * * * *	
6815.11–6815.19	A change to subheading 6815.11 through 6815.19 from any other subheading outside that group.
6815.20–6815.99	A change to subheading 6815.20 through 6815.99 from any other subheading.
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Chapter 70 Note: The country of origin of goods classified in subheadings 7019.13.15 and 7019.13.28 shall be determined under the provisions of § 102.21.	
7019.11–7019.13	A change to subheading 7019.11 through 7019.13 from any other heading.
7019.14–7019.19	A change to subheading 7019.14 through 7019.19 from any other subheading outside that group, except subheading 7019.71.
7019.61	A change to subheading 7019.61 from any other subheading, except subheading 7019.72 through 7019.73.
7019.62	A change to subheading 7019.62 from any other subheading, except subheading 7019.69 or subheading 7019.72 through 7019.90.

HTSUS	Tariff shift and/or other requirements
7019.63–7019.66	A change to subheading 7019.63 through 7019.66 from any other subheading outside that group, except subheading 7019.61, 7019.62, 7019.69, 7019.72 through 7019.73, 7019.80, and 7019.90.
7019.69	A change to subheading 7019.69 from any other subheading, except subheading 7019.62 or subheading 7019.72 through 7019.90.
7019.71	A change to subheading 7019.71 from any other subheading, except subheading 7019.14 through 7019.19.
7019.72–7019.73	A change to subheading 7019.72 through 7019.73 from any other subheading outside that group, except subheading 7019.61 through 7019.69, subheading 7019.80 and subheading 7019.90.
7019.80	A change to glass wool and articles of glass wool of subheading 7019.80 from any other heading; or
	A change to subheading 7019.80 from any other subheading, except subheading 7019.61, 7019.62, 7019.63, 7019.64, 7019.65, 7019.66, 7019.69, 7019.72, 7019.73, and 7019.90.
7019.90	A change to subheading 7019.90 from any other heading; or
	A change to subheading 7019.90 from any other subheading, except from glass wool and articles of glass wool of subheading 7019.80 or subheading 7019.61, 7019.62, 7019.63, 7019.64, 7019.65, 7019.66, 7019.69, 7019.72, and 7019.73.
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(n).....	Section XV: Chapters 72 through 83
* * * *	* * *
7419.20–7419.80	A change to cloth, grill or netting of copper wire or to expanded metal of copper of subheading 7419.80 from any other good of subheading 7419.80 or from any other subheading; or
	A change to any other good of subheading 7419.80 from cloth, grill or netting of copper wire or expanded metal of copper of subheading 7419.80; or
	A change to copper springs of subheading 7419.80 from any other good of subheading 7419.80 or from any other subheading; or
	A change to any other good of subheading 7419.80 from copper springs of subheading 7419.80; or
	A change to any other good of subheading 7419.20 through 7419.80 from any other subheading, including another subheading within that group.
* * * *	* * *
8103.20–8113.00	A change to germanium of subheading 8112.92 through 8112.99 from any other good of subheading 8112.31 through 8112.49, 8112.92 through 8112.99 or from any other subheading; or

HTSUS	Tariff shift and/or other requirements
	A change to vanadium of subheading 8112.92 through 8112.99 from any other good of subheading 8112.31 through 8112.49, 8112.92 through 8112.99 or from any other subheading; or
	A change to any other good of subheading 8112.92 through 8112.99 from germanium or vanadium of subheading 8112.92 through 8112.99 or from any other subheading; or
	A change to any other good of subheading 8112.31 through 8112.49 from germanium or vanadium of subheading 8112.92 through 8112.99 or from any other subheading; or
	A change to any of the following goods classified in subheading 8103.20 through 8113.00, including from materials also classified in subheading 8103.20 through 8113.00: Matte; unwrought; powder except from flakes; flakes except from powder; bars except from rods or profiles; rods except from bars or profiles; profiles except from rods or bars; wire except from rod; plates except from sheets or strip; sheets except from plate or strip; strip except from sheets or plate; foil except from sheet or strip; tubes except from pipes; pipes except from tubes; tube or pipe fittings except from tubes or pipes; cables/stranded wire/plaited bands; or
	A change to any other good of subheading 8103.20 through 8113.00 from any other subheading, including another subheading within that group.
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(o).....	Section XVI: Chapters 84 through 85
* * * *	* * *
8456.11–8456.90	A change to subheading 8456.11 through 8456.90 from any other heading, other than a change to water-jet cutting machines of subheading 8456.50, except from machine-tools for dry-etching patterns on semiconductor materials of subheading 8486.20; or
	A change to water-jet cutting machines of subheading 8456.50 from any other good of subheading 8456.40 or from any other subheading, except from subheading 8479.89 or from subheading 8486.10 through 8486.40.
* * * *	* * *
8471.60–8472.90	A change to addressing machines or address plate embossing machines of subheading 8472.90 from any other good of subheading 8472.90, provided that the change is not the result of simple assembly; or
	A change to any other good of subheading 8472.90 from addressing machines and address plate embossing machines of subheading 8472.90, provided that the change is not the result of simple assembly; or
	A change to subheading 8471.60 through 8472.90 from any other subheading outside that group, except from subheading 8504.40 or from heading 8473; or

HTSUS	Tariff shift and/or other requirements
	A change to subheading 8471.60 through 8472.90 from any other subheading within that group or from subheading 8504.90 or from heading 8473, provided that the change is not the result of simple assembly; or
	A change to word-processing machines of subheading 8472.90 from any other good of heading 8472 or from any other subheading, except from automatic typewriters of heading 8472; or
	A change to automatic typewriters of subheading 8472.90 from any other good of heading 8472 or from any other subheading, except from word-processing machines of heading 8472; or
	A change to other electric typewriters of subheading 8472.90 from any other good of heading 8472 or from any other subheading, except from other non-electric typewriters of heading 8472; or
	A change to other non-electric typewriters of subheading 8472.90 from any other good of heading 8472 or from any other subheading, except from other electric typewriters of heading 8472.
* * * * * * *	
8479.10–8479.89	A change to subheading 8479.10 through 8479.89, other than a change to passenger boarding bridges of subheading 8479.71 or 8479.79, from any other subheading, including another subheading within that group, except from subheading 8486.10 through 8486.40 and except for a change to 8479.89 from water-jet cutting machines of 8456.50; or
	A change to passenger boarding bridges of subheading 8479.71 or 8479.79 from any other subheading.
* * * * * * *	
8485.10–8485.90	A change to subheading 8485.10 from any other subheading except from subheading 8486.10 through 8486.40 and from water-jet cutting machines of subheading 8456.90;
	A change to subheading 8485.20 from any other subheading;
	A change to subheading 8485.30 from any other subheading except from subheading 8475.21 through 8475.29, from 8486.10 through 8486.40, from water-jet cutting machines of subheading 8456.90, and from heading 8501, where such change from heading 8501 is the result of simple assembly;
	A change to subheading 8485.80 from any other subheading except from subheading 8486.10 through 8486.40 and from water-jet cutting machines of subheading 8456.90; and
	A change to subheading 8485.90 from any other subheading, except from parts of water-jet cutting machines of heading 8466 and except from heading 8501 when resulting from a simple assembly.

HTSUS	Tariff shift and/or other requirements
8486.10–8486.40	A change to other machine-tools for working any material by removal of material, by electro-chemical, electron beam, ionic-beam or plasma arc process of subheading 8486.10 from any other good of subheading 8486.10 or from any other subheading, except from other machine-tools for working any material by removal of material, by electro-chemical, electron beam, ionic-beam or plasma arc process of subheading 8486.40, or from subheading 8456.50 to 8456.90; or
	A change to sawing machines of subheading 8486.10 from any other good of subheading 8486.10 or from any other subheading, except from subheading 8464.10; or
	A change to steam or sand blasting machines and similar jet projecting machines of subheading 8486.20 from any other good of subheading 8486.20 or from any other subheading, except from steam or sand blasting machines and similar jet projecting machines of subheading 8424.30 or 8486.40; or
	A change to ion implanters designed for doping semiconductor materials of subheading 8486.20 from any other good of subheading 8486.20 or from any other subheading, except from ion implanters designed for doping semiconductor materials of subheading 8543.10; or
	A change to other machine-tools for dry-etching patterns on semiconductor materials of subheading 8486.20 from any other good of subheading 8486.20 or from any other subheading, except from heading 8456; or
	A change to direct write-on-wafer apparatus of subheading 8486.20 from any other good of subheading 8486.20 or from any other subheading, except from step or repeat aligners or other apparatus for the projection or drawing of circuit patterns on sensitized semiconductor materials of subheading 8486.20 or from subheading 9010.50; or
	A change to step aligners of subheading 8486.20 from any other good of subheading 8486.20 or from any other subheading, except from direct write-on-wafer apparatus, repeat aligners, or other apparatus for the projection or drawing of circuit patterns on sensitized semiconductor materials of subheading 8486.20 or from subheading 9010.50; or
	A change to repeat aligners of subheading 8486.20 from any other good of subheading 8486.20 or from any other subheading, except from direct write-on-wafer apparatus, step aligners, or other apparatus for the projection or drawing of circuit patterns on sensitized semiconductor materials of subheading 8486.20 or from subheading 9010.50; or
	A change to other apparatus for the projection or drawing of circuit patterns on sensitized semiconductor materials of subheading 8486.20 from any other good of subheading 8486.20 or from any other subheading, except from direct write-on-wafer apparatus, step or repeat aligners of subheading 8486.20 or from subheading 9010.50; or

HTSUS	Tariff shift and/or other requirements
	A change to centrifuges of subheading 8486.10 through 8486.20 from any other good of subheading 8486.10 through 8486.20 or from any other subheading, except from subheading 8421.19; or
	A change to machine-tools operated by laser or other light or photon beam process of subheading 8486.10 through 8486.20 from any other good of subheading 8486.10 through 8486.20 or from any other subheading, except from subheading 8456.11 to 8456.12; or
	A change to grinding or polishing machines of subheading 8486.10 through 8486.20 from any other good of subheading 8486.10 through 8486.20 or from any other subheading, except from subheading 8464.20; or
	A change to other electrical machines or apparatus, having individual functions, of subheading 8486.10 through 8486.20 from any other good of subheading 8486.10 through 8486.20 or from any other subheading, except from other electrical machines or apparatus of subheading 8486.10 through 8486.20, 8486.90, 8543.70, 8542.31 through 8542.39, and except from proximity cards or tags of subheading 8523.52; or
	A change to other furnaces or ovens of subheading 8486.10 through 8486.20 from any other good of subheading 8486.10 through 8486.20 or from any other subheading, except from subheading 8514.30; or
	A change to other machine-tools for working stone, ceramics or like mineral materials or for cold working glass of subheading 8486.10 through 8486.30 from any other good of subheading 8486.10 through 8486.30 or from any other subheading, except from other machine-tools for working stone, ceramics or like mineral materials or for cold working glass of subheading 8486.10 through 8486.30, or from subheading 8464.90; or
	A change to other mechanical appliances for projecting, dispersing or spraying liquids or powders of subheading 8486.10 through 8486.30 from any other good of subheading 8486.10 through 8486.30 or from any other subheading, except from subheading 8424.89; or
	A change to steam or sand blasting machines or similar jet projecting machines of subheading 8486.40 from any other good of subheading 8486.40 or from any other subheading, except from steam or sand blasting machines and similar jet projecting machines of subheading 8424.30 or 8486.20; or
	A change to pneumatic elevators or conveyors of subheading 8486.40 from any other good of subheading 8486.40 or from any other subheading, except from subheading 8428.20; or
	A change to other belt type continuous-action elevators or conveyors for goods or materials of subheading 8486.40 from any other good of subheading 8486.40 or from any other subheading, except from subheading 8428.33; or
	A change to other continuous-action elevators or conveyors for goods or materials of subheading 8486.40 from any other good of subheading 8486.40 or from any other subheading, except from subheading 8428.39; or

HTSUS	Tariff shift and/or other requirements
	A change to other lifting, handling, loading or unloading machinery of subheading 8486.40 from any other good of subheading 8486.40 or from any other subheading, except from subheading 8428.90; or
	A change to other machine-tools for working any material by removal of material, by electro-chemical, electron beam, ionic-beam or plasma arc process of subheading 8486.40 from any other good of subheading 8486.40 or from any other subheading, except from other machine-tools for working any material by removal of material, by electro-chemical, electron beam, ionic-beam or plasma arc process of subheading 8486.10, or from subheading 8456.40, 8456.50 or 8456.90; or
	A change to numerically controlled bending, folding, straightening or flattening machines of subheading 8486.40 from any other good of subheading 8486.40 or from any other subheading, except from subheading 8462.21; or
	A change to other bending, folding, straightening or flattening machines of subheading 8486.40 from any other good of subheading 8486.40 or from any other subheading, except from subheading 8462.29; or
	A change to other machines for working hard materials of subheading 8486.40 from any other good of subheading 8486.40 or from any other subheading, except from subheading 8465.99; or
	A change to injection-molding machines of subheading 8486.40 from any other good of subheading 8486.40 or from any other subheading except from subheading 8477.10; or
	A change to vacuum molding machines or other thermoforming machines of subheading 8486.40 from any other good of subheading 8486.40 or from any other subheading, except from subheading 8477.40; or
	A change to other machinery for molding or otherwise forming of subheading 8486.40 from any other good of subheading 8486.40 or from any other subheading, except from subheading 8477.59; or
	A change to parts of welding machines or of electric machines and apparatus for hot spraying of metals or cermets of subheading 8486.40 from any other good of subheading 8486.40 or from any other subheading, except from subheading 8515.90; or
	A change to pattern generating apparatus designed to produce masks or reticles from photoresist coated substrates of subheading 8486.40 from any other good of subheading 8486.40 or from any other subheading, except from subheading 9017.20; or
	A change to die attach apparatus, tape automated bonders or wire bonders for assembly of semiconductors of subheading 8486.40 from any other good of subheading 8486.40 or from any other subheading, except from subheading 8515.11 through 8515.80; or

HTSUS	Tariff shift and/or other requirements
	A change to deflash machines for cleaning and removing contaminants from the metal leads of semiconductor packages prior to the electroplating process (deflash by chemical bath) of subheading 8486.40 from any other good of subheading 8486.40 or from any other subheading, except from subheading 8465.99; or
	A change to other machines or mechanical appliances of subheading 8486.10 through 8486.40 from any other good of subheading 8486.10 through 8486.40 or from any other subheading, except from other machines or mechanical appliances of subheading 8486.10 through 8486.40, 8479.89, 8508.11 through 8508.19 or 8508.60.
* * * * * * *	
8486.90	A change to parts or accessories of drawing, marking-out or mathematical calculating instruments or to instruments for measuring length, for use in the hand, of subheading 8486.90 from any other good of subheading 8486.90 or from any other subheading, except from heading 9017; or
	A change to parts or accessories of apparatus for the projection or drawing of circuit patterns on sensitized semiconductor materials or of other apparatus or equipment for photographic laboratories or negatoscopes of subheading 8486.90 from any other good of subheading 8486.90 or from any other subheading, except from heading 9010; or
	A change to parts of electrical machines or apparatus, having individual functions, of subheading 8486.90 from any other good of subheading 8486.90 or from any other subheading, except from heading 8543; or
	A change to parts of machinery for working rubber or plastics or for the manufacture of products from these materials of subheading 8486.90 from any other good of subheading 8486.90 or from any other subheading, except from other parts of machinery for working rubber or plastics or for the manufacture of products from these materials of subheading 8486.90, or from subheading 8477.90, and except from heading 8501 when resulting from a simple assembly; or
	A change to tool holders or to self-opening dieheads of subheading 8486.90 from any other good of subheading 8486.90 or from any other subheading, except from subheading 8466.10 through 8466.94, work holders, dividing heads or other special attachments of subheading 8486.90, and except from heading 8501 when resulting from simple assembly; or
	A change to work holders of subheading 8486.90 from any other good of subheading 8486.90, except from tool holders, dividing heads or other special attachments of subheading 8486.90, or from any other subheading, except from subheading 8466.10 through 8466.94, and except from heading 8501 when resulting from simple assembly; or

HTSUS	Tariff shift and/or other requirements
	A change to dividing heads or to other special attachments for machine-tools of subheading 8486.90 from any other good of subheading 8486.90, except from tool holders or work holders of subheading 8486.90, or from any other subheading, except from subheading 8466.10 through 8466.94, and except from heading 8501 when resulting from simple assembly; or
	A change to parts or accessories for machine-tools for working stone, ceramics, concrete, asbestos-cement or like minerals or for cold working glass of subheading 8486.90 from any other good of subheading 8486.90, except from parts or accessories of: • Machine-tools for working any material by the removal of material, by laser or other light or photon beam, ultrasonic, electro-discharge, electro-chemical, electron beam, ionic-beam or plasma arc processes, or • Machine-tools for drilling, boring, milling, threading or tapping by removing metal, or for deburring, sharpening, grinding, honing, lapping, polishing or otherwise finishing metal or cermets by means of grinding stones, abrasives or polishing products, or • Machine-tools for planing, shaping, slotting, broaching, gear cutting, gear grinding or gear finishing, sawing, cutting-off, or for working by removing metal or cermets, or • Machine-tools for working metal by bending, folding, straightening, flattening sheathing, punching or notching (including presses), or • Machine-tools for working metal or cermets, without removing material, or • Machine-tools for working wood, cork, bone, hard rubber, hard plastics or similar hard materials (including machines for nailing, stapling, gluing or otherwise assembling), or • Machine-tools for working metal by forging, hammering or die forging (including presses), or • Machining centers, unit construction machines (single station) or multi-station transfer machines for working metal, or • Lathes (including turning centers), for removing metal, or • Presses for metal or working metal carbides, of subheading 8486.90, or a change from any other subheading, except from subheading 8466.10 through 8466.94, and except from heading 8501 when resulting from simple assembly; or
	A change to parts or accessories of machine-tools (including machines for nailing, stapling, gluing or otherwise assembling) for working wood, cork, bone, hard rubber, hard plastics or similar hard materials of subheading 8486.90 from any other good of subheading 8486.90, except from parts or accessories of:

HTSUS	Tariff shift and/or other requirements
	• Machine-tools for working any material by the removal of material, by laser or other light or photon beam, ultrasonic, electro-discharge, electro-chemical, electron beam, ionic-beam or plasma arc processes, or
	• Machine-tools for drilling, boring, milling, threading or tapping by removing metal, or
	• Machine-tools for deburring, sharpening, grinding, honing, lapping, polishing or otherwise finishing metal or cermets by means of grinding stones, abrasives or polishing products, or
	• Machine-tools for planing, shaping, slotting, broaching, gear cutting, gear grinding or gear finishing, sawing, cutting-off, or for working by removing metal or cermets, or
	• Machine-tools for working metal by forging, hammering or die forging (including presses), or
	• Machine-tools for working metal by bending, folding, straightening, flattening sheathing, punching or notching (including presses), or
	• Machine-tools for working metal or cermets, without removing material, or
	• Machine-tools for working stone, ceramics, concrete, asbestos-cement or like minerals or for cold working glass, or
	• Machining centers, unit construction machines (single station) or multi-station transfer machines for working metal, or
	• Lathes (including turning centers), for removing metal, or of presses for working metal or metal carbides, of subheading 8486.90, or a change from any other subheading, except from subheading 8466.10 through 8466.94, and except from heading 8501 when resulting from simple assembly; or
	A change to parts or accessories of machine-tools for working any material by the removal of material, by laser or other light or photon beam, ultrasonic, electro-discharge, electro-chemical, electron beam, ionic-beam or plasma arc processes, or for drilling, boring, milling, threading or tapping by removing metal, or for deburring, sharpening, grinding, honing, lapping, polishing or otherwise finishing metal or cermets by means of grinding stones, abrasives or polishing products, or for planing, shaping, slotting, broaching, gear cutting, gear grinding or gear finishing, sawing, cutting-off, or for working by removing metal or cermets, or to parts and accessories of machining centers, unit construction machines (single station) or multi-station transfer machines for working metal, or of lathes (including turning centers), for removing metal, of subheading 8486.90 from any other good of subheading 8486.90 except from parts or accessories of:
	• Machine-tools for working metal by forging, hammering or die forging, or
	• Machine-tools for working metal by bending, folding, straightening, flattening sheathing, punching or notching (including presses), or

HTSUS	Tariff shift and/or other requirements
	• Machine-tools for working metal or cermets, without removing material, or • Machine-tools for working stone, ceramics, concrete, asbestos-cement or like minerals or for cold working glass, or for working wood, cork, bone, hard rubber, hard plastics or similar hard materials (including machines for nailing, stapling, gluing or otherwise assembling), or • Presses for working metal or metal carbides, of subheading 8486.90, or a change from any other subheading, except from subheading 8466.10 through 8466.94, and except from heading 8501 when resulting from simple assembly; or A change to parts or accessories of machine-tools (including presses) for working metal by forging, hammering or die forging, or for working metal by bending, folding, straightening, flattening, sheathing, punching or notching (including presses), or for working metal or cermets, without removing material or to parts or accessories of presses for working metal carbide of subheading 8486.90 from any other good of subheading 8486.90, except from parts or accessories of: • Machine-tools for working any material by the removal of material, by laser or other light or photon beam, ultrasonic, electro-discharge, electro-chemical, electron beam, ionic-beam or plasma arc processes, or • Machine-tools for drilling, boring, milling, threading or tapping by removing metal, or • Machine-tools for deburring, sharpening, grinding, honing, lapping, polishing or otherwise finishing metal or cermets by means of grinding stones, abrasives or polishing products, or • Machine-tools for planing, shaping, slotting, broaching, gear cutting, gear grinding or gear finishing, sawing, cutting-off, or • Machine-tools for working by removing metal or cermets, or • Machine-tools for working stone, ceramics, concrete, asbestos-cement or like minerals or for cold working glass, or • Machine-tools for working wood, cork, bone, hard rubber, hard plastics or similar hard materials (including machines for nailing, stapling, gluing or otherwise assembling), or • Machining centers, unit construction machines (single station) or multi-station transfer machines for working metal, or • Lathes (including turning centers), for removing metal, of subheading 8486.90, or a change from any other subheading, except from subheading 8466.10 through 8466.94, and except from heading 8501 when resulting from simple assembly; or

HTSUS	Tariff shift and/or other requirements
	A change to parts suitable for use solely or principally with lifting, handling, loading or unloading machinery from any other good of subheading 8486.90 or from any other subheading, except from subheading 8431.39 and except from heading 8501 when resulting from simple assembly.
* * * * * * *	
8517.11–8517.69	A change to subheading 8517.13 through 8517.14 from any other subheading, except from other transceivers, other transmission apparatus or other transmission apparatus incorporating reception apparatus for radiotelephony or radio-telegraphy of subheading 8517.61 through 8517.69, or 8525.50 through 8525.60; or
	A change to other transmission apparatus for radiotelephony or radiotelegraphy or to other transmission apparatus incorporating reception apparatus for radiotelephony or radiotelegraphy of subheading 8517.61 through 8517.69 from any other good of subheading 8517.61 through 8517.69 or from any other subheading, except from subheading 8517.13 through 8517.14, or 8525.50 through 8525.60; or
	A change to other units of automatic data processing machines of subheading 8517.62 through 8517.69 from any other good of subheading 8517.62 through 8517.69 or from any other subheading, except from subheading 8504.90 or from heading 8473 or subheading 8517.71 or 8517.79 when the change is the result of simple assembly; or
	A change to reception apparatus for radiotelephony or radiotelegraphy of subheading 8517.69 from any other good of subheading 8517.69 or from any other subheading, except from subheading 8527.99, or
	A change to any other good of subheading 8517.11 through 8517.69 from any other subheading outside that group, except from facsimile machines or teleprinters of subheading 8443.31 through 8443.32, and except from subheading 8443.99 or 8517.71 through 8517.79 when that change is the result of simple assembly.
8517.71–8517.79	A change to parts or accessories of the machines of heading 8471 not incorporating a cathode ray tube from any other good of heading subheading 8517.71 or 8517.79 or from any other subheading, except from heading 8414, 8501, 8504, 8534, 8541, or 8542 when resulting from a simple assembly, and except from heading 8473 or subheading 8443.99; or
	A change to antennas or antenna reflectors of a kind suitable for use with apparatus for radiotelephony or radiotelegraphy or to other parts suitable for use solely or principally with apparatus for radiotelephony or radiotelegraphy from any other good of subheading 8517.71 and 8517.79 or from any other subheading, except from heading 8529; or

HTSUS	Tariff shift and/or other requirements
	A change to any other good of subheading 8517.71 through 8517.79 from parts or accessories of the machines of heading 8471 not incorporating a cathode ray tube, or from antennas or antenna reflectors of a kind suitable for use with apparatus for radiotelephony or radiotelegraphy, or from other parts suitable for use solely or principally with the apparatus for radiotelephony or radiotelegraphy of subheading 8517.71 through 8517.79, or from any other heading.
* * * *	* * *
8524.11–8524.99	A change to subheading 8524.11 from any other subheading;
	A change to subheading 8524.12 through 8524.19 from any other heading;
	A change to subheading 8524.91 from any other subheading;
	A change from subheading 8524.92 through 8524.99 from any other heading.
* * * *	* * *
8525.81–8525.89	A change to subheading 8525.81 through 8525.89 from any other subheading or from any other good of subheading 8525.81 through 8525.89, except a change to video camera recorders from television cameras.
* * * *	* * *
8528.42	A change to display units from any other subheading, except from subheading 8471.60 or 8504.40, or from heading 8473 when the change is the result of a simple assembly.
* * * *	* * *
8528.52	A change to display units from any other subheading, except from subheading 8471.60 or 8504.40, or from heading 8473 when the change is the result of a simple assembly.
* * * *	* * *
8528.62	A change to display units from any other subheading, except from subheading 8471.60 or 8504.40, or from heading 8473 when the change is the result of a simple assembly.
* * * *	* * *
8539.41–8539.52	A change to subheading 8539.41 through 8539.52 from any other subheading outside that group.
* * * *	* * *
8543.20–8543.40	A change to subheading 8543.20 through 8543.40 from any other subheading, including another subheading within that group.
8543.70	A change to subheading 8543.70 from any other subheading, except from LED modules of subheading 8539.51 and LED lamps of subheading 8539.52, except from proximity cards or tags of subheading 8523.52 and except from other machines or apparatus of subheading 8486.10 through 8486.20.

HTSUS	Tariff shift and/or other requirements
* * * *	* * *
8548	A change to heading 8548 from any other heading, except from heading 8549.
8549.00	A change to heading 8549 from any other heading, except from heading 8548.
* * * *	* * *
(p).....	Section XVII: Chapters 86 through 89
* * * *	* * *
8708.22	A change to subheading 8708.22 from any other heading.
* * * *	* * *
8708.40	A change to parts for power trains of subheading 8708.40 from any other good of subheading 8708.40 or from any other subheading, except from parts or accessories of the goods of subheading 8708.50, 8708.80 through 8708.92, or 8708.94 through 8708.99; or
	A change to any other good of subheading 8708.40 from parts for power trains of subheading 8708.40, except when the change is pursuant to General Rule of Interpretation 2(a), or from any other subheading, except from parts or accessories of the goods of subheading 8708.50, 8708.80 through 8708.92, or 8708.94 through 8708.99, when the change is pursuant to General Rule of Interpretation 2(a).
* * * *	* * *
8801–8806	A change to heading 8801 through 8806 from any other heading outside that group, except from heading 8807 when that change is pursuant to General Rule of Interpretation 2(a).
8807.10–8807.90	A change to subheading 8807.10 through 8807.90 from any other subheading, including another subheading within that group.
* * * *	* * *
(q).....	Section XVIII: Chapters through 92
* * * *	* * *
9006.30–9006.69	A change to cameras of a kind used for recording documents on microfilm, microfiche or other microforms of subheading 9006.53 through 9006.59 from any other good of subheading 9006.53 through 9006.59 or from any other subheading; or
	A change to any other good of subheading 9006.53 through 9006.59 from cameras of a kind used for recording documents on microfilm, microfiche or other microforms of subheading 9006.53 through 9006.59 or from any other subheading; or
	A change to flashbulbs, flashcubes or the like of subheading 9006.69 from any other good of subheading 9006.69 or from any other subheading; or
	A change to any other good of subheading 9006.30 through 9006.69 from any other subheading, including another subheading within that group.

HTSUS	Tariff shift and/or other requirements
* * * *	* * *
(s)	Section XX: Chapters 94 through 96
* * * *	* * *
9401.10–9401.80	A change to subheading 9401.52 through 9401.59 from any subheading outside that group, except from subheading 9401.10 through 9401.80, subheading 9403.10 through 9403.89, and except from subheading 9401.91 through 9401.99 or 9403.91 through 9403.99 when that change is pursuant to General Rule of Interpretation 2(a); or A change to subheading 9401.10 through 9401.80 from any other subheading outside that group, except from subheading 9403.10 through 9403.89, and except from subheading 9401.91 through 9401.99 or 9403.91 through 9403.99, when that change is pursuant to General Rule of Interpretation 2(a).
9401.91–9401.99	A change to subheading 9401.91 through 9401.99 from any other heading, except from subheading 9403.91 through 9403.99.
9402	A change to heading 9402 from any other heading, except from heading 9401.10 through 9401.80 or subheading 9403.10 through 9403.89, and except from subheading 9401.91 through 9401.99 or 9403.91 through 9403.99, when that change is pursuant to General Rule of Interpretation 2(a).
9403.10–9403.89	A change to subheading 9403.10 through 9403.89 from any other subheading outside that group, except from subheading 9401.10 through 9403.89, and except from subheading 9401.91 through 9401.99 or 9403.91 through 9403.99, when that change is pursuant to General Rule of Interpretation 2(a).
9403.91–9403.99	A change to subheading 9403.91 through 9403.99 from any other heading, except from subheading 9401.91 through 9401.99.
* * * *	* * *
9405.11–9405.69	A change to subheading 9405.11 through 9405.69 from any other subheading outside that group, except from subheading 9405.91 through 9405.99 when that change is pursuant to General Rule of Interpretation 2(a).
* * * *	* * *
9503	A change to wheeled toys designed to be ridden by children or to dolls' carriages or dolls' strollers, parts or accessories thereof from any other chapter, except from heading 8714 when that change is pursuant to General Rule of Interpretation 2(a); or A change to dolls, whether or not dressed, from any other subheading or from any other good of heading 9503, except from skins for stuffed dolls of heading 9503; or A change to parts or accessories of dolls representing only human beings from any other heading or from any other good of heading 9503, except from toys representing animals or non-human creatures of heading 9503; or

HTSUS	Tariff shift and/or other requirements
	A change to electric trains, including tracks, signals and other accessories or parts thereof from any other good of heading 9503 or from any other subheading; or
	A change to reduced-size ("scale") model assembly kits, (excluding electric trains) or to parts or accessories thereof, from any other good of heading 9503 or from any other subheading; or
	A change to other construction sets and constructional toys or to parts or accessories thereof from any other good of heading 9503 or from any other subheading; or
	A change to toys representing animals or non-human creatures or to parts or accessories thereof from wheeled toys de- signed to be ridden by children, dolls' carriages, or dolls representing only human beings of heading 9503 or from any other heading; or
	A change to toys representing animals or non-human creatures from parts or accessories of toys representing animals or non-human creatures of heading 9503; or
	A change to parts or accessories of toys representing animals or non-human creatures from wheeled toys designed to be ridden by children, dolls' carriages, or dolls' strollers of heading 9503 or from any other heading, except from heading 6111 or 6209; or
	A change to toy musical instruments and apparatus from any other good of heading 9503 or from any other subheading; or
	A change to puzzles from any other good of heading 9503 or from any other subheading; or
	A change to other toys, put up in sets or outfits, or to other toys and models, incorporating a motor, or to other toys from any other chapter.
* * * * * * *	
Chapter 96 Note: The country of origin of goods classified in subheading 9612.10.9010 will be determined under the provisions of § 102.21. The country of origin of goods classified in subheadings 9619.00.21 through 9619.00.79, HTSUS, will be determined under the provisions of § 102.21.	
* * * * * * *	
9620.00	A change to subheading 9620.00 from any other heading or subheading, except from heading 9001 or 9002 and except from heading 8414, 8501, 8504, 8534, 8541, or 8542 when resulting from a simple assembly.
* * * * * * *	
(t)	Section XXI: Chapter 97.
9701.21–9701.99	A change to subheading 9701.21 through 9701.99 from any other subheading, including another subheading within that group.
* * * * * * *	

■ 3. In § 102.21:

■ a. Paragraph (b)(5) is amended by revising the list of tariff numbers;

■ b. Paragraph (c)(3)(ii) is revised;

■ c. Add a heading to the table following paragraph (e)(1);

■ d. Newly designated table 1 to paragraph (e)(1) is amended by:

■ i. Removing the entries for: "4202.12.40–4204.12.80", "4202.22.40–4202.22.80", "4202.32.40–4202.32.95", "4202.92.15–4202.92.30", "4202.92.60–4202.92.90", "6201–6208", "6201–6208", "6209.20.5040", "6210–6212", "7019.19.15", "7019.19.28", and "7019.40–7019.59"; and

■ ii. Adding in numerical order entries for: "4202.12.40–4202.12.89", "4202.22.40–4202.22.89", "4202.32.40–4202.32.99", "4202.92.15–4202.92.33", and "4202.92.60–4202.92.97";

■ iii. Revising the entry for "6201– 6208"; and

■ iv. Adding in numerical order entries for "6210–6211", "6212", "6501", "7019.13.15", "7019.13.28", "7019.61–7019.90", and "9619.00.31–9619.00.33"; and

■ e. Paragraph (e)(2) introductory text is revised.

The revisions and additions read as follows:

§ 102.21 Textile and apparel products.

* * * * *

(b) * * *

(5) * * *

3005.90
3921.12.15
3921.13.15
3921.90.2550
4202.12.40–89
4202.22.40–89
4202.32.40–99
4202.92.04–08
4202.92.15–33
4202.92.60–97
6405.20.60
6406.10.77
6406.10.90
6406.90.15
6501
6502

6504
6505.00 (except for hair-nets of subheading 6505.00)
6601.10–99
7019.13.15
7019.13.28
7019.61–90
8708.21
8804
9113.90.40
9404.90
9612.10.9010
9619.00.21–79

* * * * *

(c) * * *

(3) * * *

(ii) Except for fabrics of chapter 59 and goods of headings 5609, 5807, 5811, 6213, 6214, 6301 through 6306, and 6308, and subheadings 6307.10, 6307.90, 9404.90, and 9619.00.31–33 if the good was not knit to shape and the good was wholly assembled in a single country, territory, or insular possession, the country of origin of the good is the country, territory, or insular possession in which the good was wholly assembled.

* * * * *

(e) * * *

(1) * * *

TABLE 1 TO PARAGRAPH (E)(1)

HTSUS	Tariff shift and/or other requirements
* * * * * * *	
4202.12.40–4202.12.89	A change to subheading 4202.12.40 through 4202.12.89 from any other heading, provided that the change is the result of the good being wholly assembled in a single country, territory, or insular possession.
4202.22.40–4202.22.89	A change to subheading 4202.22.40 through 4202.22.89 from any other heading, provided that the change is the result of the good being wholly assembled in a single country, territory, or insular possession.
4202.32.40–4202.32.99	A change to subheading 4202.32.40 through 4202.32.99 from any other heading, provided that the change is the result of the good being wholly assembled in a single country, territory, or insular possession.

HTSUS	Tariff shift and/or other requirements
* * * * * * *	
4202.92.15–4202.92.33	A change to subheading 4202.92.15 through 4202.92.33 from any other heading, provided that the change is the result of the good being wholly assembled in a single country, territory, or insular possession.
4202.92.60–4202.92.97	A change to subheading 4202.92.60 through 4202.92.97 from any other heading, provided that the change is the result of the good being wholly assembled in a single country, territory, or insular possession.
* * * * * * *	
6201–6208	(1) If the good consists of two or more component parts, a change to an assembled good of heading 6201 through 6208 from unassembled components, provided that the change is the result of the good being wholly assembled in a single country, territory, or insular possession.
	(2) If the good does not consist of two or more component parts, a change to heading 6201 through 6208 from any heading outside that group, except from heading 5007, 5111 through 5113, 5208 through 5212, 5309 through 5311, 5407 through 5408, 5512 through 5516, 5602 through 5603, 5801 through 5806, 5809 through 5811, 5903, 5906 through 5907, and 6217, and subheading 6307.90, and provided that the change is the result of a fabric-making process.
* * * * * * *	
6210–6211	(1) If the good consists of two or more component parts, a change to an assembled good of heading 6210 through 6211 from unassembled components, provided that the change is the result of the good being wholly assembled in a single country, territory, or insular possession.
	(2) If the good does not consist of two or more component parts, a change to heading 6210 through 6211 from any heading outside that group, except from heading 5007, 5111 through 5113, 5208 through 5212, 5309 through 5311, 5407 through 5408, 5512 through 5516, 5602 through 5603, 5801 through 5806, 5809 through 5811, 5903, 5906 through 5907, 6001 through 6006, and 6217, subheading 6307.90, and subheading 9619.00.61 through 9619.00.79, and provided that the change is the result of a fabric-making process.
6212	(1) If the good is not knit to shape and consists of two or more component parts, a change to an assembled good of heading 6212 from unassembled components, provided that the change is the result of the good being wholly assembled in a single country, territory, or insular possession.

HTSUS	Tariff shift and/or other requirements
	(2) If the good is not knit to shape and does not consist of two or more component parts, a change to heading 6212 from any other heading, except from heading 5007, 5111 through 5113, 5208 through 5212, 5309 through 5311, 5407 through 5408, 5512 through 5516, 5602 through 5603, 5801 through 5806, 5809 through 5811, 5903, 5906 through 5907, 6001 through 6006, and 6217, and subheading 6307.90, and provided that the change is the result of a fabric-making process.
	(3) If the good is knit to shape, a change to heading 6212 from any other heading, provided that the knit to shape components are knit in a single country, territory, or insular possession.
* * * * * * *	
6501	(1) If the good consists of two or more components, a change to heading 6501 from any other heading, provided that the change is the result of the good being wholly assembled in a single country, territory, or insular possession.
	(2) If the good does not consist of two or more components, a change to heading 6501 from any other heading, except from heading 5602, and provided that the change is the result of a fabric-making process.
* * * * * * *	
7019.13.15	(1) If the good is of filaments, a change to subheading 7019.13.15 from any other heading, provided that the change is the result of an extrusion process.
	(2) If the good is of staple fibers, a change to subheading 7019.13.15 from any other subheading, except from subheading 7019.13.35, 7019.19.30 through 7019.19.91, 7019.14.00 through 7019.15.00, 7019.80.90, 7019.71.00, 7019.80.10, and 7019.90, and provided that the change is the result of a spinning process.
7019.13.28	(1) If the good is of filaments, a change to subheading 7019.13.28 from any other heading, provided that the change is the result of an extrusion process.
	(2) If the good is of staple fibers, a change to subheading 7019.13.28 from any other subheading, except from subheading 7019.13.35, 7019.19.30 through 7019.19.91, 7019.14.00 through 7019.15.00, 7019.80.90, 7019.71.00, 7019.80.10, and 7019.90, and provided that the change is the result of a spinning process.
7019.61–7019.90	A change to subheading 7019.61 through 7019.90 from any other subheading, provided that the change is the result of a fabric-making process.
* * * * * * *	

HTSUS	Tariff shift and/or other requirements
9619.00.31–9619.00.33	The country of origin of a good classifiable in subheading 9619.00.31 through 9619.00.33 is the country, territory, or insular possession in which the fabric comprising the good was formed by a fabric-making process.

(2) For goods of HTSUS headings 6213 and 6214 and HTSUS subheadings 6117.10, 6302.22, 6302.29, 6302.53, 6302.59, 6302.93, 6302.99, 6303.92, 6303.99, 6304.19, 6304.93, 6304.99, 9404.90.85 and 9404.90.95, except for goods classified under those headings or subheadings as of cotton or of wool or consisting of fiber blends containing 16 percent or more by weight of cotton:

* * * * *

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

[Published in the Federal Register, November 15, 2022 (85 FR 68338)]

U.S. Court of International Trade

Slip Op. 22–122

ELLWOOD CITY FORGE CO., ELLWOOD NATIONAL STEEL CO., ELLWOOD QUALITY STEELS CO., AND A. FINKL & SONS, Plaintiffs/Defendant-Intervenors, v. UNITED STATES, Defendant, and BGH EDELSTAHL SIEGEN GMBH, Defendant-Intervenor/Plaintiff.

Before: Stephen Alexander Vaden, Judge
Consol. Court No. 1:21–00077

[Denying Ellwood City's Motion for Judgment on the Agency Record and granting BGH Edelstahl's Motion in part.]

Dated: November 8, 2022

Myles S. Getlan, Cassidy Levy Kent LLP, of Washington, DC, for Plaintiffs. With him on the brief were *Jack A. Levy*, *Thomas M. Beline*, *James E. Ransdell, IV*, and *Nicole Brunda*.

Sarah E. Kramer, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC, for Defendant United States. With her on the brief were *Brian M. Boynton*, Principal Deputy Assistant Attorney General, *Jeanne E. Davidson*, Director, Commercial Litigation Branch, *Patricia M. McCarthy*, Assistant Director, Commercial Litigation Branch, and *Hendricks Valenzuela*, Office of Chief Counsel for Trade Enforcement and Compliance, U.S. Department of Commerce.

James Kevin Horgan, deKieffer & Horgan, PLLC, of Washington, DC, for Defendant-Intervenor. With him on the brief were *Alexandra H. Salzman*, *Gregory Stephen Menegaz*, and *Marc Edward Montalbine*.

OPINION

Vaden, Judge:

Ellwood City Forge Company, Ellwood National Steel Company, Ellwood Quality Steels Company, and A. Finkl & Sons (collectively "Ellwood City" and "Plaintiffs") filed this case on February 26, 2021, under Section 516A of the Tariff Act of 1930, as amended. Plaintiffs challenge certain aspects of the final determination in the less-than-fair-value investigation of forged steel fluid end blocks (FEBs) from Germany issued by the U.S. Department of Commerce (Commerce). Specifically, Plaintiffs challenge Commerce's decision to issue verification questionnaires in lieu of conducting on-site verification, the results obtained from that procedure, the cost data on which Commerce relied, and Commerce's subsequent determination of a 3.82% dumping margin for BGH Edelstahl Siegen GmbH (BGH), a German producer of FEBs and mandatory respondent in this investigation. *See* Compl., ECF No. 6. In the companion consolidated case, No. 21–00079, BGH challenges Commerce's use of a particular market

situation adjustment to the sales-below-cost test and what it refers to as the "inter-product zeroing" Commerce used in its differential pricing analysis. BGH Mot. for J. on the Agency R. at 3, ECF No. 23. Before the Court are both Motions for Judgment on the Agency Record. For the reasons set forth below, Ellwood City's Motion is **DENIED**, BGH's Motion is **GRANTED** in part, and the case is **REMANDED** to Commerce for further consideration consistent with this opinion.

BACKGROUND

The products at issue in this case are fluid end blocks produced in Germany for import into the United States. The International Trade Administration described the types of FEBs included in the scope:

> The products covered by this investigation are forged steel fluid end blocks (fluid end blocks), whether in finished or unfinished form, and which are typically used in the manufacture or service of hydraulic pumps.
>
> The term "forged" is an industry term used to describe the grain texture of steel resulting from the application of localized compressive force. Illustrative forging standards include, but are not limited to, American Society for Testing and Materials (ASTM) specifications A668 and A788.
>
> . . .
>
> The products covered by this investigation are: (1) Cut-to-length fluid end blocks with an actual height (measured from its highest point) of 8 inches (203.2 mm) to 40 inches(1,016.0 mm), an actual width (measured from its widest point) of 8 inches (203.2 mm) to 40 inches (1,016.0 mm),and an actual length (measured from its longest point) of 11 inches (279.4 mm) to 75 inches (1,905.0 mm); and (2) strings of fluid end blocks with an actual height (measured from its highest point) of 8 inches (203.2 mm) to 40 inches (1,016.0 mm), an actual width (measured from its widest point) of 8 inches (203.2 mm) to 40 inches (1,016.0 mm), and an actual length (measured from its longest point) up to 360 inches (9,144.0 mm).
>
> . . .
>
> A fluid end block may be imported in finished condition (i.e., ready for incorporation into a pump fluid end assembly without further finishing operations) or unfinished condition (i.e., forged but still requiring one or more finishing operations before it is ready for incorporation into a pump fluid end assembly). Such

finishing operations may include: (1) Heat treating; (2) milling one or more flat surfaces; (3) contour machining to custom shapes or dimensions; (4) drilling or boring holes; (5) threading holes; and/or (6) painting, varnishing, or coating.

Forged Steel Fluid End Blocks from The Federal Republic of Germany, India, and Italy: Initiation of Less-Than-Fair-Value Investigations, 85 Fed. Reg. 2,394, 2,399 Appendix I (Jan. 15, 2020) (describing the particular characteristics of FEBs included in this investigation), J.A. at 80,005, ECF No. 42.

STATEMENT OF FACTS

I. The Antidumping Investigation

The investigation at issue began on December 18, 2019, when Plaintiffs filed a petition with the Department of Commerce alleging that German producers were selling FEBs at less than fair market value in the United States. *Forged Steel Fluid End Blocks from the Federal Republic of Germany, India, and Italy: Initiation of Less-than-Fair-Value Investigations*, 85 Fed. Reg. 2,394 (Jan. 15, 2020). Commerce initiated an investigation on January 15, 2020, and published its Respondent Selection Memorandum identifying BGH Edelstahl Siegen GmbH as a mandatory respondent on February 4, 2020. Preliminary Decision Memorandum (PDM) at 3, J.A. at 82,877. Commerce sent BGH a standard initial questionnaire on February 10, 2020, requesting information about the German producer's sales in the United States and costs of production. *Id.* Between March 10, 2020, and April 28, 2020, BGH submitted responses to each section of the initial questionnaire. *Id.* at 4.

During the period that BGH was submitting its questionnaire responses, the World Health Organization officially classified COVID-19 as a pandemic. *WHO Director-General's opening remarks at the media briefing on COVID-19 - 11 March 2020*, WORLD HEALTH ORGANIZATION (Mar. 11, 2020) https://bit.ly/WHORemarks. On March 15, 2020, the Department of Commerce issued an agency-wide memorandum prohibiting all travel not "mission-critical and pre-approved by senior bureau leadership." DEP'T OF COMMERCE, *All Hands: Coronavirus Update (3–16–20)* https://bit.ly/commercecoronavirus. The CDC issued a Level 4 travel advisory, urging all U.S. citizens to avoid international travel on March 31, 2020. CENTERS FOR DISEASE CONTROL AND PREVENTION, Global Level 4 Health Advisory: Do Not Travel (Mar. 31, 2020).

Given those pandemic-related disruptions, Commerce postponed the preliminary determination in the investigation by fifty days from March 26, 2020, to July 16, 2020. *Forged Steel Fluid End Blocks from the Federal Republic of Germany, India and Italy: Postponement of Preliminary Determinations in the Less-Than-Fair-Value Investigations*, 85 Fed. Reg. 17,042 (March 26, 2020). Meanwhile, Commerce continued to issue supplemental questionnaires to BGH between April and June of 2020. PDM at 4, J.A. at 82,879. With some extensions, BGH timely responded to those questionnaires. *Id.* Based on the initial information it had gathered from BGH, Commerce issued a Preliminary Affirmative Determination of Sales at Less Than Fair Value (SLTFV), assessing a preliminary zero percent dumping margin for BGH. *Forged Steel Fluid End Blocks from Germany: Preliminary Affirmative Determination of Sales at Less Than Fair Value, Postponement of Final Determination, and Extension of Provisional Measures* (Prelim. Determination), 85 Fed. Reg. 44,513, 44,514 (July 23, 2020).

On October 20, 2020, Ellwood City filed comments on Commerce's planned verification method. There, Ellwood City stated that it "appreciate[d] that Commerce [] indicated its intention to issue a questionnaire to BGH in lieu of performing an on-site verification." Pet'rs' Req. That Commerce Include Specific Instructions in BGH Suppl. Questionnaire (Oct. 20, 2020), bar code 4042079–01, PR 310. Ellwood City then made a number of specific recommendations, including that "consistent with on-site verifications, Commerce should instruct BGH to support its responses with source documentation" and that Commerce should impose a one-week deadline for the verification questionnaire response because "BGH has been aware for nearly three months that Commerce would verify BGH's submitted information." *Id.*

Later that same day, Commerce issued a questionnaire "in lieu of performing an on-site verification." Letter to BGH, J.A. at 83,328, ECF No. 42. Commerce explained that the purpose of the questionnaire was "to probe information . . . already submitted – not to obtain new information." *Id.* Thus, "the questions are similar to those that the Department of Commerce (Commerce) would normally ask during an on-site verification." *Id.* BGH requested an extension of time to complete the verification response, and Commerce ultimately granted a one-day extension while explaining that it could not grant a longer extension because it would frustrate the purposes of its chosen verification methodology. Letter Granting Extension, J.A. at 83,334, ECF No. 42. BGH submitted its response on October 28, 2020. J.A. at 83,336, ECF No. 42.

BGH and Ellwood City submitted administrative case briefs on November 9, 2020. IDM at 2, J.A. at 83,988, ECF No. 42. Ellwood City's submission repeatedly refers to the questionnaires as verification, calling the procedure "verification" and a "verification questionnaire." Administrative Case Br. at 3, ECF No. 48 ("BGH's response to Commerce's sales trace requests at verification establishes that BGH's CONNUM reporting methodology is riddled with material errors . . . ." and "verification revealed that BGH relied on inadequate records . . . ."); *see, e.g.*, *id.* at 15 ("[I]n its verification questionnaire, Commerce again asked BGH to validate its reported costs . . . ."); *id.* at 18 ("BGH's verification documentation indicates . . . ."); *id.* at 19 ("an error that would not have come to light absent verification . . . ."); *id.* at 25 ("BGH . . . fail[ed] to comply with Commerce's requests at verification."); *id.* at 70 ("BGH's verification documentation reveal significant reporting errors . . . .").

The parties then requested a virtual public hearing, which Commerce held on November 24, 2020. There, counsel for Ellwood City once again referenced "verification" and "verification questionnaires" without objecting to their use in lieu of traditional on-site verification. *See generally* Tr. of Hearing, J.A. at 83,893, ECF No. 42. Instead, Ellwood City only questioned whether BGH had submitted verifiable information and argued that discrepancies in its responses prevented Commerce from being able to rely on the submitted information. *Id.* at 11:4–8, J.A. at 83,903 ("I'm going to address . . . BGH's failure to correctly report other information that was revealed in the verification . . . ."); 16:16–22, J.A. at 83,908 ("The virtual verification or the verification questionnaire that was issued to BGH revealed further deficiencies that call into question the integrity of BGH's submitted data . . . verification is a spot check and that's what Commerce sought to do in its verification questionnaire.").

On December 8, 2020, Commerce issued its Final Issues and Decision Memorandum (IDM), explaining in detail its decision to assign a dumping margin of 3.82% to BGH. J.A. at 83,987, ECF No. 42. Commerce published the Final Determination on December 11, 2020. *Forged Steel Fluid End Blocks from the Federal Republic of Germany: Final Determination of Sales at Less Than Fair Value* (Final Determination), 85 Fed. Reg. 80,018 (Dec. 11, 2020).

II. The Present Dispute

In February 2021, Ellwood City sued Commerce, challenging its final determination regarding BGH. Compl., ECF No. 6. BGH moved to intervene as Defendant-Intervenor on March 29, 2021. Consent Mot. Intervene, ECF No. 10. On May 6, 2021, the parties moved to

consolidate with companion case 21–00079, in which BGH as Plaintiff challenges elements of the same determination. The Court granted that Motion on May 7, 2021, designating the present case as the lead consolidated case. Consent Mot. to Consolidate Cases, ECF No. 17; Order Granting Mot. to Consolidate Cases, ECF No. 18. Before the Court are Rule 56.2 Motions for Judgment on the Agency Record from Plaintiffs in this case, Ellwood City, and Plaintiff in the companion case, BGH. ECF Nos. 23, 25. Ellwood City asks this Court to reverse Commerce's final determination on the bases that (1) Commerce's failure to conduct on-site verification was contrary to law and (2) Commerce's overall determination is unsupported by substantial evidence and contrary to law because it relied on unreconciled cost data. ECF No. 25. BGH similarly asks this Court to reverse and remand Commerce's final determination but on the bases that (1) Commerce erred in making particular market situation adjustments to BGH's reported costs and (2) Commerce erred in its application of differential pricing methodology. ECF No. 23.

Commerce filed its response on December 17, 2021, asserting that (1) Ellwood City waived its verification argument by failing to raise it during the administrative proceeding; (2) Commerce's verification procedures were consistent with statutory requirements and necessary given the worldwide pandemic; and (3) Commerce's application of differential pricing methodology with regard to BGH was supported by substantial evidence and in accordance with law. Def.'s Resp. to Pls.' Rule 56.2 Mot. for J. on the Agency R. (Def.'s Resp.), ECF No. 37. Commerce did not oppose a remand on BGH's particular market situation claims. *Id.* at 29.

Defendant-Intervenor BGH's December 17, 2021 response similarly argued that (1) Commerce's verification procedures were within its discretion and fulfilled the statutory requirements and (2) Commerce's verification questionnaire elicited sufficient information such that Commerce's reliance on BGH's data was supported by substantial evidence. Resp. Br. of Def.-Int. BGH Edelstahl Siegen GmbH (BGH Resp.), ECF No. 35.

In its response, Ellwood City claimed that (1) substantial evidence supported Commerce's findings that a particular market situation disrupted the German ferrochrome and electricity markets, (2) the law permitted the adjustments Commerce made, and (3) Commerce lawfully applied its differential pricing methodology. Ellwood City Resp. Br. in Opp'n to BGH Edelstahl Siegen GmbH's Rule 56.2 Mot. for J. on the Agency R. (Ellwood City Resp.), ECF No. 33.

Ellwood City and BGH filed reply briefs on January 18, 2022. Ellwood City asserted that (1) it had exhausted administrative rem-

edies regarding verification or, alternatively, that futility and the pure-question-of-law exceptions applied, (2) Commerce's new verification techniques were not justified by the pandemic, (3) Commerce's verification findings were not supported by substantial evidence, and (4) Commerce's final determination unlawfully relied on BGH's unreconciled cost information. Reply Br. Ellwood City, ECF No. 40 (Ellwood City Reply). BGH simply reasserted its earlier claims regarding Commerce's findings. Reply Br. BGH Edelstahl Siegen GmbH, ECF No. 38 (BGH Reply).

The Court held oral argument on April 25, 2022. The Court confirmed that BGH was "not contesting [Commerce's] application of the Cohen's D [*sic*] test and the ratio test to this data set, correct?" To which BGH counsel responded: "That's right, Your Honor." Oral Arg. Tr. at 22:2–5 (Tr.).

On July 7, 2022, Ellwood City filed a Notice of Supplemental Authority, arguing that Commerce's recent Remand Results in an unrelated case pending before this Court, *Bonney Forge Corporation v. United States*, Case No. 20–3837, concede that it would have been futile for Ellwood City to make its verification argument in the administrative brief. Notice of Suppl. Authority at 2, ECF No. 54. In that case, Commerce stated that it would have been too late logistically for Commerce to conduct a virtual verification when a party waited until its final case brief to make the request. *Id.*

JURISDICTION AND STANDARD OF REVIEW

This Court has exclusive jurisdiction over Ellwood City and BGH's challenge to Commerce's Final Determination under 19 U.S.C. § 1516a(a)(2)(B)(i) and 28 U.S.C. § 1581(c), which grant the Court authority to review actions contesting final affirmative determinations, including any negative part of such determinations, in an antidumping order. The Court must sustain Commerce's "determination, finding, or conclusion" unless it is "unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B)(i). This standard requires that Commerce thoroughly examine the record and "articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made." *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (internal quotation marks and citation omitted); *accord Tianjin Magnesium Int'l Co. v. United States*, 722 F. Supp. 2d 1322, 1328 (CIT 2010). "[T]he question is not whether the Court would have reached the same decision on the same record[;] rather, it is whether the admin-

istrative record as a whole permits Commerce's conclusion." *New Am. Keg v. United States*, No. 20–0008, 2021 WL 1206153, at *6 (CIT Mar. 23, 2021). "It is not for this court on appeal to 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).

Reviewing agency determinations, findings, or conclusions for substantial evidence, the Court assesses whether the agency action is reasonable given the record as a whole. *Nippon Steel Corp. v. United States*, 458 F.3d 1345, 1351 (Fed. Cir. 2006); *see also Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951) ("The substantiality of evidence must take into account whatever in the record fairly detracts from its weight."). The Federal Circuit has described "substantial evidence" as "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *DuPont Teijin Films USA v. United States*, 407 F.3d 1211, 1215 (Fed. Cir. 2005) (quoting *Consol. Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)).

DISCUSSION

I. Summary

Several diverse arguments are presented by each of the parties in this consolidated case. The Court deals with Ellwood City's arguments first. It contends that (1) Commerce's "questionnaire in lieu of on-site verification" procedure was contrary to law, (2) Commerce's verification results are unsupported by substantial evidence, and (3) Commerce improperly relied on cost data that allegedly failed to reconcile. Pls.' Mot. at 13, ECF No. 25. The Court then considers BGH's contentions. BGH maintains that (1) Commerce's particular market situation adjustment to BGH's cost of production was contrary to law, and (2) the "inter-product zeroing" aspect of its differential pricing analysis was inconsistent with statute. BGH Mot. at 3–4, ECF No. 23.

Ellwood City failed to properly preserve its objection to Commerce's verification procedure. During the underlying investigation, Ellwood City evinced satisfaction and acceptance of the questionnaire method. Although it was obvious very early in the investigation that Commerce would not conduct in-person verification, Ellwood City never lodged an objection to Commerce's verification methodology in the underlying proceeding. No exceptions to administrative exhaustion apply; therefore, the Court will not address that argument now. Regarding Ellwood City's remaining arguments, the Court finds that substantial evidence supports both Commerce's verification findings and its reliance on BGH's cost data. Ellwood City's motion is therefore **DENIED**.

Because of intervening precedent from the Federal Circuit, the Government does not oppose BGH's request for a remand to address the issue of the particular market situation adjustment to BGH's costs. Def.'s Resp. at 29, ECF No. 38. The Court does not find that Commerce's differential pricing analysis was contrary to law, however, and sustains Commerce's use of zeroing. Accordingly, BGH's Motion for Judgment on the Agency Record is **GRANTED** in part. The case is **REMANDED** for Commerce to recalculate a dumping margin consistent with this opinion.

II. Administrative Exhaustion

Ellwood City forfeited its verification argument when it failed to object to Commerce's verification methodology at any time during the antidumping investigation. The CIT's exhaustion paradigm is established by statute and clarified by Commerce's regulations. The CIT will require the exhaustion of administrative remedies "where appropriate." 28 U.S.C. § 2637(d); 19 C.F.R. § 351.309(c)(2) (2018). Here, it would not only have been appropriate but also highly desirable for Ellwood City to put Commerce on notice of its objection to Commerce's "questionnaire in lieu of on-site verification method" during the investigation. Despite the new and continuing arguments that Ellwood City raises regarding the applicability of two exceptions to the exhaustion requirement, its failure to timely raise these arguments is excused neither by the futility exception nor the pure-question-of-law exception.

Though the Court rules on the specific facts of this case, the same legal principles regarding exhaustion discussed in its recent opinion *Ellwood City Forge Co. v. United States* apply to the facts at hand and will therefore be summarized here. No. 1:21–00073, 2022 WL 2129102 (CIT June 14, 2022). The purpose of the "general rule that parties exhaust prescribed administrative remedies before seeking relief from the federal courts" is to "protect[] administrative agency authority and promot[e] judicial efficiency." *McCarthy v. Madigan*, 503 U.S. 140, 144–45 (1992). The Court of International Trade thus requires the exhaustion of administrative remedies in antidumping order reviews "where appropriate." 28 U.S.C. § 2637(d). Department of Commerce regulations establish that the administrative case brief is the *last* opportunity for parties to submit any arguments they deem relevant. Parties can and should raise their objections early and often; but after the case brief stage, any arguments not included are deemed forfeited. 19 C.F.R. § 351.309(c)(2) (2018) (requiring that parties include in their final case briefs "all arguments that continue in the submitter's view to be relevant to the Secretary's final determination or final results, including any arguments presented before

the date of publication of the preliminary determination or preliminary results"). In other words, parties must "state all relevant arguments in their final brief to the agency or forever hold their peace." *Ellwood City*, 2022 WL 2129102, at *8.

The goal of exhaustion is to ensure that "Commerce was put on notice of the issue" and had an opportunity to resolve it. *Trust Chem Co. Ltd. v. U.S.*, 791 F. Supp. 2d 1257, 1268 n.27 (CIT 2011); *see also Luoyang Bearing Corp. v. United States*, 347 F. Supp. 2d 1326, 1352 (CIT 2004) ("[P]laintiff's brief statement of the argument is sufficient if it alerts the agency to the argument with reasonable clarity and avails the agency with an opportunity to address it," but a plaintiff cannot "merely mention[] a broad issue without raising a particular argument.").

Commerce argues that Plaintiff failed to exhaust its administrative remedies because "it did not raise during the administrative proceeding its arguments that the procedures chosen by Commerce to conduct its verification were deficient." Def.'s Resp. at 8, ECF 37. The Court concurs. Ellwood City had many opportunities to object to the verification methodology Commerce suggested; however, neither in its post-preliminary comments on verification, nor in its seventy-one-page case brief, nor in its hearing with Commerce officials did Ellwood City object. Instead, it repeatedly embraced Commerce's questionnaire "in lieu of performing on-site verification." Questionnaire, J.A. at 83,328, ECF No. 42. In the investigation, Ellwood City simply called the procedure "verification" and the method chosen a "verification questionnaire," not "so-called verification" or any designation to indicate dissatisfaction with the procedure. Administrative Case Brief at 3, ECF No. 48 ("BGH's response to Commerce's sales trace requests at verification establishes that BGH's CONNUM reporting methodology is riddled with material errors . . . verification revealed that BGH relied on inadequate records . . . ."); *see, e.g.*, *id.* at 15 ("[I]n its verification questionnaire, Commerce again asked BGH to validate its reported costs . . . ."); *id.* at 18 ("BGH's verification documentation indicates . . . ."); *id.* at 19 ("[A]n error that would not have come to light absent verification . . . ."); *id.* at 25 ("BGH . . . fail[ed] to comply with Commerce's requests at verification."); *id.* at 70 ("BGH's verification documentation reveal significant reporting errors . . . ."). The public hearing demonstrated similar approval of the verification regime. Tr. of Hearing 11:4–8, 16:16–22 ("I'm going to address . . . BGH's failure to correctly report other information that was revealed in the verification" and "The virtual verification or the verification questionnaire that was issued to BGH revealed further deficiencies that call

into question the integrity of BGH's submitted data . . . verification is a spot check and that's what Commerce sought to do in its verification questionnaire.").

This is not a case of just failing to include an argument in the final case brief, as the regulation requires; an objection to the verification procedure is nowhere to be found in the administrative record — even when it was clear that Commerce would not be conducting an "on-site" verification. *See* 19 C.F.R. § 351.309(c)(2) (2018). Commerce conducted what it presumably considered to be a valid verification, using questionnaires "in lieu of performing on-site verification." Letter to BGH, J.A. 83,328, ECF No. 42. Before, during, and afterward, Ellwood City had the opportunity to object that the questionnaire verification failed to satisfy the statutory requirements for verification in 19 U.S.C. § 1677m(i)(1) but failed to do so. Commerce could not have been put on notice or responded on the record to an argument that was not raised during the investigation. Allowing Ellwood City to proceed would therefore enable "circumvent[ion]" of the prerequisites of exhaustion prescribed by existing caselaw. *Luoyang Bearing Corp. v. United States*, 347 F. Supp. 2d 1326, 1352 (CIT 2004). A "brief statement of the argument is sufficient if it alerts the agency to the argument with reasonable clarity and avails the agency with an opportunity to address it," but Ellwood City made no attempt to articulate the argument during the investigation and has therefore forfeited its argument about the validity of the verification procedure. *Id.*

Ellwood City argues that the futility and pure-question-of-law exceptions excuse its failure to timely raise its verification argument. Its reliance on those exceptions is misplaced. Ellwood City Reply at 6, ECF No. 41. The Court deals with each in turn.

A. Futility

Ellwood City's arguments here are largely the same as those it advanced in its previous case involving Italian steel producers; and though the Court's analysis of the unique facts of this case will be thorough, the Court will be brief in recounting the identical legal principles. Ellwood City claims that "arguing for on-site verification during briefing would have been a useless formality," given the limited time frame that Commerce would have had to carry out a full verification. Ellwood City Reply at 7, ECF No. 41 ("It was not possible to carry out this multi-step process prior to the statutory deadline."). Ellwood City bolsters this argument by citing to a recent Commerce publication that describes those logistical barriers in another case.

Notice of Suppl. Authority at 2, ECF No. 54. For the reasons that follow, the Court is unpersuaded by Ellwood City's novel interpretation of futility.

As the Federal Circuit has explained, "a party often is permitted to bypass an available avenue of administrative challenge if pursuing that route would clearly be futile, i.e., where it is clear that *additional* filings with the agency would be ineffectual." *Itochu Bldg. Prod. v. United States*, 733 F.3d 1140, 1146 (Fed. Cir. 2013) (internal quotation marks omitted) (emphasis added). The parties here set *Corus Staal BV v. United States*, 502 F.3d 1370 (Fed. Cir. 2007) and *Itochu* in opposition to each other, but this is an inaccurate framework for the facts of this case. In both *Corus Staal* and *Itochu*, there was some objection made during the administrative proceedings. In *Itochu*, for example, the party had repeatedly and zealously "put its argument on the record before Commerce issued its preliminary results: it set forth its position in comments, met with eight department officials to discuss the issue, and submitted legal support for its position." *Itochu*, 733 F.3d at 1146. Likewise in *Corus Staal*, a respondent set forth its argument before the preliminary determination (an argument Commerce rejected) but failed to raise the argument again in its final case brief to allow Commerce to reconsider or respond. *Corus Staal*, 502 F.3d at 1378. Neither case blesses the complete failure to raise an issue during the entirety of the administrative proceeding.

For this reason, Ellwood City's argument that Commerce essentially concedes futility in its Remand Redetermination in the unrelated case *Bonney Forge* is misguided. Notice of Suppl. Authority, ECF No. 54. In the Remand Redetermination of *Bonney Forge v. United States*, Case No. 20–3837, Commerce explains its decision not to conduct a real-time virtual verification in that investigation despite a timely request from one of the parties to do so.[1] Notice of Suppl. Authority, Ex. 1, at 13, ECF No. 54. Commerce says that, while the request for virtual verification was "timely submitted," it "came far too late in the proceeding for Commerce to pursue the request." *Id.* Commerce goes on to assert that "[i]f parties had a genuine suggestion regarding alternative verification approaches, the appropriate time for parties to have raised that argument would have been sometime between April and June 2020, when Commerce normally would have prepared for, and conducted, verification." *Id.* at 14. At best, the Remand Redetermination in *Bonney Forge* provides Ellwood City with some degree of post hoc confidence that, had it objected at the

[1] The record in *Bonney Forge* is not part of the record in this case. Because the Remand Results in *Bonney Forge* do not advance Ellwood City's argument, the Court will nonetheless address the issue.

last possible opportunity, Commerce would have refused to change course. But this is insufficient: "The mere fact that an adverse decision may have been likely does not excuse a party from a statutory or regulatory requirement that it exhaust administrative remedies." *Corus Staal*, 502 F.3d at 1379.

Commerce's explanation instead supports the natural interpretation and purpose of 19 C.F.R. § 351.309(c)(2) as a regulation designating the *last* opportunity to state an objection that that a party hopes to raise later before a court, not designating the *only* time the objection may be brought to the agency's attention. Though an argument raised only in the final administrative case brief should still be acknowledged and considered by the agency and will still be preserved for appeal to the CIT, a party should object early and often if it believes the agency is acting unlawfully to allow the agency to consider and respond to the concern. In this case, Ellwood City knew that Commerce did not intend to conduct on-site investigation in Germany as early as October 19, 2020, when Commerce memorialized a phone call in which it informed BGH that Commerce would issue a questionnaire in lieu of verification. Telephone Notification of Questionnaire in Lieu of Verification, J.A. at 2,046, ECF No. 43. The very next day, Ellwood City submitted comments on Commerce's verification questionnaire in which it evinced no objection to Commerce's chosen procedure. Indeed, Ellwood City expressed its gratitude, stating that it "appreciate[d] that Commerce has indicated its intention to issue a questionnaire to BGH in lieu of performing an on-site verification." Pet'rs' Req. That Commerce Include Specific Instructions in BGH Suppl. Questionnaire (Oct. 20, 2020), J.A. at 12,048, ECF No. 43 (also acknowledging familiarity with the other two investigations in which Ellwood City was a petitioner and Commerce had already likewise issued questionnaires instead of conducting on-site verification). On October 20, 2020, Commerce issued the promised supplemental questionnaire "in lieu of performing an on-site verification" to BGH. Letter to BGH, J.A. at 83,328, ECF No. 42. Yet Ellwood City once again failed to object in either its administrative case brief on November 9, 2020, or the hearing on November 24, 2020. Administrative Case Br., ECF No. 48; Tr. of Hearing, J.A. at 83,893, ECF No. 42. Ellwood City had at least three opportunities to object after receiving confirmation of Commerce's intent to employ a questionnaire in lieu of verification, but Ellwood City repeatedly failed to do so.

Although it is true that it "makes little sense to require litigants to present claims to adjudicators who are powerless to grant the relief

requested," *Carr v. Saul*, 141 S. Ct. 1352, 1361 (2021), here it was well within Commerce's ability to consider and potentially alleviate concerns about its verification methods. Commerce's assertions that it would not have been logistically feasible to accomplish a virtual verification in another case between the administrative case briefing stage — when the issue was first raised — and the final determination does not excuse Ellwood City from having never raised the issue at all. It only emphasizes that Ellwood City, which had the benefit of observing how Commerce was (or was not) conducting verifications in other investigations with timelines earlier in the pandemic, should have raised its objections *as soon as possible*.[2] *See, e.g.*, *Bonney Forge Corp. v. United States*, 560 F. Supp. 3d 1303 (CIT 2022) (producer requested a "virtual verification" in its final administrative case brief to the agency after it became clear that Commerce would not conduct a traditional verification).

Even if Commerce could not have further tolled the deadline for the final determination or established new verification procedures in the remaining time, "it would still have been preferable, for purposes of administrative regularity and judicial efficiency," for Ellwood City "to make its arguments in its case brief and for Commerce to give its full and final administrative response in the final results." *Corus Staal*, 502 F.3d at 1380. Commerce could then have acknowledged and responded to Ellwood City's objections on the record. And this is to say nothing of what procedural modifications Commerce could have made had Plaintiffs not remained silent but instead stated their objections early and often. *Cf. Itochu*, 733 F.3d at 1146 (noting that appellant stated its objections before eight separate departmental officials and submitted its legal rationale in writing *before* the optional final briefing stage).

In short, Ellwood City failed to put Commerce on notice of its argument at any point in the proceeding. Commerce was blindsided by Ellwood City's objection to its verification procedure before the Court. Ellwood City never met with Commerce officials to discuss the issue of on-site verification. Furthermore, after verification took place, Ellwood City submitted a brief that evinced its acceptance of Commerce's use of verification questionnaires "in lieu of on-site verification." Ellwood City never once stated any objection to the off-site verification methodology, despite having ample opportunity to do so.

[2] Ellwood City was also involved in two other simultaneous antidumping investigations of FEBs from Italy and India during this period. *See Forged Steel Fluid End Blocks from Italy: Final Affirmative Determination of Sales at Less Than Fair Value*, 85 Fed. Reg. 79,996 (Dec. 11, 2020); *Forged Steel Fluid End Blocks from India: Final Negative Determination of Sales at Less Than Fair Value*, 85 Fed. Reg. 80,003 (Dec. 11, 2020). Ellwood City, therefore, was fully aware of how Commerce was responding to the pandemic and its statutory duty to conduct verification.

A properly timed objection could have led Commerce to change course or provide a further explanation. The futility exception "is a narrow one," and Ellwood City has not satisfied it here. *Corus Staal*, 502 F.3d at 1380.

B. Pure Question of Law

The second exception presents a less complicated juridical framework, but Ellwood City's failure to exhaust is similarly not excused by its appeal to the pure-question-of-law exception. "Requiring exhaustion may also be inappropriate where the issue for the court is a 'pure question of law' that can be addressed without further factual development or further agency exercise of discretion." *Itochu*, 733 F.3d at 1146. If an argument "implicates a pure question of law, it may be addressed" on appeal if "[s]tatutory construction alone is sufficient to resolve the merits of the argument." *Agro Dutch Indus. Ltd. v. United States*, 508 F.3d 1024, 1029 (Fed. Cir. 2007). Ellwood City's verification argument implicates factual inquiries into Commerce's past practice and the logistics of verification; accordingly, the pure-question-of-law exception does not apply.

The Federal Circuit has limited this exception solely to appeals eschewing fact-intensive inquiries. An argument is not a "pure legal issue" if it also alleges that "Commerce arbitrarily changed its well-established practice and contravened the reasonable expectations of importers." *Consol. Bearings Co. v. United States*, 348 F.3d 997, 1003 (Fed. Cir. 2003). Where a party's allegations "require[] a factual record of Commerce's past practice and an assessment of Commerce's justifications for any departure from that past practice," the Federal Circuit has held that "[s]tatutory construction alone" is not sufficient to resolve the case and it therefore cannot qualify as a "pure question of law." *Id.*

Ellwood City argues that the pure-question-of-law exception applies here. It places considerable emphasis on Commerce's acknowledgement that it was "unable to conduct on site verification of the information relied upon in making its final determination in this investigation as provided for in section 782(i)." Ellwood City Reply at 8, ECF No. 40; 85 Fed. Reg. 79,996–97. Plaintiffs claim Commerce thereby admitted a violation of this provision and assert that "the question remains whether Commerce complied with its black-and-white statutory mandate." Ellwood City Reply at 8, ECF No. 40. But Ellwood City's true inquiry has both factual and legal components. In its brief, Ellwood City suggests that "Commerce could have, for example, arranged a virtual 'on site' verification visit with BGH, given Commerce's extensive use of videoconferencing during the pan-

demic." Ellwood City Mot. at 23, ECF No. 25. There is not only the legal question of whether a "virtual on site" verification complies with the statute but also the factual question of the feasibility of such an endeavor in this instance. That is precisely why Commerce should have first been alerted to the argument during the pendency of the investigation rather than on appeal to this Court. Commerce could have explored the suggestion and either accepted it or provided a reason on the record why it was not possible.

Ellwood City's request is analogous to the situation in *Consolidated Bearings* in which the Federal Circuit ruled that the pure-question-of-law exception could not be applied when a party claims Commerce deviated from "well-established practice and contravened the reasonable expectations of importers." *Consol. Bearings Co.*, 348 F.3d at 1003. Like Ellwood City, Consolidated Bearings first alleged that all a court need do is examine specific statutory provisions to rule on its claim. *Compare* Pls.' Mot. at 15 (citing 19 U.S.C. § 1677m(i); 19 C.F.R. § 351.307*), with Consol. Bearings Co*., 348 F.3d at 1003 (citing 19 U.S.C. § 1675). However, this seemingly simple statutory claim quickly morphs into allegations that Commerce's decision was an "unlawful deviation from past practice." *Compare* Pls.' Mot. at 22–23 (citing past alternatives that could have been employed in this case), *with Consol. Bearings Co.*, 348 F.3d at 1003 (noting that Consolidated alleged Commerce violated its "well established prior practice of applying the final results of administrative reviews to importers who did not participate in the review, but import the same merchandise from resellers"). Indeed, Ellwood City's acceptance of these past "off-site" practices as "verification" and suggestion of virtual alternatives confirm the factual rather than purely legal nature of the inquiry. *See* Pls.' Mot. at 20–21, 23–24 (complaining that Commerce "failed to explain why alternative mechanisms of the type previously employed, or that more closely approximated on-site verification, were not possible."). These are exactly the type of allegations that "require a factual record of Commerce's past practice and an assessment of Commerce's justifications for any departure from that past practice." *Consol. Bearings Co.*, 348 F.3d at 1003. No such record exists because Plaintiffs failed to raise their claim before the agency. As "[s]tatutory construction alone" is not sufficient to resolve Plaintiffs' claim, the pure-question-of law exception does not apply.[3] *Id.*

[3] To the extent Plaintiffs' argument regarding the lack of a verification report is separate from their larger verification questionnaire argument, the Court will accept their premise *arguendo* that Commerce failed to include the required materials in the record and that the pure-question-of-law exception applies. Plaintiffs' claim still fails because they have not demonstrated substantial prejudice. *See Am. Farm Lines v. Black Ball Freight Serv.*, 397 U.S. 532, 539 (1970) (stating the "general principle" that it is always within the discretion

C. Failure to Exhaust

The Federal Circuit has held that Congress intended "absent a strong contrary reason, the [trade] court should insist that parties exhaust their remedies before the pertinent administrative agencies." *Corus Staal*, 502 F.2d at 1379. Had Plaintiffs done so here, this Court would have had the benefit of the agency's reasoned judgment about both its interpretation of its legal authorities as well as its past practices. Because Ellwood City chose not to assert the alleged illegality of Commerce's verification questionnaire, the administrative record is devoid of Commerce's explanation of both the law and the facts supporting its chosen methodology. The Court may not now consider extra-record evidence about past practices to resolve Plaintiffs' claim. *See* 19 U.S.C. § 1516a(b)(1)(B)(i) (limiting the Court to reviewing conclusions and evidence found "on the record"). Ellwood City has failed to identify a "strong contrary reason" not to apply the general rule that claims may not be raised for the first time in court. *Corus Staal*, 502 F.3d at 1379. The Court therefore may not consider the merits of Plaintiffs' claims because of their failure to exhaust their administrative remedies. *See* 28 U.S.C. § 2637(d).

III. Verification Procedure and Results

Ellwood City argues that Commerce's procedure for verifying BGH's data was unlawful and separately that its results are unreliable. Although the Court does not reach the merits of the verification procedure claim because of a failure to exhaust, Ellwood City successfully preserved its objections that the verification results were unreliable. The Court finds that Commerce was justified in relying on the verification results and upholds Commerce's findings on this issue.

Dumping occurs "when a foreign producer sells a product in the United States at a price that is below that producer's sales price in the country of origin." *Dongbu Steel Co. v. United States*, 635 F.3d

of "an administrative agency to relax or modify its procedural rules . . . when in a given case the ends of justice require it. The action . . . is not reviewable except upon a showing of substantial prejudice to the complaining party."); *United States v. Great Am. Ins. Co. of New York*, 738 F.3d 1320, 1330 (Fed. Cir. 2013) ("the suspension in this case could be invalidated only if Great American showed that the agency's procedural error caused it substantial prejudice"); *PAM S.p A. v. United States*, 463 F.3d 1345, 1348 (Fed. Cir. 2006) ("[A]gencies may relax or modify their procedural rules and . . . a subsequent agency action is only rescindable 'upon a showing of substantial prejudice.'") Plaintiffs point to no argument they would have raised had Commerce earlier placed additional information on the record, *see* Pls.' Mot. at 21, ECF No. 21, and Plaintiffs had plenty of notice Commerce did not intend to conduct a traditional on-site verification. Letter to Metalcam, J.A. at 3,027, ECF No. 30 (informing all parties of the "questionnaire in lieu of on-site verification" method Commerce planned to pursue). Plaintiffs just chose not to object. Indeed, the remaining substantive arguments Plaintiffs advance are the same ones they made — and preserved — before the agency.

1363, 1365 (Fed. Cir. 2011); *see* 19 U.S.C. § 1677(34). If requested by a domestic industry, "Commerce conducts an investigation to determine whether and to what extent dumping is occurring." *Dongbu Steel*, 635 F.3d at 1365. In those investigations, "Commerce determines antidumping duties for a particular product by comparing the product's 'normal value' (the price a producer charges in its home market) with the export price of comparable merchandise." *Id.*

The Court reviews both "Commerce's verification process" and the verification results themselves under the substantial evidence standard. *Micron Tech., Inc. v. United States*, 117 F.3d 1386, 1397 (Fed. Cir. 1997). In doing so, the Court looks "to whether a reasonable mind might accept the relevant evidence in the record as adequate to support the results of Commerce's verification." *Id.* The Court can only sustain Commerce's action if the agency "articulate[s] a satisfactory explanation for its action including a rational connection between the facts found and the choice made." *Motor Vehicle Mfrs.*, 463 U.S. at 43. When reviewing a determination for substantial evidence, the Court's role is not to "reweigh the evidence" or "reconsider questions of fact anew." *Trent Tube Div.,* 975 F.2d at 815.

In *Micron Tech*, the Federal Circuit found that substantial evidence supported Commerce's verification results even when (1) Commerce stated that it "was not able to trace costs to company source documents" because the respondent's "normal cost accounting system prepared unit cost information on a semi-annual basis, while its cost response reported information on a monthly basis" and where, (2) despite a petitioner's objection, the Court was able to reconcile cost of production figures for another respondent. 117 F.3d at 1399–1400. An examination of the record here demonstrates that Commerce articulated "a satisfactory explanation for its action including a rational connection between the facts found and the choice made" in Ellwood City's preserved arguments. *Motor Vehicle Mfrs.*, 463 U.S. at 43.

Ellwood City bases its argument about the unreliability of the verification results on errors BGH reported in two of the four transactions Commerce traced as part of its verification questionnaire. Ellwood City Mot. at 29, ECF No. 25. BGH reported both errors to Commerce at the beginning of its verification questionnaire response. The first was an error in the reported length of the product; the initial reported length was off by 11.5 mm, or less than a half inch on a block over four feet in length. BGH Verification Questionnaire Response, Ex. VE-5 (Oct. 28, 2020), J.A. at 83,337, ECF No. 42; BGH Rebuttal Brief at 11 (Nov. 18, 2020), J.A. at 86,432, ECF No. 42. Commerce's analysis determined that the error had no impact on any other fields or to the dumping margin nor did it seem to be "indicative of a

systemic reporting issue." IDM at 43–44, J.A. at 84,029–30, ECF No. 42 ("The correction to the U.S. sale consists of change to a single product characteristic.").

The second correction was to a transaction of a CONNUM[4] not sold in the United States in which BGH initially misreported information for three variables: tensile strength, number of bores, and days between end of production and shipment. BGH Verification Questionnaire Response, Ex. VE-5 (Oct. 28, 2020), J.A. at 83,337, ECF No. 42. BGH explained on the record that those errors arose because the invoice for that transaction came from BGH's old order processing system, and a review of the record revealed that the transaction was the only sales file that came out of the old order processing system. J.A. at 2,875, ECF No. 43. The corrections did change the CONNUM categorization, but neither the original nor the revised CONNUM were sold in the United States and the price or cost data were not altered. It thus had no significant impact on the overall dumping margin.[5] *Id.*

On review of all the data before it, Commerce considered both corrections to be "minor clerical errors which Commerce would normally accept at verification." IDM at 43, J.A. at 84,029, ECF No. 42. One related to a proportionately small inaccuracy in the length of a product; the other was an outlier transaction from an outdated processing system of a product not sold in the United States. Neither of those errors implicate widespread problems such that Commerce should have disregarded the legitimacy of all of BGH's information or should have been *compelled* to request additional information. As in *Micron Tech*, where some slight differences in the cost reporting system did not impact the overall reliability of the data, there are reasonable explanations for both errors Ellwood City identifies — explanations fully articulated by Commerce — and a reasonable mind could find that sufficient evidence exists to support Commerce's verification results on the basis of its explanation. Accordingly, the Court finds that substantial evidence exists to support Commerce's reliance on its verification outcomes.

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[4] "**'CONNUM'** is a contraction of the term 'control number,' and is Commerce jargon for a unique product. A particular **CONNUM** roughly corresponds to a particular product **defined** 'in terms of a hierarchy of specified physical characteristics determined in each antidumping proceeding.'" *Xi'an Metals & Minerals Import & Export Co., Ltd. v. U.S.*, 2022 WL 4391436, at *2 (Fed. Cir. Sept. 23, 2022) (internal citations omitted).

[5] Moreover, BGH established at oral argument, and the other parties did not dispute, that each individual CONNUM was composed of at least 18 factors. Tr. 72:18–25. This means that the four sales traces Commerce completed involved entry of 72 individual data factors on behalf of BGH, meaning that, if BGH had inaccuracies in 4 entries, its overall error rate was still only 5%.

IV. Cost Reconciliation

Ellwood City objects that Commerce impermissibly relied on BGH's cost data after it failed to reconcile. Commerce and BGH assert, by contrast, that BGH's costs do reconcile and that Commerce had all the information it needed to rely on BGH's costs. *See* Ellwood City Mot. at 30, ECF No. 25; Def.'s Resp. at 20, ECF No. 37; BGH Resp. at 20, ECF No. 35. Commerce is required to ensure that a respondent's costs of production reconcile to its audited financial statements. 19 U.S.C. § 1677b(f)(1)(A). The statute directs that costs in antidumping investigations "be calculated based on the records of the exporter or producer of the merchandise, if such records are kept in accordance with the generally accepted accounting principles of the exporting country . . . and reasonably reflect the costs associated with the production and sale of the merchandise." 19 U.S.C. § 1677b(f)(1)(A). "Cost-reconciliation information refers to cost of production information that Commerce requires a party to provide to reconcile the reported costs to the company's audited financial statements." *Hyundai Elec. & Energy Sys. Co. v. United States*, 466 F. Supp. 3d 1303, 1310 n.7 (CIT 2020).

Ellwood City argued before the agency that BGH's cost reconciliation was unsupported and reiterates that argument again before this Court. Ellwood City Mot. at 30, ECF No. 25. Specifically, Ellwood City asserts that BGH's cost database did not reconcile with BGH's financial statements and that Commerce's reliance on the database was misplaced because of edits BGH made to the database at verification. *Id.* at 27–31. Because the Court finds sufficient evidence on the record to support Commerce's reliance on the cost database, the Court rejects Ellwood City's objections.

There is no dispute that BGH's records are "kept in accordance with the generally accepted accounting principles" of Germany so that the sole question here is whether the records BGH provided "reasonably reflect the costs associated with the production and sale of the merchandise." 19 U.S.C. § 1677b(f)(1)(A). Commerce explained on the record the many steps BGH took to provide complete and accurate information in the manner Commerce requested. BGH collected and provided this information despite its cost accounting system not generally allocating costs down to specific products but instead to specific "cost centers." IDM at 38, J.A. at 84,024, ECF No. 42. Commerce concluded that BGH "reasonably used its basic standard costs and production information as a starting point in order to calculate product-specific costs for Commerce," and it determined that the "method used by BGH provides product-specific costs based on a

combination of actual material costs and adjusted standard conversion costs (by steel making and finishing) for each product characteristic identified by Commerce." *Id.* at 39. BGH also "submitted CONNUM-specific worksheets which show the precise calculation of its reported costs for the CONNUMs having the largest volume of sales in the U.S. and the home market" and "provided various worksheets (i.e., material cost calculation worksheet, alloy scrap calculation worksheet, copies of inventory valuation lists, copies of standard pricing calculations, various standard cost build ups, variance worksheets, etc.) to support its reported CONNUM-specific costs." *Id.* at 39–40. Ultimately, Commerce determined, after explaining its reasoning in detail, that "the reported costs fully reconcile to the company's financial statement costs." *Id.* at 40. Substantial evidence on the record supports Commerce's conclusion.

V. Particular Market Situation Adjustments

BGH disputes Commerce's particular market situation (PMS) adjustments to its cost of production, relying on numerous CIT cases for the proposition that Commerce's adjustments are contrary to law. BGH Mot. at 5–19, ECF No. 23. Recent Federal Circuit precedent has confirmed BGH's position, and Commerce does not oppose a remand on this issue. Accordingly, the request for a remand will be granted.

19 U.S.C. § 1677b describes how Commerce is to determine "normal value," (*e.g.*, the price at which the merchandise is sold in the home country) for purposes of its antidumping calculations. The statute instructs Commerce to calculate the normal value of the product by determining "the price at which the foreign like product is first sold (or, in the absence of a sale, offered for sale) for consumption in the exporting country." *Id.* § 1677b(a)(1)(B)(i). However, if Commerce determines that the normal value of the subject merchandise cannot be discerned by that method, then Commerce may use the "constructed value" of the merchandise. *Id.* § 1677b(a)(4). "Constructed value" is described by § 1677b(e) as the sum of the following: (1) the cost of materials and production; (2) either the actual amount realized in a sale in that foreign country or, if unavailable, an average of actual profits for that product or the profit from a similar product; and (3) the cost of packing and shipping to the United States. As relevant here, § 1677b(e) also states that for purposes of paragraph § 1677b(e)(1) (cost of materials and production), "if a particular market situation exists such that the cost of materials and fabrication or other processing of any kind does not accurately reflect the cost of

production in the ordinary course of trade, the administering authority may use another calculation methodology under this part or any other calculation methodology."

The problem is that § 1677b(e) does not apply when there are sales of subject merchandise below the cost of production. *See* 19 U.S.C. § 1677b(b). The statute instead prescribes a separate cost calculation — one without language permitting adjustments for particular market situations. *Id.* § 1677b(b)(3). Commerce took the position that, when it believes a "particular market situation" exists, Commerce can effectively cut-and-paste the language of § 1677b(e) into § 1677(b). IDM at 16, J.A. at 84,002. *But see Russello v. United States*, 464 U.S. 16, 23 (1983) ("[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.") (quoting *United States v. Wong Kim Bo*, 472 F.2d 720, 722 (5th Cir. 1972)).

This Court has stridently disagreed with Commerce's non-textual approach to statutory interpretation. *See, e.g.*, *Hyundai Steel Co. v. United States*, 483 F. Supp. 3d 1273, 1279 (CIT 2020), *aff'd* 19 F.4th 1346 (Fed. Cir. 2021) (cataloging CIT cases finding that "[a]s this Court has held repeatedly, the statute does not authorize an adjustment to the cost of production when Commerce applies the sales-below-cost test to determine which home market sales to exclude from the calculation of normal value."). The Federal Circuit recently has concurred with this Court that the "structure of section 1677b . . . clearly indicates that Congress intended to limit PMS [particular market situation] adjustments to calculations pursuant to the 'constructed value' subsection, 19 U.S.C. § 1677b(e), and not to authorize Commerce to make such adjustments pursuant to the 'cost of production' subsection, *id.* § 1677b(b)." *Hyundai Steel Co. v. United States*, 19 F.4th 1346, 1352 (Fed. Cir. 2021). Commerce thus may not employ a particular market situation adjustment "when calculating the cost of production for purposes of applying the sales-below-cost test." *Id.*

The bulk of BGH's August 9, 2021 Motion for Judgment on the Agency Record is dedicated to the argument that Commerce erred in making such adjustments to BGH's reported cost of manufacture. BGH Mot. at 5–19, ECF No. 23. BGH cited to the numerous CIT decisions holding that 19 U.S.C. § 1677b(b) does not authorize Commerce to make particular market situation adjustments to a respondent's cost of production when Commerce applies the sales-below-cost test to determine which home market sales to exclude from the calculation of normal value. *Id.* at 5.

In its December 17, 2021 response, the Government acknowledged

the "precedential decision" in *Hyundai Steel*, "which is adverse to the United States" and "is binding upon this Court." Def.'s Resp. at 29, ECF No. 37. The United States "therefore does not oppose the remand sought by BGH regarding those PMS adjustments in light of the intervening precedent." *Id.* The Court notes that, although the Federal Circuit's decision is certainly binding on the CIT, it is more relevant that it is "binding" on Commerce — especially given that Commerce has stubbornly maintained its interpretation of the statute despite losing before the CIT on this issue at least seven times in the past three years. *See, e.g.*, *Hyundai Steel Co.*, 483 F. Supp. 3d at 1279; *Saha Thai Steel Pipe Pub. Co. v. United States*, 422 F. Supp. 3d 1363, 1368–70 (2019); *Husteel Co. v. United States*, 426 F. Supp. 3d 1376, 1383– 89 (2020); *Borusan Mannesmann Boru Sanayi Ve Ticaret A.S .v. United States*, 426 F. Supp. 3d 1395, 1411–12 (2020); *Dong-A Steel Co. v. United States*, 475 F. Supp. 3d 1317, 1337–41 (2020); *Husteel Co. 6 v. United States*, 476 F. Supp. 3d 1363, 1370–73 (2020); *Saha Thai Steel Pipe Pub. Co. v. United States*, 476 F. Supp. 3d 1378, 1382–86 (2020). In compliance with *Hyundai Steel*, the Court remands this issue to allow Commerce to recalculate the dumping margin without impermissible cost-based particular market situation adjustments for BGH's electricity and ferrochrome inputs. Like the Federal Circuit in *Hyundai Steel*, this Court "need not reach the question whether Commerce's PMS finding was supported by substantial evidence," having established that the adjustments were not permitted by statute. 19 F.4th at 1356.

VI. Differential Pricing Methodology

BGH argues that Commerce's application of its differential pricing analysis was unlawful when it employed "inter-product zeroing" based on a misunderstanding of the definition of "comparable merchandise." BGH Mot. at 21, ECF No. 23. Differential pricing analysis is the methodology Commerce uses to determine what procedure for determining dumping margins it should employ and is designed to identify patterns of prices that vary significantly across time, regions, or purchasers. *Stupp Corp. v. United States*, 5 F.4th 1341, 1345 (Fed. Cir. 2021).[6] The governing statute requires that Commerce perform this analysis for "comparable merchandise" but does not define the

[6] The Court notes the objections of both Commerce and Ellwood City that *Stupp* is inapplicable to this case because BGH has not challenged Commerce's application of the Cohen's *d* test. Def.'s Resp. at 26 n.6, ECF No. 37; Ellwood City Resp. at 37 n.8, ECF No. 33. While the Court agrees that the broader legal holdings of *Stupp* do not apply here, its clear explication of the highly technical issue of differential pricing methodology is useful, and the Court references it for that purpose.

term. *See* 19 U.S.C. § 1677f-1(d)(1). Although BGH believes that Commerce impermissibly applied the method to multiple products, the Court finds that BGH is making a distinction without difference and denies BGH's Motion with respect to this issue.

19 U.S.C. § 1677f-1 describes the methodology for determining dumping rates. It explains the default method: Commerce will determine if there has been dumping either "by comparing the *weighted average* of the normal values to the *weighted average* of the export prices (and constructed export prices) for comparable merchandise" — in Commerce's regulations, the average-to-average method — or "by comparing the normal values of *individual transactions* to the export prices (or constructed export prices) of *individual transactions* for comparable merchandise," the transaction-to-transaction comparison method. 19 U.S.C. § 1677f-1(d)(1)(A)(i)-(ii) (emphasis added); 19 C.F.R. § 351.414; *see also Stupp Corp.*, 5 F.4th at 1345 ("When calculating a weighted average dumping margin, Commerce typically uses the average-to-average comparison method . . . [which] compares the weighted average of the respondent's sales prices in its home country during the investigation period to the weighted average of the respondent's sales prices in the United States during the same period.").

Section 1677f-1(d)(1) contains an exception, however. Commerce may determine whether subject merchandise is being sold in the United States at less than fair value "by comparing the *weighted average* of normal values to export prices (or constructed export prices) of *individual transactions* for comparable merchandise" — the average-to-transaction method — if two conditions are present: (1) "there is a pattern of export prices (or constructed export prices) for comparable merchandise that differ significantly among purchasers, regions, or periods of time"; and (2) Commerce "explains why such differences cannot be taken into account using a method described in paragraph (1)(A)(i) or (ii)." § 1677f-1(d)(1)(B) (emphasis added); *Stupp Corp.*, 5 F.4th at 1345 ("Commerce refers to the alternative method of calculating a weighted average dumping margin as the 'average-to-transaction' method.").

This exception was created because the average-to-average method "sometimes fails to detect 'targeted' or 'masked' dumping, because a respondent's 'sales of low-priced "dumped" merchandise would be averaged with (and offset by) sales of higher-priced "masking" merchandise, giving the impression that no dumping was taking place.'" *Stupp Corp.*, 5 F.4th at 1345 (quoting *Apex*, 862 F.3d at 1341) ; *see also Mid Continent Steel & Wire, Inc. v. United States*, 31 F.4th 1367, 1370–71 (Fed. Cir. 2022) ("The object is to uncover 'targeted' dump-

ing, a label for an exporter's unduly low pricing in portions (less than all) of its overall U.S. sales, which would be 'masked' (offset) by the exporter's other, higher-priced sales if only overall averages are considered."). The rationale for the average-to-transaction exception is that "targeted dumping is more likely to be occurring when export prices fit a pricing model that differs significantly among different periods of time, different purchasers, or different regions of the United States." *Stupp Corp.*, 5 F.4th at 1345.

When using the average-to-transaction method, Commerce "subtract[s] each individual export price for a particular product group from the weighted average of the home market prices for that product group in an iterative fashion, and sum[s] the results." *Id.* at 1347–48. In so doing, "Commerce 'zeroes out' iterations that produce a negative dumping margin (i.e., when the weighted average home market price is less than an individual export price), a practice known as 'zeroing.'" *Id.* at 1348. The Federal Circuit has determined that the practice of zeroing is appropriate when Commerce is using the average-to-transaction comparison method, because "[w]hen examining individual export transactions, using the average-to-transaction comparison methodology, prices are not averaged and zeroing reveals masked dumping. This ensures the amount of antidumping duties assessed better reflect the results of each average-to-transaction comparison." *Union Steel v. United States*, 713 F.3d 1101, 1109 (Fed. Cir. 2013). However, the average-to-transaction method "cannot be said to require zeroing methodology." *U.S. Steel Corp. v. United States*, 621 F.3d 1351, 1362 (Fed. Cir. 2010).

In *Apex Frozen Foods Private Ltd. v. United States*, Commerce evaluated an Indian shrimp importer's sales with the Cohen's *d* test[7] and then "applied the [average-to-transaction] methodology (with zeroing) to those sales passing the test, and the [average-to-average] methodology (without zeroing) for sales that did not pass, resulting in two antidumping margins: an [average-to-transaction] margin and an [average-to-average] margin." 862 F.3d 1337, 1349–50 (Fed. Cir.

[7] "For each subset within a category, Commerce makes that subset the 'test group' and aggregates the remaining subsets in that category into the 'comparison group.' If both groups have at least two observations (i.e., sales prices), and if the sum of the comparison group is at least five percent of the total amount of export sales, Commerce applies the 'Cohen's *d* test,' named after statistician Jacob Cohen, to evaluate whether the test group differs significantly from the comparison group. The formula for calculating the Cohen's *d* value is as follows:

$$\frac{|M_c - M_t|}{\sigma_p}$$

[the mean of group one minus the mean of group two divided by the pooled standard-deviation for the two groups]." *Stupp Corp.*, 5 F.4th at 1346 (internal citations omitted).

2017). Commerce then aggregated the two dumping margins by zeroing out the negative average-to-average margin, a step to which the importer objected as improperly skewing the overall calculation. *Id.* at 1350. The Federal Circuit disagreed, however. It noted that the mixed alternative approach employed by Commerce resulted in a tension, because "[z]eroing the negative [average-to-average] margins would appear to 'defeat the purpose' of using the [average-to-average] methodology in the mixed calculation at all" but aggregating negative margins with positive margins would "run[] into a similar paradox, wherein Commerce would effectively be performing 'double offsetting' and 're-masking' masked dumping revealed by the [average-to-transaction] methodology." *Id.* In other words, "in seeking to combine the two methodologies to arrive at a single antidumping rate, Commerce would be forced to subordinate the policy goals of one to the other." *Id.* Thus, even when Commerce was presented with a situation in which some sales for which there was a negative dumping margin would be subsumed by sales with a positive dumping margin, the Federal Circuit found it was appropriate for Commerce "to maximize and preserve the extent of uncovered masked dumping," and that Commerce's "decision was consistent with the overall statutory purpose." *Id.*

Other litigants before the CIT have previously advanced arguments that "the exception in § 1677f-1(d)(1)(B) applies only to significant differences for the same product among purchasers, regions, or time periods and does not relate to significant price differences between different products" and that it is therefore "unlawful for the Department to apply inter-product zeroing under the guise of applying the exception in section 1677f-1(d)(1)(B)." *Dillinger France S.A. v. United States*, 350 F. Supp. 3d 1349, 1371, 1373 (CIT 2018). In *Dillinger*, the CIT found that the litigant failed to preserve that argument and therefore did not reach the merits of the challenge. The Court nevertheless opined in dicta that the inter-product zeroing argument would have failed on the merits because the litigant provided "no reasoning or authority to support its assertion." *Id.* at 1373; *see also AG der Dillinger Huttenwerke v. United States*, 532 F. Supp. 3d 1338, 1344 (CIT 2021) (dismissing the same inter-product zeroing argument from another respondent who failed to exhaust administrative remedies). The argument that applying zeroing between different products is contrary to the statute has to date not been addressed on the merits by this Court.

For Commerce to use the average-to-transaction method, there must be a pattern of export prices for "comparable merchandise." 19 U.S.C. § 1677f1(d)(1)(B)(i). These sets of products may differ signifi-

cantly among purchasers, regions, or periods of time — all variables that may confound simple comparisons. Given these realities, the Federal Circuit has shed light on the meaning of "comparable merchandise." In *Dillinger France S.A. v. United States*, a French producer of steel and carbon plates argued that "Commerce's use of the Cohen's *d* test to determine a pattern among export prices was not in accordance with the law because Dillinger's products are custom-made." 981 F.3d 1318, 1326 (Fed. Cir. 2020). Commerce had defined comparable merchandise "by product control numbers ('CONNUMs'), which have certain 'physical characteristics' that were subject to notification and comment during Commerce's investigation." *Id.* Commerce rejected Dillinger's claim that "its made-to-order products are inferably so unique and embrace such a wide range of grades within a given [CONNUM] that any comparison of U.S. prices on a CONNUM basis must take into account these inter-CONNUM variations." *Id.* The Federal Circuit discerned no error in Commerce's determination, indicating that even custom-made products may qualify as "comparable merchandise" as long as they fall within the same product control number. *Id*; *see generally The Timken Co. v. United States*, 179 F. Supp. 3d 1168, 1180 (CIT 2016) ("[Respondent] fails to demonstrate that using CONNUMs as a basis for establishing 'comparable merchandise' is unreasonable.").

In its Motion for Judgment on the Agency Record, BGH advances the argument that "inter-product zeroing" is not permitted by 19 U.S.C. § 1677f-1, the statute that governs the determination of the weighted average dumping margin. BGH Mot. at 21, ECF No. 23. At the outset, the Court notes that BGH and the Government seem to agree that by "same product," they mean "same CONNUM." *Compare* BGH Reply at 7 n.3, ECF No. 38 ("By the term 'same product,' BGH simply means the same CONNUM.") *with* Def.'s Resp. at 28, ECF No. 37 ("Commerce used CONNUMs as the basis for establishing 'comparable merchandise.'") *and* IDM at 14, J.A. at 2,291 (defining "comparable merchandise" as "the product control number and all characteristics of the U.S. sales, other than purchaser, region, and time period, that Commerce uses in making comparisons between [the export price] or [the constructed export price] and [the normal value] for the individual dumping margins").

It is well settled that zeroing is permissible when Commerce applies the average-to-transaction method; and similarly, the other elements of the differential pricing analysis have been upheld by the Federal Circuit. *See Union Steel*, 713 F.3d at 1109. Unlike the respondents in *Dillinger France* and *Dillinger Huttenwerke*, BGH preserved its inter-product zeroing argument in the record below so that this

Court may now fully consider its merits. *Compare* BGH Case Br. at 8–9, J.A. at 86,407, ECF No. 42 (arguing that it is "unlawful for Commerce to apply inter-product zeroing under the guise of applying the exception in section 1677f-1(d)(1)(B)") (emphasis in original) *with Dillinger France S.A.*, 350 F. Supp. 3d at 1371 (finding that respondent "failed to exhaust its administrative remedies for advancing its inter-product argument") *and AG der Dillinger Huttenwerke*, 532 F. Supp. 3d at 1344 (agreeing "that Dillinger should have raised this argument before the agency"). Notably, however, BGH has not challenged any specific aspect of Commerce's use of the Cohen's *d* test or ratio test.[8] Tr. at 22:2–5 (The Court: "Now, if I read your brief correctly, you are not contesting [Commerce's] application of the Cohen's D [*sic*] test and the ratio test to this data set, correct?" BGH counsel: "That's right, Your Honor.").

That it does not is significant given other recent disputes regarding Commerce's administration of the test. *See Stupp Corp.*, 5 F.4th at 1360 (finding that remand was required given uncertainty about the reliability of Commerce's use of Cohen's *d* with a company's datasets). BGH's specific argument is essentially that, having used Cohen's *d* and determined that a pattern of differential pricing exists, Commerce then used the average-to-transaction methodology and zeroed out negative dumping margins for some control numbers that could have offset positive dumping margins of other control numbers. BGH Mot. at 19, ECF No. 23. BGH argues that this is inconsistent with the purpose and text of the statute, which is to detect and prevent masked dumping. *Id.* at 21–22. Not so, however; it is appropriate for Commerce to "maximize and preserve the extent of uncovered masked dumping," and that is "consistent with the overall statutory purpose" even when, as in *Apex*, it means that the benefit of negative dumping margins (CONNUMs sold at lower prices in Germany than in the U.S.) to a respondent will be offset by necessary zeroing to preserve Commerce's ability to address the positive dumping margins

[8] "If the Cohen's *d* value is equal to or greater than 0.8 for any test group, the observations within that group are said to have 'passed' the Cohen's *d* test, i.e., Commerce deems the sales prices in the test group to be significantly different from the sales prices in the comparison group. . . . Commerce counts the number of observations within each product group that were tagged as 'passing,' and applies what it calls a 'ratio test' to the results: If the total percentage of passing transactions is 33% or less, Commerce uses the default average-to-average method to calculate the weighted average dumping margin. If the total percentage is 66% or more, Commerce tentatively selects the alternative average-to-transaction method as the method it will use to calculate the weighted average dumping margin. If the total percentage is between 33% and 66%, Commerce tentatively selects a hybrid approach in which it applies the alternative average-to-transaction method to those transactions passing the Cohen's *d* test and the average-to-average method to the remainder of the transactions."*Stupp Corp.*, 5 F.4th at 1347 (citations omitted).

(CONNUMs sold at lower prices in the U.S. than in Germany). *See Apex*, 862 F.3d at 1350. Once Commerce has justified its use of the average-to-transaction method, its use of zeroing is permissible, as is the case here. *Union Steel*, 713 F.3d at 1109. BGH has failed to challenge Commerce's decision to apply the average-to-transaction method. Commerce applied that method in a manner approved — but not mandated by — the Federal Circuit. Accordingly, the Court will find substantial evidence supports the portion of the decision BGH chose to challenge.

CONCLUSION

This case is remanded on narrow grounds. Ellwood City forfeited its objection to Commerce's use of a verification questionnaire in lieu of in-person verification. Commerce provided a satisfactory explanation on the record of its reliance on BGH's costs, and its verification results are therefore supported by substantial evidence. The Court is similarly unpersuaded by BGH's narrow argument that Commerce's differential pricing methodology impermissibly zeroes the margin for control numbers with negative dumping. Accordingly, only BGH's request for a remand based on Commerce's illegal finding of a particular market situation is granted.

On consideration of all papers and proceedings held in relation to this matter, and on due deliberation, it is hereby:

ORDERED that Ellwood City's Motion for Judgment on the Agency Record is **DENIED**; it is further

ORDERED that BGH's Motion for Judgment on the Agency Record is **GRANTED IN PART** ; it is further

ORDERED that Commerce's determination is remanded for reconsideration of the particular market situation adjustment consistent with this opinion; and it is further

ORDERED that Commerce shall file its remand redetermination with the Court within 120 days of this date.

ORDERED that Defendant shall supplement the administrative record with all documents considered by Commerce in reaching its decision in the Remand Redetermination;

ORDERED that Plaintiffs shall have 30 days from the filing of the Remand Redetermination to submit comments to the Court; and

ORDERED that Defendant shall have 15 days from the date of Plaintiffs' filing of comments to submit a reply; and it is further

ORDERED that Defendant-Intervenor shall have 15 days from the date of Defendant's filing of comments to submit a reply.

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SO ORDERED.

Dated: November 8, 2022
New York, New York

/s/ *Stephen Alexander Vaden*
STEPHEN ALEXANDER VADEN, JUDGE

Slip Op. 22–123

ELLWOOD CITY FORGE COMPANY, ELLWOOD NATIONAL STEEL COMPANY, ELLWOOD QUALITY STEELS COMPANY, AND A. FINKL & SONS Plaintiffs, v. UNITED STATES, Defendant, and METALCAM S.P.A., Defendant-Intervenor.

Before: Stephen Alexander Vaden, Judge
Court No. 1:21–00073

[Denying Plaintiffs' Motion for Reconsideration.]

Dated: November 8, 2022

Thomas M. Beline, Cassidy Levy Kent LLP, of Washington, DC, for Plaintiffs. With him on the brief were *Jack A. Levy*, *Myles S. Getlan*, *Jeffery B. Denning*, *James E. Ransdell*, and *Nicole Brunda*.

Sarah E. Kramer, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC, for Defendant United States. With her on the brief were *Brian M. Boynton*, Principal Deputy Assistant Attorney General, *Jeanne E. Davidson*, Director, Commercial Litigation Branch, *Patricia M. McCarthy*, Assistant Director, Commercial Litigation Branch, and *Hendricks Valenzuela*, Office of Chief Counsel for Trade Enforcement and Compliance, U.S. Department of Commerce.

Douglas J. Heffner, Faegre Drinker Biddle & Reath, LLP, of Washington, DC, for Defendant-Intervenor. With him on the brief was *Richard P. Ferrin*.

OPINION AND ORDER

Vaden, Judge:

On July 7, 2022, Plaintiffs Ellwood City filed a Motion under USCIT Rule 59(a)(1)(B) for reconsideration of the Court's June 14, 2022, Opinion and the accompanying Judgment, which denied Plaintiffs' Motion for Judgment on the Agency Record and sustained Commerce's determination. *See Ellwood City Forge Co. v. United States*, 582 F. Supp. 3d 1259 (CIT 2022). In that decision, the Court found that a failure to exhaust administrative remedies barred Ellwood City's arguments protesting Commerce's verification method and that substantial evidence supported Commerce's determination. *See id.* In its Motion for Reconsideration, Ellwood City cites "new facts" in the form of a remand redetermination Commerce filed in an unrelated case. *See* Pls.' Mot. for Recons. (Pls.' Mot.) at 1, ECF No. 46. Defendant filed a response to Plaintiffs' Motion on August 11, 2022, arguing that Ellwood City's Motion is an inappropriate attempt to relitigate the

case based on irrelevant evidence in a separate proceeding. Def.'s Resp. to Pls.' Mot. for Recons. (Def.'s Resp.) at 4, ECF No. 49. Plaintiffs filed a reply brief on August 25, 2022, and the Motion is ripe for consideration. Pls.' Reply in Supp. of Mot. for Recons. (Pls.' Reply), ECF No. 50. For the reasons that follow, Plaintiffs' Motion is **DENIED**.

BACKGROUND

The Court presumes familiarity with the facts of this case as set forth in its previous opinion, *see Ellwood City*, 582 F. Supp. 3d at 1265–70, and recounts only those facts relevant to the disposition of this Motion. Plaintiffs are domestic producers of forged steel fluid end blocks (FEBs) that, in December 2019, filed a petition requesting Commerce investigate whether Italian producers were selling FEBs at below fair market value in the United States. *Forged Steel Fluid End Blocks from the Federal Republic of Germany, India, and Italy: Initiation of Less-Than-Fair-Value Investigations*, 85 Fed. Reg. 2,394 (Jan. 15, 2020). The ensuing investigation, which Commerce initiated in January 2020, coincided with the start of the COVID-19 pandemic. *See Ellwood City*, 582 F. Supp. 3d at 1266. Commerce modified its procedures because of pandemic restrictions and issued questionnaires "in lieu of" on-site verification to respondents Metalcam and Lucchini. *Id.* at 1267.

During this investigation, Ellwood City never objected to Commerce's revised verification policy but instead praised and affirmed it. *See id.* at 1268. On December 11, 2020, Commerce published its Final Determination, assigning a 0.00% dumping margin to Metalcam and 7.33% to Lucchini. *Forged Steel Fluid End Blocks from Italy: Final Affirmative Determination of Sales at Less Than Fair Value*, 85 Fed. Reg. 79,996, J.A. at 83,315, ECF No. 29. Dissatisfied with the results, Ellwood City filed suit in this Court. Compl., ECF No. 6. Despite never raising any objection before the agency, in its briefs before the Court, Ellwood City argued that Commerce's decision to substitute questionnaires for on-site verification was contrary to law. Pls.' Mot. for J. on the Agency R. at 14–16, ECF No. 21. The Government responded that Ellwood City forfeited its verification argument because Ellwood City did not first address it to the agency. Def.'s Resp. to Pls.' Mot. for J. on the Agency R. at 7, ECF No. 23. Ellwood City countered that it had raised some form of its objection previously and that, even if it had not, the futility and pure-question-of-law exceptions applied. Pls.' Reply in Support of Mot. for J. on the Agency R. at 6, 8, ECF No. 26. The Court issued its opinion on June 14, 2022, holding in relevant part that Ellwood City forfeited its verification

argument because it failed to object at any point during the investigation and that none of the exceptions to the administrative exhaustion requirement applied. *See Ellwood City*, 582 F. Supp. 3d at 1265.

STANDARD OF REVIEW

Plaintiffs move the Court to reconsider, alter, or amend its prior decision under USCIT Rule 59(a)(1)(B), which is a mechanism for requests for reconsideration in the Court of International Trade.[1] *See United States v. UPS Customhouse Brokerage, Inc.*, 714 F. Supp. 2d 1296, 1300 (CIT 2010). Under USCIT Rule 59(a)(1)(B), "[t]he court may, on motion, grant a new trial or rehearing on all or some of the issues – and to any party . . . after a nonjury trial, for any reason for which a rehearing has heretofore been granted in a suit in equity in federal court." USCIT Rule 59(a)(1)(B). The grant of a motion for reconsideration is within the sound discretion of the Court. *UPS Customhouse Brokerage, Inc.*, 714 F. Supp. 2d at 1300 (citing *Yuba Nat. Res., Inc. v. United States*, 904 F.2d 1577, 1583 (Fed. Cir. 1990)).

Reconsideration or rehearing of a case is proper when "a significant flaw in the conduct of the original proceeding" exists. *Union Camp Corp. v. United States*, 963 F. Supp. 1212, 1213 (CIT 1997) (quoting *Kerr-McGee Chem. Corp. v. United States*, 14 CIT 582, 583 (1990)). "A motion for reconsideration will not be granted merely to give a losing party another chance to re-litigate the case or present arguments it previously raised." *Am. Nat. Fire Ins. Co. v. United States*, 30 C.I.T. 1426, 1427 (2006); *accord Peerless Clothing Int'l, Inc. v. United States*, 991 F. Supp. 2d 1335, 1337 (CIT 2014). The Court should not disturb its prior decision unless it is manifestly erroneous. *Papierfabrik August Koehler SE v. United States*, 44 F. Supp. 3d 1356, 1357 (CIT 2015).

DISCUSSION

Ellwood City's Motion appears to be little more than an impermissible attempt to relitigate an argument the Court already considered and rejected. For that reason and for reasons similar to those articu-

[1] Despite the plain text of Rule 59 referring to "actions which have been tried and gone to judgment," long standing decisions of this Court identify Rule 59 as allegedly broad enough to include "rehearing of any matter decided by the court without a jury." *Nat'l Corn Growers Ass'n v. Baker*, 623 F. Supp. 1262, 1274 (CIT 1985). Regardless of whether USCIT Rule 59 or USCIT Rule 60 is the more textually appropriate basis for Plaintiffs' Motion, this Court has the power to reconsider its prior opinion. *Compare* USCIT Rule 59(a)(1)(B) (invoked by Plaintiffs here and providing for rehearing "for any reason for which a rehearing has heretofore been granted in a suit in equity in federal court"), *with* USCIT Rule 60(b) (providing that the Court "may relieve a party or its legal representative from a *final judgment, order*, or proceeding" for any of the listed reasons) (emphasis added).

lated in the Court's recent slip opinion in *Ellwood City Forge Company v. United States*, Case No. 21–77, Ellwood City's Motion is denied.

Ellwood City cites to remand results in a separate proceeding, *Bonney Forge Corp. v. United States*, Case No. 20–3837, Final Results of Remand Redetermination Pursuant to Court Remand, ECF No. 61, in which Commerce stated that a party's timely objection to Commerce's verification questionnaires in the administrative case brief still would not have allowed enough time for Commerce to reevaluate its methodology in that case. Pls.' Mot. at 3, ECF No. 46. Ellwood City argues that statement, in an unrelated proceeding, necessarily indicates that it would have been futile for Ellwood City to raise its verification argument in the administrative case brief in *this* proceeding. But Ellwood City misunderstands the nexus between futility and the statutory and regulatory requirement to exhaust administrative remedies. Though 19 C.F.R. § 351.309(c)(2) delineates the *last* opportunity for a party to raise a relevant argument it hopes to preserve for court review, it is by no means the first or only opportunity for a party to object to Commerce's chosen procedures. Ellwood City was aware of Commerce's verification questionnaire methodology by September 2, 2020. Letter to Metalcam, J.A. at 3,027, ECF No. 30. In the ensuing three months between receiving notice of Commerce's intentions and Commerce's issuance of its final decision, Ellwood City never once raised an objection to Commerce's proposed questionnaires in lieu of verification. As Commerce aptly stated in its response brief, "Ellwood not only failed to raise its newly alleged grievances in its case briefs, it failed to raise them *at all*." Def.'s Resp. at 7, ECF No. 49 (emphasis in original). It did not request to file additional comments when the questionnaires were issued, nor did it seek a meeting with Commerce to demand an in-person verification. *See Ellwood City*, 582 F. Supp. 3d at 1266–69 (recounting details of Ellwood City's actions and arguments during the investigation). Ellwood City did not raise its objections in the administrative brief, rebuttal brief, or public hearing. *Id.* As the Government noted, "the case briefing stage was not the only time Ellwood could have registered objections to the verification questionnaire process. Indeed, it could have raised its concerns any time after Commerce indicated it would be conducting verification by questionnaire rather than on-site." Def.'s Resp. at 6, ECF No. 49.

The principal case Ellwood City cites demonstrates this well. Although the complaining party there did not mention its objection in a final brief, it had previously raised the objection before the agency once in comments and again in meetings with eight Commerce offi-

cials. *See Itochu Bldg. Prod. v. United States*, 733 F.3d 1140, 1146–48 (Fed. Cir. 2013). The squeaky wheel gets the grease, but Ellwood City chose to be as quiet as a church mouse. The remand results in *Bonney Forge* — if they could be considered here[2] — would offer Ellwood City no respite. A party that completely fails to object is not in the same position as one who made an effort to do so. Plaintiffs have simply reiterated the futility argument they made previously, which is not an appropriate ground for reconsideration. *See* Pls.' Reply in Supp. of Mot. for J. on the Agency R. at 8, ECF No. 26; *Am. Nat. Fire Ins. Co.*, 30 C.I.T. at 1427.

CONCLUSION

Plaintiffs have failed to identify a "significant flaw" in the Court's opinion. *Cf. Union Camp Corp.*, 963 F. Supp. at 1213. The evidence they have identified does not change the viability of their appeal to futility. For the reasons expressed herein as well as the more fulsome discussion found in the separate opinion in *Ellwood City Forge Company v. United States*, Case No. 21–77, also decided today, Plaintiffs' Motion is **DENIED.**

Dated: November 8, 2022
New York, New York

/s/ Stephen Alexander Vaden
STEPHEN ALEXANDER VADEN, JUDGE

[2] The Government objects to the consideration of the *Bonney Forge* Remand Results as non-record evidence. Def.'s Resp. at 4–5, ECF No. 49. The Government is correct about this, but the Court has chosen to address Plaintiffs' arguments because the substance of the Remand Results do not alter the outcome.

Slip Op. 22–124

AMSTED RAIL COMPANY, INC., ASF-K DE MEXICO S. DE R.L. DE C.V., STRATO, INC., WABTEC CORP. AND TTX COMPANY, Plaintiffs, v. UNITED STATES INTERNATIONAL TRADE COMMISSION, AND ACTING SECRETARY KATHERINE M. HINER, in her official capacity, Defendants, and COALITION OF FREIGHT RAIL COUPLER PRODUCERS, Defendant-Intervenor.

Before: Judge Gary S. Katzmann
Court No. 22–00307
PUBLIC VERSION

[The Amended Complaint is dismissed without prejudice to refiling under 28 U.S.C. § 1581(c).]

Dated: November 15, 2022

Brian B. Perryman, Faegre Drinker Biddle & Reath, LLP, of Washington, D.C., argued for Plaintiffs Amsted Rail Company, Inc. and ASF-K de Mexico S. de R.L. de C.V. With him on the briefs were *Richard Ferrin*, *Douglas J. Heffner* and *Carolyn Bethea Connolly*.

Ryan M. Proctor, Jones Day, of Washington, D.C., argued for Plaintiff Wabtec Corp. With him on the joint briefs was *David M. Morrell*.

Ned H. Marshak, Grunfeld, Desiderio, Lebowitz, Silverman & Klestadt LLP, of New York, N.Y., argued for Plaintiff Strato, Inc. With him on the joint briefs was *Andrew T. Schutz*.

James M. Smith, Covington & Burling LLP, of Washington, D.C., argued for Plaintiff TTX Company. With him on the joint briefs were *Shara L. Aranoff* and *Sooan (Vivian) Choi*.

Andrea C. Casson, Assistant General Counsel for Litigation and *Jane C. Dempsey*, Attorney-Advisor, Office of the General Counsel, U.S. International Trade Commission, of Washington, D.C., argued for Defendants U.S. International Trade Commission and Acting Secretary Katherine M. Hiner, in her official capacity. With them on the briefs were *David A.J. Goldfine* and *Brian R. Allen*.

OPINION AND ORDER

Katzmann, Judge:

At the heart of this case are sensitive and time-honored questions of federal jurisdiction and agency power, protection of confidential information, and professional responsibility. Plaintiffs Amsted Rail Company, Inc., ASF-K de Mexico S. de R.L. de C.V., Strato, Inc., Wabtec Corp., and TTX Company (together, "Plaintiffs") are parties subject to ongoing antidumping and countervailing duty investigations by Defendants the U.S. International Trade Commission and Acting Secretary Katherine M. Hiner, in her official capacity (to-

gether, the "Commission") into freight rail couplers ("FRCs")[1] and related parts from China and Mexico, which were initiated by a petition filed by Defendant-Intervenor Coalition of Freight Rail Coupler Producers ("Coalition"). *See Certain Freight Rail Couplers and Parts Thereof from China and Mexico*, USITC Inv. Nos. 701-TA-682 & 731-TA-1592–1593 (Preliminary) ("Current Investigations"). In the course of the Current Investigations, Plaintiffs allege two instances of attorney misconduct: (1) [[ ]] ("Attorney") of [[ ]] ("Law Firm"), the Coalition's counsel before the Commission, violated the Commission's administrative protective order[2] ("APO") for having used business proprietary information[3] ("BPI") for improper pur-

[1] FRCs are "used to connect freight railcars together. The coupler resembles a curved human hand and holds the train cars together to eliminate the dangerous task for a railroad worker to stand between cars in order to join them together." Petitions at 8, *Certain Freight Rail Couplers and Parts Thereof from China and Mexico*, USITC Inv. Nos. 701-TA-682 & 731-TA-1592–1593, EDIS No. 781165.

[2] The APO statute relevant to this case reads:

> Upon receipt of an application . . . which describes in general terms the information requested and sets forth the reasons for the request, . . . the Commission shall make all business proprietary information presented to, or obtained by it, during a proceeding . . . available to interested parties who are parties to the proceeding under a protective order.

19 U.S.C. § 1677f(c)(1)(A). The APO process is also governed by regulation in 19 C.F.R. Parts 201, 206, 207, and 208. *See generally* U.S. Int'l Trade Comm'n, *An Introduction to Administrative Protective Order Practice in Import Injury Investigations* (6th ed. 2022), https://www.usitc.gov/publications/701_731/pub5280.pdf [hereinafter *APO Handbook*].

Safeguarding the laws regulating APOs and confidential information is critical to the larger administration of international trade law in the United States. The Department of Commerce ("Commerce") and the Commission must both be able to "obtain meaningful business data, much of which are confidential, from domestic and foreign enterprises alike. If either side develops doubts about the mechanism for protecting its property rights . . . , [Commerce's and the Commission's] task becomes much more difficult, and the public interest suffers." *Hyundai Pipe Co. v. U.S. Dep't of Com.*, 11 CIT 238, 243–44, 1987 WL 8807, at *5 (Apr. 1, 1987).

[3] The Commission defines "confidential business information," which includes the term "'proprietary information' within the meaning of section 777(b) of the Tariff Act of 1930 (19 U.S.C. [§] 1677f(b))," to mean:

> [I]nformation which concerns or relates to the trade secrets, processes, operations, style of works, or apparatus, or to the production, sales, shipments, purchases, transfers, identification of customers, inventories, or amount or source of any income, profits, losses, or expenditures of any person, firm, partnership, corporation, or other organization, or other information of commercial value, the disclosure of which is likely to have the effect of either impairing the Commission's ability to obtain such information as is necessary to perform its statutory functions, or causing substantial harm to the competitive position of the person, firm, partnership, corporation, or other organization from which the information was obtained, unless the Commission is required by law to disclose such information.

19 C.F.R. § 201.6(a)(1). "The Commission collects both public and confidential business information in the course of conducting investigations under the statutory authorities it administers. . . . In antidumping and countervailing duty (AD/CVD) investigations . . . , the Commission refers to the CBI that it collects as 'business proprietary information' (BPI), such as data on private companies' profits, investments, and production processes." U.S. Int'l Trade Comm'n, *APO Handbook*, *supra* note 2, at 1.

poses; and (2) Attorney and Law Firm continue to participate in the Current Investigations despite a disabling conflict of interest. The Commission denied Plaintiffs' requests for further investigation of these claims.

Plaintiffs filed the instant action before the conclusion of the Current Investigations. They seek review of the Commission's actions under the Administrative Procedure Act ("APA"), 5 U.S.C. § 706,[4] and ask this court for declaratory and injunctive relief to (1) block disclosure of Plaintiffs' BPI to the Attorney and Law Firm for the remainder of the Current Investigations; (2) disqualify the Law Firm from participating in the investigations; and (3) direct the Commission to dismiss the petition that initiated the Current Investigations. Plaintiffs plead subject matter jurisdiction under 28 U.S.C. § 1581(i), which grants to "the Court of International Trade . . . exclusive jurisdiction of any civil action commenced against the United States, its agencies, or officers, that arises out of any law of the United States providing for . . . [the] administration and enforcement" of "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), (D). Plaintiffs alternatively plead jurisdiction pursuant to the court's power to supervise members of its bar and as a petition for writ of mandamus.

After successfully petitioning the court for a temporary restraining order, Plaintiffs now move for a preliminary injunction against the Commission to block disclosure of Plaintiffs' BPI to Attorney and Law Firm for the remainder of the Current Investigations. The Commission argues that the court must deny Plaintiffs' Motion for Preliminary Injunction because the court lacks subject matter jurisdiction over Plaintiffs' claims. The Commission first contends that 28 U.S.C. § 1677f(c)(2) removes Plaintiffs' claims from the court's subject matter jurisdiction because § 1677f is limited to judicial review of denials, not grants, of information access. The Commission alternatively argues that 28 U.S.C. § 1581(i) jurisdiction is improper because a claim brought under 28 U.S.C. § 1581(c) would not be "manifestly inadequate," *Miller & Co. v. United States*, 824 F.2d 961, 963 (Fed. Cir. 1987), and Plaintiffs should wait until their claims ripen. The Commission also contests Plaintiffs' alternative bases for jurisdiction.

[4] Specifically, Plaintiffs allege that (1) the Commission's refusal to disqualify the Law Firm was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," 5 U.S.C. § 706(2); (2) the Commission's decision to release Plaintiffs' BPI to the Law Firm was similarly arbitrary and capricious; and (3) the Commission's decision to release Plaintiffs' BPI to the Law Firm was a violation of procedural due process, U.S. Const. amend. V, and therefore "contrary to constitutional right," 5 U.S.C. § 706(2). Plaintiffs also make an analogous charge as a petition for writ of mandamus. As explained below, today's holding expresses no views on the merits of Plaintiffs' claims.

The court holds that § 1677f does not preclude jurisdiction, § 1581(c) jurisdiction is not manifestly inadequate in this case, and alternative bases for jurisdiction are unavailable. The court, therefore, lacks subject matter jurisdiction to hear Plaintiffs' claims and grant their requested relief. The court dismisses the Amended Complaint without prejudice to refiling once a claim under 28 U.S.C. § 1581(c) is ripe, vacates the Temporary Restraining Order, and denies Plaintiffs' Motion for Preliminary Injunction and other outstanding motions as moot.

BACKGROUND

I. The Predecessor Investigations

The facts necessary for the court to determine jurisdiction are as follows.[5] Amsted Rail Company, Inc. ("ARC") is a U.S. producer and importer of FRC systems and components. Am. Verified Compl. or, in the Alternative, Petition for Writ of Mandamus ¶ 9 ("Am. Compl."), Oct. 24, 2022, ECF No. 44. On June 17, 2021, ARC engaged Wiley Rein LLP ("Wiley") for legal advice related to the potential prosecution of FRC imports. *Id.* ¶ 20. The Attorney, then a partner at Wiley, executed the engagement letter on Wiley's behalf. *Id.* ¶ 22. Attorney was at the time, and is still, a member of the Bar of the District of Columbia and admitted to practice before the Court of International Trade. *Id.*

The Coalition is a domestic trade association. *Id.* ¶ 16. Through the Attorney, the Coalition filed a petition with the Commission and Commerce on September 28, 2021. *Id.* ¶ 25. At the time of filing, it comprised ARC and McConway and Torley, LLC ("M&T"), a domestic producer of FRCs. *Id.* ¶ 26. The petition alleged that certain FRCs from China were being sold in the United States at less than normal value and were being subsidized by the Chinese government, which was causing material injury to the domestic industry producing FRCs. *See Freight Rail Coupler Systems and Components from China*, USITC Inv. Nos. 701-TA-670 & 731-TA-1570 ("Predecessor Investigations"). The next day, the Attorney applied for access to BPI under the Commission's APO. Ex. 1 to Def.'s Resp. to Mot. for Prelim. Inj. ("Def.'s Resp."), Oct. 21, 2022, ECF No. 42. On October 6, 2021, seven days after the petition's filing, ARC filed a letter withdrawing from the petition and explained that United Steel, Paper and For-

[5] "Although jurisdictional facts normally are stated in the complaint, the court may consider matters outside the pleadings," including exhibits to the Commission's and Coalition's filings. *JSC Acron v. United States*, 37 CIT 120, 126, 893 F. Supp. 2d 1337, 1344 (2013) (citing *Land v. Dollar*, 330 U.S. 731, 735 n.4 (1947); *Cedars–Sinai Med. Center v. Watkins*, 11 F.3d 1573, 1583–84 (Fed. Cir. 1993)).

estry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, AFL-CIO, CLC would take its place as a member in the Coalition. Am. Compl. ¶ 29. The Commission approved the Attorney's request to access BPI on October 12, 2021. Ex. 4 to Def.'s Resp. On October 14, 2021, the Commission issued the list of parties subject to the APO, which included the Attorney, Wiley, and counsel for Plaintiffs Strato, Inc. and Wabtec Corp. Ex. 5 to Def.'s Resp.

The Commission issued its preliminary determinations on November 15, 2021, and found reasonable indication of material injury to U.S. industry. *See Freight Rail Coupler Systems and Components from China*, 86 Fed. Reg. 64,958, 64,958 (Nov. 19, 2021). On March 1, 2022, the Attorney amended his entry of appearance and advised parties of a change in firms from Wiley to the Law Firm. Am. Compl. ¶ 39. On July 5, 2022, the Commission issued its final determinations and found that U.S. industry was not materially injured or threatened with material injury by FRC imports from China.[6] *See Freight Rail Coupler Systems and Components from China*, 87 Fed. Reg. 41,144, 41,145 (July 11, 2022). After the final determination, but within the 30-day period to file an action for judicial review of the Commission's negative determinations, *see* 19 U.S.C. § 1516a(1)(C), the Attorney amended the APO to include other applicants from the Law Firm. Ex. 6 to Def.'s Resp. The Coalition did not file an appeal. On September 26, the Attorney certified destruction of all BPI released to the Law Firm under the Predecessor Investigations' APO. Ex. 7 to Def.'s Resp.

II. The Current Investigations

On September 28, 2022, the Coalition, again through the Attorney, filed new petitions alleging that FRC imports from China and Mexico were being sold at less than normal value and FRC imports from China were being subsidized, resulting in material injury to U.S. FRC producers. *See Certain Freight Rail Couplers and Parts Thereof from China and Mexico*, USITC Inv. Nos. 701-TA-682 & 731-TA-1592–1593 (Preliminary) ("Current Investigations"). On September 29, the Law Firm filed an APO application with the Commission covering the same set of lawyers and staff covered under the APO in the Predecessor Investigations. Am. Compl. ¶ 51. As the preliminary investi-

[6] The Commission noted that Mexico was the largest source of nonsubject FRC imports, that "nonsubject imports correlate with meaningful decreases [of domestic prices] to a greater degree than do subject imports," and the Coalition's contentions that ARC's "outshore[d] some of its FRC production operations to Mexico." *See, e.g.*, Final Determinations at 15, 29 & n.149, *Freight Rail Coupler Systems and Components from China*, USITC Inv. Nos. 701-TA-670 & 731TA-1570.

gation proceeded, Plaintiffs "each submitted significant amounts of extraordinarily detailed BPI in response to the Commission's questionnaires." *Id.* ¶ 53.

From October 11 to 14, Plaintiffs separately filed letters with the Commission challenging the Attorney and Law Firm's participation in the Current Investigations. *See id.* ¶¶ 64–73. Plaintiffs asked the Commission to: (1) disqualify the Law Firm from further participation as counsel for the Coalition in the Current Investigations; (2) rescind the Law Firm's authorization to receive BPI under the Current Investigations APO; and (3) not require Plaintiffs to serve BPI questionnaire responses on the Law Firm until the Commission made a determination regarding the allegations. *See id.* Plaintiffs challenged the Attorney and Law Firm's access to BPI by making two allegations of misconduct. First, Plaintiffs alleged that the Attorney's prior representation of ARC gave rise to an ongoing and unconsented conflict of interest in the Current Investigations, a proceeding that is substantially related to the Predecessor Investigations and where ARC's interests are materially adverse to those of the Coalition. *See* Am. Compl. ¶¶ 92–94; *see also* D.C. Rules of Pro. Conduct r. 1.9 ("A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed consent."). Second, Plaintiffs alleged that the Law Firm "abused the Predecessor APO by using ARC's and others' BPI as a springboard for the Current Investigations" because the Law Firm "added nine attorneys and non-attorneys to the Predecessor APO *after* the Commission had already issued its determinations in the Predecessor Investigations."[7] Am. Compl. ¶ 71; *see also* 19 C.F.R. § 207.7(b)(2) (parties to an APO may "[u]se such business proprietary information solely for the purposes of representing an interested party in the Commission investigation *then in progress*" (emphasis added)).

The Commission deemed several of these letters as improperly filed because they mentioned both the ethical and APO breach allegations on the public record, which was contrary to Commission policy to

[7] Defendant-Intervenor disputes the number of attorneys and non-attorneys added after the Commission's final determination. *See* Def.-Inter.'s Resp. to Mot. for Temporary Restraining Order and Mot. to Vacate Temporary Restraining Order at 3–4, Oct. 26, 2022, ECF No. 52 ("Def.-Inter.'s Br.").

address APO breach allegations confidentially and off the record.[8] Ex. 8 to Def.'s Resp. ("Hiner Declaration"); *see also* U.S. Int'l Trade Comm'n, *APO Handbook*, *supra* note 2, at 12 ("[T]he Commission keeps all correspondence between the Commission and an alleged breaching party confidential. . . . This correspondence is not served on parties to the investigation or available for public access on EDIS."). On an October 13 phone call from Acting Secretary Hiner to counsel for ARC, the Acting Secretary stated that, regarding the APO breach allegations, "in general, parties submitting such allegations should provide details about the information compromised. Counsel said that they did not have those specifics, but rather that the circumstances regarding the timeline for APO applications on the predecessor investigation post-Commission vote and filing of the new petition 'smelled untoward.'" Hiner Declaration ¶ 5. Later that day, the Commission released the APO and Public Service Lists, which included the Attorney. Ex. 10 to Def.'s Resp. On the morning of October 14, ARC filed a letter regarding the APO breach to the Acting Secretary regarding the APO breach allegations, requesting that the Commission rescind the Attorney's APO access and not compel Plaintiffs to serve their BPI questionnaires on the Attorney. Hiner Declaration ¶ 3.

III. Procedural History

Plaintiffs filed the instant action against the Commission on the evening of October 14, 2022 to challenge the Commission's determination that BPI would not be withheld before its conclusion of the Attorney Investigations. *See* Compl. at 11–14, Oct. 14, 2022, ECF No. 14. Plaintiffs filed a Motion for Temporary Restraining Order ("TRO Motion") on the same day. *See* Mot. for Temporary Restraining Order, Oct. 14, 2022, ECF No. 15. Plaintiffs provided the Commission with telephonic notice of the TRO Motion on October 14, 2022, Compl. at 11, and served the Commission on October 17, 2022, *see* Certificate of Service, Oct. 17, 2022, ECF No. 18. The court scheduled a status conference with the parties that same day, Order Scheduling Status Conference, Oct. 17, 2022, ECF No. 19, and issued a temporary stay in order to consider the arguments raised by the Commission during the status conference before the Commission's 5:15 p.m. deadline that day to serve Plaintiffs' BPI on the parties. *See* Amended Procedural Order, Oct. 17, 2022, ECF No. 26.

[8] Since February 1991, the Commission has published periodic reports in the Federal Register that summarize its APO breach practices and discuss specific APO breach investigations without disclosing identifying details. *See, e.g.*, *Summary of Commission Practice Relating to Administrative Protective Orders*, 86 Fed. Reg. 71,916 (Dec. 20, 2021).

The court granted Plaintiffs' TRO Motion the following day. *See* Temporary Restraining Order, Oct. 18, 2022, ECF No. 28; Erratum Order, Oct. 18, 2022, ECF No. 30. The court deemed Plaintiffs' TRO Motion to be a Motion for Preliminary Injunction and ordered a response by the Commission, a reply by Plaintiffs, and a hearing. Temporary Restraining Order at 2. On October 20, 2022, the Coalition filed an unopposed motion to intervene as Defendant-Intervenor, *see* Def.-Inter.'s Mot. to Intervene, Oct. 18, 2022, ECF No. 35, which the court granted, *see* Order Granting Def.-Inter.'s Mot. to Intervene, Oct. 20, 2022, ECF No. 38. The Commission filed its response brief on October 21, 2022. *See* Def.'s Resp.

On the same day, the Commission also issued its decisions not to investigate the misconduct allegations. In a declaration setting forth a chronology of events made by the Commission to the court, Acting Secretary Hiner stated: "Regarding the alleged APO violation, I, as Acting Secretary, have determined that the evidence is insufficient to warrant institution of an APO breach at this time." Hiner Declaration ¶ 16. Similarly, in a letter from Acting Secretary Hiner to Plaintiffs, the Commission "determined that there is not good cause under Rule 201.15(a), at this time, to disqualify [[ ]] from participation in this investigation based on the ethical issues that ARC has raised." Ex. 13 to Def.'s Resp. at 3. The Commission further stated that it "does not adjudicate alleged violations of the Rules of Professional Conduct of a state Bar, nor does it determine whether conduct has violated the Model Rules of Professional Conduct of the American Bar Association," concluding that "[s]uch a determination falls under the purview of the relevant state bar association" and noting that "no such determination has been made." *Id.* at 2–3.

With determinations having been made by the Commission that the evidence was insufficient to warrant an institution of an APO breach and that the allegations of ethical misconduct were not subject to further review, Plaintiffs filed an Amended Complaint three days later as a matter of course. *See* Am. Compl.; *see also* USCIT R. 15(a)(1)(A). Plaintiffs ask for declaratory and injunctive relief to direct the Commission to disqualify the Law Firm from further participation in the Current Investigations, forbid the Commission's disclosure of BPI to the Law Firm, and direct the Commission to dismiss the petition filed in the Current Investigations without prejudice to

refiling.[9] *Id.* at 26–27. Less than half an hour later, the Commission also moved to dismiss the case, without reference to the Amended Complaint, for failure to exhaust administrative remedies and mootness, lack of subject matter jurisdiction, and failure to state a claim. *See* Def.'s Mot. to Dismiss, Oct. 24, 2022, ECF No. 46.

On October 26, 2022, Plaintiffs filed a reply to the Commission's Response, *see* Pls.' Reply, Oct. 26, 2022, ECF No. 50, and Defendant-Intervenor filed a response to the preliminary injunction motion that also moved to vacate the Temporary Restraining Order, *see* Def.-Inter.'s Br. The Commission filed a joint motion for protective order, *see* Joint Mot. for Protective Order, Oct. 26, 2022, ECF No. 49, which the court granted the next day, *see* Protective Order, Oct. 27, 2022, ECF No. 53.

Having determined that the preservation of the status quo while parties responded to arguments raised after the filings of the Amended Complaint and Motion to Vacate was good cause, the court extended the Temporary Restraining Order to November 15, 2022, on October 27, 2022, and ordered further briefing. *See* Order Extending Temporary Restraining Order, Oct. 27, 2022, ECF No. 54. The Commission filed a sur-reply to Plaintiffs' reply, *see* Def.'s Sur-Reply, Nov. 2, 2022, ECF No. 60, and Plaintiffs filed a response to Defendant-Intervenor's Motion to Vacate, *see* Pls.' Reply to Def-Inter., Nov. 2, 2022, ECF No. 61. Plaintiffs also filed a response to the Commission's Motion to Dismiss that same day. *See* Pls.' Resp. to Mot. to Dismiss, Nov. 2, 2022, ECF No. 63. On November 7, 2022, the Commission filed another Motion to Dismiss, this time challenging the Amended Complaint for lack of subject matter jurisdiction and failure to state a claim. *See* Def.'s Mot. to Dismiss Am. Compl., Nov. 7, 2022, ECF No. 73. The court held a closed hearing to consider the Motion for Preliminary Injunction on November 9, 2022, in advance of the expiration of the Temporary Restraining Order on November 15, 2022. *See* Courtroom Proceeding, Nov. 9, 2022, ECF No. 76. Plaintiffs and the Commission filed supplemental authority later that day. *See* Pls.' Notice of Suppl. Authority, Nov. 9, 2022, ECF No. 77; Def.'s Notice of Suppl. Authority, Nov. 9, 2022, ECF No. 78. The court invited parties to file post-hearing submissions, and on November 10, 2022, Plaintiffs

[9] Also on October 24, 2022, Plaintiffs filed a Second Motion for Preliminary Injunction ("Second PI Motion"). *See* Pls.' Second Mot. for Prelim. Inj., Oct. 24, 2022, ECF No. 48. The Second PI Motion seeks to forbid the Commission from allowing the Attorney and the Law Firm any access to the Current Investigations. *Id.* at 1–2. The Second PI Motion has not yet fully been briefed.

On November 1, 2022, Plaintiffs filed another action seeking similar relief against the United States Department of Commerce ("Commerce"). *See Amsted Rail Co. v. U.S. Dep't of Com.* ("*Amsted Rail II*"), No. 22–00316 (CIT Nov. 1, 2022). The court does not express any view on *Amsted Rail II*.

filed such a submission. *See* Pls.' Post-Hearing Submission, Nov. 10, 2022, ECF No. 79. The briefing and hearing on the Motion for Preliminary Injunction included arguments relating to both subject matter jurisdiction and the merits.

DISCUSSION

"Federal courts are courts of limited jurisdiction." *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994). And thus the "court may and should raise the question of its jurisdiction sua sponte at any time it appears in doubt." *Arctic Corner, Inc. v. United States*, 845 F.2d 999, 1000 (Fed. Cir. 1988). The court must evaluate and "enforce the limits of its jurisdiction" in all cases, especially those that invoke its powers in law and equity to intervene in an ongoing agency proceeding. *Borusan Mannesmann Boru Sanayi ve Ticaret A.Ş. v. United States*, 38 CIT __, __, 986 F. Supp. 2d 1381, 1384 (2014).

I. 19 U.S.C. § 1677f(c)(2) Does Not Remove Plaintiffs' Claims from the Court's Subject Matter Jurisdiction

Plaintiffs seek review of the Commission's decision to grant the Attorney and Law Firm access to BPI under the APO. The Commission contests the court's jurisdiction to hear such a claim by drawing a negative inference from 19 U.S.C. § 1677f(c)(2), which reads in relevant part:

> If the administering authority *denies* a request for information . . . , then application may be made to the United States [Court of International Trade] for an order directing the administering authority or the Commission to make the information available.

19 U.S.C. § 1677f(c)(2) (emphasis added); *see also* 28 U.S.C. § 1581(f) ("The Court of International Trade shall have exclusive jurisdiction of any civil action involving an application for an order directing . . . the International Trade Commission to make confidential information available . . . ."). In short, the Commission contends that because Congress limited the language of § 1677f(c)(2) to *denials* of information access, Congress did not vest the Court of International Trade with jurisdiction to review *grants* of information access. *See* Def.'s Sur-Reply at 4.

"The force of any negative implication, however, depends on context." *Marx v. Gen. Revenue Corp.*, 568 U.S. 371, 381 (2013). While it is well established that "[c]ourts created by statute can have no jurisdiction but such as the statute confers," *Sheldon v. Sill*, 49 U.S. (8 How.) 441, 449 (1850), "jurisdiction is not defeated by implication."

Galveston, Harrisburg & San Antonio Ry. v. Wallace, 223 U.S. 481, 490 (1912). And when applying administrative law, courts must also consider "a familiar principle of statutory construction: the presumption favoring judicial review of administrative action." *Guerrero-Lasprilla v. Barr*, 140 S. Ct. 1062, 1069 (2020) (internal quotation marks omitted) (quoting *Kucana v. Holder*, 558 U.S. 233, 251 (2010)). "The presumption can only be overcome by 'clear and convincing evidence' of congressional intent to preclude judicial review." *Id.* (quoting *Reno v. Catholic Soc. Servs., Inc.*, 509 U.S. 43, 64 (1993)).

The relevant evidence of congressional intent falls far short of "clear and convincing." First, the text and structure of § 1581 counsel against the Commission's interpretation. § 1581(i) authorizes this Court to hear "*any* civil action . . . that arises out of *any* law of the United States providing for . . . tariffs, duties, fees, or other taxes on the importation of merchandise for reasons other than the raising of revenue . . . ; or . . . *administration and enforcement* with respect to [those] matters." 28 U.S.C. § 1581(i) (emphasis added). The text clearly implements Congress's intent to grant "broad residual jurisdiction to the United States Court of International Trade." H.R. Rep. No. 96–1235, at 33 (1980). Furthermore, under 28 U.S.C. § 1581(c) and 19 U.S.C. § 1516a, "the procedural correctness" of any determination listed under 19 U.S.C. §§ 1516a and 1517, "as well as the merits, are subject to judicial review." *Miller & Co.*, 824 F.2d at 964. Negative implications from the text of one jurisdictional statute, without more, should not be used to undo another unless the two are impossible to reconcile. *Cf. Conn. Nat. Bank v. Germain*, 503 U.S. 249, 253 (1992) ("Redundancies across statutes are not unusual events in drafting, and so long as there is no 'positive repugnancy' between two laws, a court must give effect to both." (quoting *Wood v. United States*, 41 U.S. 342, 363 (1842)). Congress's design in § 1581 does not compel a conflict between 19 U.S.C. § 1677f and 28 U.S.C. § 1581(f), which authorize the court's review of denials of access to confidential information, and other provisions of § 1581, which, if applicable, authorize review of a grant of access to confidential information.[10]

Second, while "jurisdiction is 'governed by the intent of Congress,'" *Nat. Ass'n of Mfrs. v.* Dep't of Def., 138 S. Ct. 617, 634 (2018) (quoting *Fla. Power & Light Co. v. Lorion*, 470 U.S. 729, 745 (1985)), the Commission's cited legislative history does not evince congressional

[10] Congress's design does apply *de novo* review to 28 U.S.C. § 1581(f) actions, which differs from the more deferential standards of review in 28 U.S.C. § 1581(c) and (i) actions. *See* 19 U.S.C. § 1516a(b)(1); 28 U.S.C. § 2640(a)(4), (e). The parties do not dispute that judicial review of the grant of information access, if extant, would be subject to these deferential standards.

intent to limit judicial review. The Commission argues that the legislative history "regarding 19 U.S.C. § 1677f shows that the congressional intent was to ensure that parties could access BPI and do so expeditiously without undue hindrance." Def.'s Mot. to Dismiss Am. Compl. at 4. The Senate report accompanying the 1987 amendment to Section 777 of the Tariff Act of 1930 — which does not once mention the grant of APO access — emphasized the Commission's "broad authority to frame such regulations as are necessary to ensure maximum possible access to information without impeding the ITC's ability to complete its investigations within the tight time limits for investigation provided by statute." S. Rep. No. 100–71, at 113 (1987). That amendment sought to correct the disclosure statute, which left the Commission's disclosure of confidential information to parties to the Commission's discretion; the Committee was in turn "concerned that the ITC's practice creates difficulties for parties to ITC investigations." *Id.* at 112. Congress sought to promote expeditious and accurate proceedings, but it opted to do so by allowing for more input from *parties* interpreting confidential information, not expanding agency discretion. *Id.* (noting that pre-amendment practices prevent parties from "present[ing] their cases effectively" or correcting the Commission's "error[s] in the presentation or interpretation in the data"). In other words, the 1987 amendment was about *limiting* agency discretion. Nor did Congress intend for the promulgation of information to be unfettered. *E.g.*, *id.* at 113 ("Information should only be made available if the ITC is satisfied that adequate sanctions for disclosure are available against the proposed recipient of the information."). To draw from a Senate Report, which does not expressly address review of agency decisions granting information access, that such an action is unreviewable and committed to agency discretion is a strained reading of Congress's intent.

It is therefore unsurprising that prior cases of this court have held that 19 U.S.C. § 1677f(c)(2) does not preclude jurisdiction over agency decisions to grant information access. *See SNR Roulements v. United States*, 13 CIT 1, 4, 704 F. Supp. 1103, 1107 (1989); *Sacilor, Acieries et Laminoirs de Lorraine v. United States*, 3 CIT 191, 193, 542 F. Supp. 1020, 1023 (1982). The Commission relies on the subsequent case *General Electric Company v. United States*, which stressed that "[t]he statutory scheme clearly requires that the [International Trade Administration] *deny* an application for an APO before an interested party can avail itself of judicial intervention." 16 CIT 864, 870, 802 F. Supp. 474, 479 (1992) (emphasis in original). But that case did not involve a grant of information access at all; the court considered whether a claim of constructive denial could satisfy § 1677f(c)(2) and

emphasized the word "deny" to admonish the agency for not issuing an actual denial. Seeing little reason to depart from prior interpretations of § 1677f,[11] the court holds once again that "the grant of jurisdiction in section 1581(f) over actions to force disclosure under section 777(c)(2) of the Tariff Act of 1930, 19 U.S.C. § 1677(f), does not operate to bar jurisdiction over an action to block disclosure, which action has its origin elsewhere." *Sacilor*, 3 CIT at 193, 542 F. Supp. at 1023.

II. 28 U.S.C. § 1581(i) Jurisdiction Is Improper Because § 1581(c) Jurisdiction Is Not Manifestly Inadequate

Under 28 U.S.C. § 1581(i), the Court of International Trade has "exclusive jurisdiction of any civil action commenced against the United States, its agencies, or officers, that arises out of any law of the United States providing for . . . [the] administration and enforcement" of "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), (D). But the court does not possess jurisdiction "over an antidumping or countervailing duty determination which is reviewable by . . . the Court of International Trade under section 516A(a) of the Tariff Act of 1930." *Id.* § 1581(i)(2)(A).

Consistent with these principles, the court begins by applying the familiar holding from the Federal Circuit that "[s]ection 1581(i) jurisdiction may not be invoked when jurisdiction under another subsection of § 1581 is or could have been available, unless the remedy provided under that other subsection would be manifestly inadequate." *Miller & Co.*, 824 F.2d at 963. But applying *Miller & Co.* to requests for review of agency actions during an *ongoing* investigation requires a slightly more specialized inquiry. "[I]n the case of actions potentially reviewable under § 1581(c), section 1581(i) review is appropriate where eventual standing may be speculative, or the opportunity for full relief would be lost by awaiting the final determination." *Dofasco Inc. v. United States*, 28 CIT 263, 270, 326 F. Supp. 2d 1340, 1346 (2004), *aff'd on other grounds*, 390 F.3d 1370 (Fed. Cir.

[11] *Heckler v. Cheney* establishes a "presumption . . . that judicial review is not available" for an agency's "[r]efusals to take enforcement steps." 470 U.S. 821, 831 (1985). To the extent that the Commission alternatively argues that its actions are unreviewable enforcement decisions, the court is not persuaded. Plaintiffs, among other claims, challenge the reasonableness of the Commission's decisions to disclose BPI and not to disqualify the Law Firm for lack of good cause pursuant to 19 C.F.R. §§ 201.15(a), 207.7(a)(3)(iii). *See* Am. Compl. ¶¶ 88, 105. Those actions appear to be more similar to an agency's "exercise [of] its *coercive* power over an individual's liberty or property rights," which courts "often are called upon to protect," than to the category of agency decisionmaking that necessitates "the proper ordering of its priorities" and evaluates "whether the agency has enough resources to undertake the action at all." *Heckler*, 470 U.S. at 831–32.

2004) (internal quotation marks omitted) (quoting *Associacao Dos Industriais de Cordoaria E Redes v. United States*, 17 CIT 754, 757, 828 F. Supp. 978, 983 (1993)). "[T]he party asserting § 1581(i) jurisdiction has the burden to show how that remedy would be manifestly inadequate." *Miller & Co.*, 824 F.2d at 963.

Shakeproof Industrial Products Division of Illinois Tool Works Inc. v. United States, 104 F.3d 1309 (Fed. Cir. 1997), is instructive. The plaintiff, Shakeproof, objected to a law firm's access under APO and continued participation in Commerce's review of an antidumping order because a partner of that law firm had served as Assistant Secretary of Commerce for Import Administration at the time the original antidumping investigation had begun. *Id.* at 1311. After a formal ruling from Commerce denying Shakeproof's request for disqualification, Shakeproof filed action in the Court of International Trade challenging Commerce's ruling and seeking disqualification. *Id.* at 1312. Shakeproof sought the same relief as Plaintiffs in the instant case — revocation of APO access and disqualification — and, again like Plaintiffs here, "sought interlocutory review under [§ 1581] on the ground that judicial review after the conclusion of the administrative review would be 'manifestly inadequate.'" *Id.* But the Federal Circuit questioned the basis for jurisdiction under § 1581(i):

> We have serious doubts that judicial review of the disqualification issue would be manifestly inadequate if it were postponed until Commerce's final decision on the first review of the antidumping order. For that reason, we believe there is substantial force to the government's suggestion that Shakeproof's request for judicial review in this case was premature.

Id. at 1313. The *Shakeproof* court ultimately "found it unnecessary to decide that issue when it has concluded that the plaintiff was not entitled to relief in any event," *id.*, rendering its language opining on jurisdiction dicta.

Guided by *Shakeproof*'s "serious doubts," the court holds that Plaintiffs here fail to meet their "burden to show how that remedy would be manifestly inadequate." *Miller & Co.*, 824 F.2d at 963. The antidumping and countervailing duty investigations are still underway before the Commission and Commerce, and neither agency has yet issued a reviewable determination under 19 U.S.C. § 1516a. It is still entirely possible that the Commission may even reach a negative injury determination, in which case Plaintiffs would likely lack standing to bring their claims. Furthermore, Plaintiffs may easily reframe the three counts of arbitrary and capricious refusal to disqualify, arbitrary and capricious disclosure of BPI, and disclosure of BPI in vio-

lation of constitutional due process as components of challenges to final determinations "unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B)(i). Neither party disputes that "[u]nder 28 U.S.C. § 1581(c) and 19 U.S.C. § 1516a, the procedural correctness" of any determination listed under 19 U.S.C. §§ 1516a and 1517, "as well as the merits, are subject to judicial review." *Miller & Co.*, 824 F.2d at 964; *see also Koyo Seiko Co. v. United States*, 13 CIT 461, 464, 715 F. Supp. 1097, 1100 (1989) ("[Congress] intended that [§ 1851(i)] should not be used to permit the appeal of a procedural determination, but rather, that all procedural considerations should be decided by this court when the final agency determination is made." (internal quotation marks omitted) (quoting *PPG Indus. Inc. v. United States*, 2 CIT 110, 112–13, 525 F. Supp. 883, 885 (1981))).

Plaintiffs instead ask the court to follow another Federal Circuit case, *NEC Corp. v. United States*, 151 F.3d 1361 (Fed. Cir. 1998). NEC's competitor filed an antidumping petition with Commerce and the Commission against vector supercomputers from Japan. *Id.* at 1366. But after the Commission notified Commerce that the Commission had made an affirmative determination in the preliminary injury phase of the antidumping investigation, NEC filed suit before this court under § 1581(i) to "enjoin Commerce's investigation . . . on the grounds that its due process rights were violated." *Id.* at 1366. NEC alleged that Commerce was "a partisan ally" of its competitor after Commerce's involvement in the National Science Foundation's potential contract award to the competitor, which "rendered [Commerce] constitutionally incapable of adjudicating the merits of [the competitor's] dumping allegation." *Id.* at 1366–67. The court denied Commerce's motion to dismiss for subject matter jurisdiction but ultimately dismissed the case for failing to satisfy the burden for statutory prejudgment claims. *Id.* at 1367. The Federal Circuit affirmed this court's ruling on jurisdiction, holding that "[r]equiring NEC to appeal from the conclusion of an investigation that, allegedly, was preordained because of impermissible prejudgment is a classic example of a remedy that was 'manifestly inadequate.'" *Id.* at 1368 (collecting cases). The court further reasoned that "NEC is attempting to adjudicate an issue that goes to the very heart of the administrative system—neutrality—using the only adequate avenue available." *Id.* at 1368–69. The holding on jurisdiction in *NEC* was dispositive to the appellate judgment and therefore is binding on this court.

Shakeproof and *NEC* represent two sides of the same jurisdictional coin. *See also NEC Corp.*, 151 F.3d at 1368 (citing approvingly to

Shakeproof for the manifestly inadequate principle). The key fact that satisfied the manifestly inadequate burden in *NEC* was the plaintiff's challenge to the agency's *authority* to bring the investigation. With the notable exceptions of *Hyundai Corp.* and *Makita*, discussed below, cases before the Court of International Trade that have proceeded on § 1581(i) jurisdiction have "all sought to stop an allegedly unnecessary or ultra vires administrative proceeding before plaintiffs were burdened with them." *Borusan*, 986 F. Supp. 2d at 1388 (emphasis added); *see also, e.g.*, *Dofasco Inc. v. United States*, 28 CIT 263, 270, 326 F. Supp. 2d 1340, 1346 (2004), *aff'd*, 390 F.3d 1370 (Fed. Cir. 2004) (considering a challenge to Commerce's initiation of an administrative review and reasoning that "forcing Dofasco to wait until a final determination has been issued before it may challenge the lawfulness of the administrative review, would mean that Dofasco's opportunity for full relief -- i.e., freedom from participation in the administrative review -- would be lost"); *Carnation Enterprises v. U.S. Dep't of Com.*, 13 CIT 604, 604–05, 719 F. Supp. 1084, 1085 (1989) (§ 1581(i) jurisdiction was proper where the plaintiffs challenged the legal validity of the order underlying the two administrative reviews to which the plaintiffs were named mandatory respondents); *Nissan Motor Corp. v. United States*, 10 CIT 820, 822, 651 F. Supp. 1450, 1453 (1986) (§ 1581(i) jurisdiction was proper where there was possibility Commerce would never complete its § 751 administrative review and thereby "escape judicial scrutiny"). The *Shakeproof* court, by contrast, did not consider Commerce's decision not to investigate a naked assertion of an ethical issue to rise to the level of cases that collaterally attack an agency proceeding and require interlocutory judicial review. Under § 1581(c), if the court finds the Commission's actions to be unreasonable, it may remand the matter for further investigation as appropriate. And "if after remand the court determines that the agency determination was tainted by an improper predisposition, the court can again remand for reconsideration." *Koyo Seiko*, 13 CIT at 464, 715 F. Supp. at 1099.

But Plaintiffs maintain that this case does indeed rise to NEC's level and that attack on the entirety of the Commission's investigation is warranted. *See* Am. Compl. at 27 (requesting dismissal of the Commission's investigations without prejudice to refiling the petition). Determining whether full relief would be lost requires the court not only to compare the remedies available but also to evaluate the nature of the harm in waiting for review to ripen under § 1581(c). This court has repeatedly held that "[t]hat judicial review may be delayed by requiring a party to wait for Commerce's final determination is not enough to render judicial review under § 1581(c) mani-

festly inadequate." *Valeo N. Am., Inc. v. United States*, 41 CIT __, __, 277 F. Supp. 3d 1361, 1365 (2017); *see also M S Int'l, Inc. v. United States*, 44 CIT __, __, 425 F. Supp. 3d 1332, 1337 (2020), *appeal voluntarily dismissed*, No. 2020–1670, 2020 WL 9171126 (Fed. Cir. June 16, 2020) ("Participating in an administrative proceeding, incurring the attendant litigation expense, and enduring the collateral consequences of such participation, business or otherwise, does not, and cannot, constitute irreparable harm." (citing *FTC v. Standard Oil*, 449 U.S. 232, 244 (1980))). In turn, Plaintiffs present two separate but interrelated theories of why relief under § 1581(c) would be manifestly inadequate. First, because Plaintiffs seek to block disclosure of BPI to an attorney accused of misconduct, "any rights of a party injured by either advertent or inadvertent use of confidential information in violation of a protective order could not redress that particular, irreparable harm." Pls.' Reply at 5 (internal quotation marks omitted) (quoting *Hyundai Pipe*, 11 CIT at 243). Second, because Plaintiffs seek to disqualify the Law Firm due to an alleged ongoing ethical violation, the Law Firm's continued participation "will bring about the very evil which the rule against his participation is designed to prevent, and a subsequent reversal . . . cannot undo the damage that will have been done as a result of such participation." *Id.* at 5–6 (internal quotation marks omitted) (first quoting *Yablonski v. United Mine Workers of Am.*, 454 F.2d 1036, 1039 (D.C. Cir. 1971); then citing *Makita Corp. v. United States*, 17 CIT 240, 250, 819 F. Supp. 1099, 1108 (1993)). Plaintiffs' support is grounded in two cases from this court: *Hyundai Pipe*, 11 CIT 238, 1987 WL 8807, and *Makita*, 17 CIT 240, 819 F. Supp. 1099. We address each in turn and hold that Plaintiffs' reading of both cases is ultimately overbroad.[12]

In *Hyundai Pipe*, respondents to a Commerce review of circular welded carbon steel pipes and tubes from Korea objected to the release of their confidential information to petitioners' counsel in January 1987. *Id.* at 239. Respondents alleged that petitioners' counsel had violated the terms of the APO and disclosed confidential information. *Id.* In March 1987, Commerce notified the respondents of its decision to release their confidential information even though "[t]he Department has not yet completed its investigation into the alleged violation." *Id.* Respondents brought suit before this court and sought "a permanent injunction restraining the defendants from disclosing business proprietary information submitted by plaintiffs *until Commerce makes a final determination* in accordance with law con-

[12] While the decisions of other trial courts are not binding, *Algoma Steel Corp. v. United States*, 865 F.2d 240, 243 (Fed. Cir. 1989), it is within the discretion of a court to consider and address them, particularly where they are cited and debated by the litigants, and facilitate the analysis of the case now before the court.

cerning APO violations." *Id.* (emphasis added) (internal quotation marks and citation omitted).

The dispositive fact in *Hyundai Pipe* was that Commerce sought to release BPI *before* it made an administrative determination as to whether the APO breach allegations had merit. Two months after respondents' counsel had filed the objection, Commerce had still not completed its investigation of APO breach and yet found "no basis for not releasing the proprietary information under APO." *Id.* at 239. The court emphasized that Commerce did "not offer any timetable for completion of the investigation," characterized "their sense of the stakes" as "mystifying," and admonished Commerce for "an inability or an unwillingness to state how much additional time is required for the Department to reach a final decision . . . , although this court is not persuaded that a considerable, additional amount should be necessary." Id. at 240. Commerce's delay and decision to disclose BPI before conclusion of its investigation are the facts that contextualize these two sentences of the *Hyundai Pipe* opinion:

> Clearly, the plaintiffs are faced with a *threat* of *immediate* irreparable harm. Not only is the revelation of a secret an irrevocable act, but this and other courts have concluded that any rights of a party injured by either advertent or inadvertent use of confidential information in violation of a protective order could not redress that particular, irreparable harm.

Id. at 243 (footnote omitted) (emphasis in original). The court further reasoned "that sufficient uncertainty [of attorney misconduct] . . . exist[ed] to constitute a threat" and that "[p]erhaps caution has led Commerce to prolong its consideration of the alleged violations. But in taking its time to deal with the lawyers in question, the Department cannot act in haste to disclose the other side's secrets." *Id.* (emphasis added). Plaintiffs graft the irreparable harm language from *Hyundai Pipe* into this case's manifestly inadequate inquiry, arguing that "[i]f their BPI is wrongfully released, any rights of a party injured by either advertent or inadvertent use of confidential information in violation of a protective order could not redress that particular, irreparable harm.'" Pls.' Reply at 5 (quoting *Hyundai Pipe*, 11 CIT at 243).

The court declines to read *Hyundai Pipe* so expansively. The court found "*sufficient* uncertainty" of attorney misconduct to constitute a threat, *Hyundai Pipe*, 11 CIT at 243 (emphasis added), and the "threat of immediate harm" was tied to the fact that respondents would be deprived of *any* opportunity to have their APO allegations

reviewed in *any* administrative or judicial forum. Because Commerce was poised to strip respondents of any remedy by prematurely releasing BPI, the court was compelled to intervene under § 1581(i). But those are not the facts in the instant case. Plaintiffs already had the opportunity to have their APO- and ethics-related evidence weighed before the Commission. Put simply, the respondents in *Hyundai Pipe* asked for just one bite at the apple. Plaintiffs today ask for two. *Hyundai Pipe* does not grant us free license to intervene in agency proceedings when allegations of APO violations are made; a more specific showing of irreparable harm or, in this case, manifest inadequacy is required.[13]

Plaintiffs ground an analogous argument for allegations of attorney misconduct in *Makita*, which allowed § 1581(i) review of an agency decision during the pendency of an investigation to not investigate alleged ethical violations. In that case, the International Trade Administration ("ITA") initiated antidumping duty investigations into electric cutting, sanding, and grinding tools. *Makita*, 17 CIT at 241, 819 F. Supp. at 1100. The company that was the primary focus of the investigations, Makita Corporation ("Makita"), objected to the petitioner's inclusion of a particular attorney on the APO list because he had "a significant and substantial involvement in a Section 337 case Makita had brought before the ITC in 1988–1989. At that time he was working for Makita, and became privy to Makita's sensitive financial and marketing data." *Id.* at 240–241, 819 F. Supp. at 1101. After six months of Makita's opposition to the attorney's inclusion on professional ethics grounds, the ITA issued a "limited decision for the sole purpose of determining if the relationship in question would compromise proprietary information to be released under APO, now or in the future," and granted the attorney access to the confidential information. *Id.* at 241, 819 F. Supp. at 1101. The ITA also determined that "such allegations would seem to be more appropriately decided by the Bar in which [the attorney] is a member, or in some other forum which has jurisdiction over such matters." *Id.* Makita then filed suit before the Court of International Trade pursuant to § 1581(i) seeking the withholding of BPI disclosure and disqualification of the attorney. The defendants did not challenge subject matter jurisdiction, *id.* at 245, 819 F. Supp. at 1104 n.6, and the court preliminarily enjoined the attorney from access to the ongoing agency proceedings, *id.* at 251, 819 F. Supp. at 1108.

The court once again declines to rely on an overbroad reading.

[13] While the *Hyundai Pipe* court did not consider § 1581(c) jurisdiction or the manifestly inadequate standard, its presumptive exercise of § 1581(i) jurisdiction is consistent with the manifestly inadequate standard.

Plaintiffs in the instant case urge the court to apply *Makita*'s holding on irreparable harm:

> In *Hyundai Pipe Co.*, this court held that, not only is the revelation of a secret an irrevocable act, any rights of a party injured by either advertent or inadvertent use of confidential information could not redress that particular, irreparable harm. Of course, unlike those cases, disclosure is not quite the point here. According to the plaintiffs, they have already shared much inside information with [the attorney] while in their employ. [An attorney for Makita] testifies to that employment in a wholly-complimentary fashion, so much so that his clients claim fear of unfair advantage if their adversary Black & Decker is at liberty to avail itself of [the attorney's] accumulated knowledge. Whatever has already happened independent of these proceedings, this case requires the court to look to the present and the future, and, from this perspective, it cannot be said with certainty that any taking of unfair advantage could be remedied ex post facto. Ergo, the plaintiffs are confronted with the threat of irreparable harm.

Id. at 250, 819 F. Supp. at 1107–08 (citations omitted). But the facts that gave rise to the need for immediate relief in *Makita* are vastly different from the facts here. Most notably, the *Makita* plaintiffs had furnished affidavits and live testimony that detailed the precise nature of the information that the potentially conflicted attorney had acquired. He had been a paralegal, part-time law clerk, and summer associate at the law firm representing Makita before the ITC and had worked on that matter for a period of fifteen months between January 1989 and April 1990. *Id.* at 242, 819 F. Supp. at 1102. He had discussed "pricing comparisons of Makita's and competitors' products," provided input "into a large number of the pleadings . . . in the Section 337 proceeding," had access and likely reviewed "thousands (at least 80,000) of documents . . . submitted under the ITC protective order" that "contained confidential information regarding Makita's competition, Makita's distribution practices, its pricing practices, operations and sales figures," among other confidential information. *Id.* at 242–43, 819 F. Supp. at 1102. The plaintiffs' submitted evidence in *Makita* made it abundantly clear that the attorney was aware of specific categories of information relevant to Makita's defense in the antidumping investigations and that those categories of information extended far beyond what Makita would have otherwise revealed under APO. Comparatively, the facts that Plaintiffs offer in the instant case — looking only to the pleaded complaint and filings, as no

additional affidavits or testimony is available — fall far short of establishing "sufficient uncertainty" of attorney misconduct that necessitates relief under § 1581(i). In so holding, the court expresses no view as to the merits of the ethical misconduct allegations nor forecloses consideration of these issues as might be appropriate.[14] Yet Plaintiffs' allegations of attorney misconduct in this case, just like their APO breach allegations, are too threadbare to meet the more specific showing that manifest inadequacy under § 1581(i).

It could be argued that § 1581(i) jurisdiction was present in this case at one point, in that Plaintiffs' first Complaint mirrored the facts of *Hyundai Pipe* closely and limited its injunctive relief to block BPI disclosure to only the pendency of the Commission's determination whether to further investigate the APO- and ethics-related allegations. *See* First Compl. at 13–14. But once the Commission's decided not to investigate further, Plaintiffs filed the Amended Complaint and requested significantly broader relief. *See* Am. Compl. at 26–27; *see also supra* p. 11. Now that the Commission has issued its formal determinations that are subject to review under § 1581(c), *see Miller & Co.*, 824 F.2d at 964, the court must also consider the fact that holding for Plaintiffs would disrupt the Commission's ongoing antidumping and countervailing duties investigations. Three reasons further support today's decision not to intervene.

First, we find *Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368 (1981), persuasive in counseling against interlocutory appeals of attorney disqualification denials. In *Firestone*, the Supreme Court held that a district court's denial of a motion to disqualify counsel "plainly falls within the large class of orders that are indeed reviewable on appeal after final judgment, and not within the much smaller class of those that are not." *Id.* at 377. But the Court did not *categorically* exclude such denials from the collateral order doctrine:

> In support of its assertion that it will be irreparably harmed, petitioner hints at "the possibility that the course of the proceedings may be indelibly stamped or shaped with the fruits of a breach of confidence or by acts or omissions prompted by a divided loyalty," and at "the effect of such a tainted proceeding in frustrating public policy." But petitioner fails to supply a single concrete example of the indelible stamp or taint of which it warns. The only ground that petitioner urged in the District Court was that respondent might shape the products–liability plaintiffs' claims for relief in such a way as to increase the

[14] For example, the District of Columbia Court of Appeals has its own procedures for interpreting the D.C. Rules of Professional Conduct and opinions associated with those ethical rules.

> burden on petitioner. Our cases, however, require much more before a ruling may be considered "effectively unreviewable" absent immediate appeal.

Id. at 376; *see also Unified Sewerage Agency of Wash. Cnty. v. Jelco Inc.*, 646 F.2d 1339, 1343 (9th Cir. 1981) (finding that some clients "could suffer irremediable damage if forced to wait until after trial to appeal").

So too here. Plaintiffs allege that the Law Firm may "overtly us[e] confidences in the Current Investigations" or "may use such confidences to shape its prosecution of the Current Investigations, including guiding what lines of attack to pursue and what lines to abandon." Am. Compl. ¶ 95. That is exactly the kind of harm that the *Firestone* Court found insufficient to warrant interlocutory review. *See* 449 U.S. at 376. Plaintiffs, either in the briefing or at oral argument, fail to "supply a single concrete example of the indelible stamp or taint of which they warn[]." *Id.* ; *cf. Makita* at 242–43, 819 F. Supp. at 1102. And while *Firestone* interpreted the collateral order exception to 28 U.S.C. § 1291,[15] a different jurisdictional statute than in the instant case, its reasoning remains persuasive. Apart from the factual similarities between *Firestone* and the case at bar, a reviewable collateral order must, among other elements, "be effectively unreviewable on appeal from final judgment," 449 U.S. at 378 (internal quotation marks and citation omitted), which is analogous to a showing of manifest inadequacy under *Miller & Co.* The Supreme Court found the petitioners "unable to demonstrate that an order denying disqualification is 'effectively unreviewable on appeal from a final judgment.'" *Firestone*, 449 U.S. at 376. Under 28 U.S.C. § 1581(i), we do the same here.[16]

Second, legislative history counsels against using § 1581(i) jurisdiction to interfere with the exercise of agency power. Congress "intend[ed] that any determination specified in section 516A of the Tariff Act of 1930, or any preliminary administrative action which, in the course of proceeding, will be, directly or by implication, incorporated in or superseded by any such determination, is reviewable exclusively

[15] The statute states in relevant part: "The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States . . . ." 28 U.S.C. § 1291.

[16] Today's holding does not foreclose any interlocutory judicial review of APO breach or attorney misconduct allegations. By applying the manifestly inadequate test to determine § 1581(i) jurisdiction on a case by case basis, there may indeed be fact patterns involving APO violations or ethical violations that rise to the level of interlocutory review. We limit today's holding to the facts at bar and conclude that Plaintiffs have not met their burden under *Miller & Co.*

as provided in section 516A." H.R. Rep. No. 96–1235, at 48 (1980) (emphasis added). "The legislative history to [§] 1581(i), the case law, and the Administrative Procedure Act *all* discourage piecemeal review of [administrative] international trade proceedings." *M S Int'l*, 425 F. Supp. 3d at 1337; *see also* H.R. Rep. No. 98–725, at 47 (1984) ("The purpose of eliminating interlocutory judicial review is to eliminate costly and time-consuming legal action where the issue can be resolved just as equitably at the conclusion of the administrative proceedings.").

Finally, as a prudential matter, the court ultimately struggles to differentiate between (1) the immediate harm alleged by Plaintiffs in this case and (2) the immediate harm that could be alleged by a hypothetical party in a Commission investigation that raises threadbare accusations of APO breach and attorney misconduct. A party could challenge APO access or attorney participation based on skeletal facts without alleging how precisely the attorney could use that confidential information to the detriment of that party and, once the agency finds no reason to investigate further, bring proceedings to court. *Cf. Firestone*, 449 U.S. at 378 ("[p]ermitting wholesale appeals" of attorney disqualification denials would, among other consequences, "constitute an unjustified waste of scarce judicial resources"). To rule for Plaintiffs would add an avenue of interlocutory review that runs counter to prior cases: *Miller & Co.*, *Shakeproof*, *NEC Corp.*, *Firestone*, the relevant CIT case law, and the legislative history of § 1581(i) all counsel against such an outcome. *Hyundai Pipe* and *Makita* may not be read so broadly as to outweigh those authorities. The court, therefore, lacks subject matter jurisdiction under § 1581(i) to grant Plaintiffs' preliminary relief.

III. Alternative Bases for Jurisdiction Are Unavailable

Plaintiffs plead two alternative bases for jurisdiction in the Amended Complaint. First, Plaintiffs argue that the court may exercise jurisdiction because it "has plenary authority and responsibility to supervise professional conduct" over any attorney who is "a member of the Bar of this Court of International Trade." *Makita*, 17 CIT at 245, 819 F. Supp. at 1104 (citing 28 U.S.C. § 1585). The Court of International Trade "possess[es] all the powers in law and equity of, or as conferred by statute upon, a district court of the United States," 28 U.S.C. § 1585, which includes the power to remedy violations of professional ethics with disqualification, sanctions, or other relief.[17]

[17] The court expresses no view as to whether the court's powers to remedy violations of professional ethics pursuant to 28 U.S.C. § 1585 may extend to violations of professional ethics before an agency, as opposed to the litigation before it. *Cf. Makita*, 17 CIT at 251, 819 F. Supp. at 1108.

See, e.g., *Makita*, 17 CIT at 251, 819 F. Supp. at 1108 (extending this power to disqualifying counsel before an agency); *Nat'l Bonded Warehouse Ass'n, Inc. v. United States*, 13 CIT 590, 597, 718 F. Supp. 967, 972–73 (1989) (declining a motion to disqualify an attorney before the CIT).

But Plaintiffs confuse jurisdiction with remedy. § 1585 "relates only to the powers of the Court to render an effective judgment once jurisdiction is established." *Sioux Honey Ass'n v. Hartford Fire Ins. Co.*, 672 F.3d 1041, 1052 (Fed. Cir. 2012) (internal quotation marks omitted) (quoting *Star Sales & Distrib. Corp. v. United States*, 10 CIT 709, 712, 663 F. Supp. 1127, 1130 (1986)). Furthermore, in the absence of subject matter jurisdiction, the court's powers are limited only to attorney conduct exercised pursuant to its rules during the litigation. *See Retamal v. U.S. Customs & Border Prot.*, 439 F.3d 1372, 1376 (Fed. Cir. 2006) ("Although we conclude that the trial court lacked jurisdiction over the merits of this case, we recognize that *under Court of International Trade Rule 16* and its inherent power, the court has the authority to discipline *attorneys appearing before it*." (emphasis added)). Because Plaintiffs cannot independently establish subject matter jurisdiction over the merits, the court's authority to supervise attorney conduct is narrowed to misconduct before the court in the instant case. The court's powers under § 1585 cannot otherwise authorize review of Plaintiffs' claims.

Second, the Amended Complaint is alternatively pleaded as a petition for writ of mandamus. The Court of International Trade may "order any other form of relief that is appropriate in a civil action, including . . . writs of mandamus," 28 U.S.C. § 2643(c)(1), which provides the court with authority over "any action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff." 28 U.S.C. § 1361. But "the remedy of mandamus is a drastic one, to be invoked only in extraordinary situations." *Allied Chem. Corp. v. Daiflon, Inc.*, 449 U.S. 33, 34 (1980). "[T]hree conditions must be satisfied before it may issue. First, 'the party seeking issuance of the writ [must] have no other adequate means to attain the relief he desires . . . . Second, the petitioner must satisfy 'the burden of showing that [his] right to issuance of the writ is clear and indisputable.' Third, even if the first two prerequisites have been met, the issuing court, in the exercise of its discretion, must be satisfied that the writ is appropriate under the circumstances." *Cheney v. U.S. Dist. Ct. for D.C.*, 542 U.S. 367, 380–81 (2004) (citations omitted) (quoting *Kerr v. U.S. Dist. Ct. for N. Dist. of Cal.*, 426 U.S. 394, 403 (1976)).

The first condition for mandamus is not satisfied here. Because Plaintiffs may adequately obtain relief through a potential suit challenging the Commission's injury determination under § 1581(c) for the reasons above, relief cannot lie in mandamus. Accordingly, the court need not reach the question of whether there is a "clear and indisputable" right to issuance at stake. *Cf. In re Shared Memory Graphics LLC*, 659 F.3d 1336, 1342 (Fed. Cir. 2011) (issuing the writ to reverse district court order disqualifying counsel). The petition for writ of mandamus is denied.

CONCLUSION

The federal courts "possess only that power authorized by Constitution and statute." *Kokkonen*, 511 U.S. at 377. Plaintiffs have not met their burden of establishing that, under the unique facts of this case, the court has subject matter jurisdiction under § 1581(i) or the alternative bases they have asserted. Because the court holds that the remedy available to Plaintiffs under § 1581(c) is not manifestly inadequate, the court will not address whether the Commission's determinations not to investigate Plaintiffs' allegations further constitute final agency action as required by APA § 704, whether Plaintiffs have exhausted remedies, or other threshold issues. Subject matter jurisdiction is lacking in the instant action, and the court does not reach the substantive issues raised by the Motion for Preliminary Injunction. *See also supra* note 16.

For the foregoing reasons, Plaintiffs' Amended Complaint is dismissed for lack of subject matter jurisdiction, without prejudice to refiling once a claim under 28 U.S.C. § 1581(c) is ripe. In so holding, the Temporary Restraining Order is vacated and any outstanding motions are denied as moot.

SO ORDERED.

Dated: November 15, 2022
New York, New York

/*s*/ *Gary S. Katzmann*
JUDGE

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