U.S. Court of International Trade

Slip Op. 23–170

NUTRICIA NORTH AMERICA, INC., Plaintiff, v. UNITED STATES, Defendant.

Before: Timothy C. Stanceu, Judge
Court No. 16–00008

[Granting defendant's cross-motion for summary judgment on the tariff classifications of various nutritional preparations intended for use by patients with medical conditions]

Dated: December 4, 2023

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Luke Mathers, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of New York, N.Y., for defendant. With him on the briefs were *Brian M. Boynton*, Principal Deputy Assistant Attorney General, *Patricia M. McCarthy*, Director, *Justin R. Miller*, Attorney-In-Charge, and *Aimee Lee*, Assistant Director, Commercial Litigation Branch. Of counsel on the briefs was *Yelena Slepak*, Office of the Assistant Chief Counsel for International Trade Litigation, U.S. Customs and Border Protection.

OPINION

Stanceu, Judge:

Plaintiff Nutricia North America, Inc. ("Nutricia"), contesting the denials by U.S. Customs and Border Protection ("Customs" or "CBP") of its administrative protests, claims that Customs incorrectly determined the tariff classification of five imported products it describes as "medical foods." Before the court are the parties' cross-motions for summary judgment. The court awards summary judgment in favor of defendant United States.

I. BACKGROUND

The merchandise was imported on four entries made in November 2014 at the ports of Philadelphia, Pennsylvania and Washington-Dulles. Upon CBP's denial of its protests of the liquidations of these entries, plaintiff commenced this action. Summons (Jan. 8, 2016), ECF No. 1.

Plaintiff moved for summary judgment, arguing for tariff classification in either of two duty-free tariff classifications. Pl.'s Mot. for Summary J. (Aug. 31, 2022), ECF Nos. 73 (Conf.), 74 (Public); Mem. of Law and Authorities in Supp. of Pl.'s Mot. for Summary J. (Aug. 31,

2022), ECF Nos. 73 (Conf.), 74 (Public) ("Pl.'s Br."). Defendant responded and cross-moved for summary judgment, maintaining that the tariff classification determined by Customs upon liquidation of the entries was correct. Def.'s Cross-Mot. for Summary J. and Resp. in Opp'n to Pl.'s Mot. for Summary J. (Oct. 28, 2022), ECF Nos. 80 (Conf.), 81 (Public); Def.'s Mem. in Supp. of its Cross-Mot. for Summary J. and Resp. in Opp'n to Pl.'s Mot. for Summary J. (Oct. 28, 2022), ECF Nos. 80 (Conf.), 81 (Public) ("Def.'s Br.").

II. DISCUSSION

A. Jurisdiction and Standard of Review

The court exercises jurisdiction according to Section 201 of the Customs Courts Act of 1980, 28 U.S.C. § 1581(a)[1], which grants the court "exclusive jurisdiction of any civil action commenced to contest the denial of a protest, in whole or in part, under section 515" of the Tariff Act of 1930 ("Tariff Act"), *as amended*, 19 U.S.C. § 1515. The court adjudicates *de novo* actions to contest the denial of a protest. 28 U.S.C. § 2640(a)(1) ("The Court of International Trade shall make its determinations upon the basis of the record made before the court.").

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

B. Description of the Merchandise

The facts stated in this Opinion to describe the imported merchandise are taken from the submissions of the parties in support of their respective summary judgment motions and are not in dispute between the parties. From a review of these submissions, the court concludes that there is no genuine dispute as to the facts material to the classification of the products at issue.

The five imported products at issue in this case are "MSUD Lophlex® LQ," "Periflex® Infant," "Periflex® Junior," "Neocate® Junior," and "Ketocal® Liquid." Plaintiff describes the five imported products as "certain Medical Foods, which are a unique class of products defined and regulated by the Food and Drug Administration

[1] All citations herein to the United States Code are to the 2012 edition.

('FDA') under the Orphan Drug Act, 21 U.S.C. § 360ee." Pl.'s Br. 1. Plaintiff further describes these products as "Medical Foods that are specially designed, produced and intended for use by infants or toddlers who suffer from a variety of diseases or disorders." *Id*. (citations omitted). All five products are labeled as having been manufactured in Liverpool, United Kingdom. *Id*. at Exs. 20A–20E.

MSUD Lophlex® LQ "is used as nutrition therapy for children who suffer from a severe, life threatening, and permanent disorder called branched-chain alpha ketoacid dehydrogenase complex (BCKDC) deficiency, (also called Maple Syrup Urine Disease or MSUD), an inborn error of the metabolism" that causes "impaired ability to metabolize three of the twenty essential amino acids: leucine, valine and isoleucine." *Id*. at 6–7 (citations omitted).

Periflex® Infant and Periflex® Junior are produced for use by patients with Phenylketonuria (PKU), which is an "inborn error of metabolism of phenylalanine" that is "characterized by inadequate formation of L-tyrosine, elevation of serum L-phenylalanine, urinary excretion of phenylpyruvic acid and other derivatives, and accumulation of phenylalanine and its metabolites." *Id*. at 8 (citation omitted). The condition "can produce brain damage resulting in severe mental retardation, often with seizures, other neurologic abnormalities such as retarded myelination and deficient melanin formation leading to hypopigmentation of the skin and eczema." *Id*. (citation omitted).

Neocate® Junior is produced for use by patients who suffer from Eosinophilic Esophagitis (EoE), which is "an immune-mediated disease of the esophagus," *id.* at 10 (citation omitted), Short Bowel Syndrome (SBS), which "may occur when those portions of the small intestine have been removed or when portions of the small intestine are missing or damaged at birth," *id*. at 11 (citation omitted), and other diseases and disorders, *id*. at 10 (citations omitted).

Ketocal® Liquid is produced for use by patients who suffer from Intractable/Refractory Epilepsy, Glucose Transporter Type 1 Deficiency (GLUT 1), and other diseases and disorders. *Id*. at 12–13. GLUT 1 "is a lifelong genetic metabolic disorder that occurs as a result of mutation in the SLC2A1 gene." *Id*. at 13 (citation omitted). "Persons with GLUT 1 demonstrate epilepsy, developmental delays, acquired microcephaly, cognitive impairment and varying degrees of spasticity, ataxia, and dystonia." *Id*. (citation omitted).

C. Tariff Classification under the HTSUS

Tariff classification under the Harmonized Tariff Schedule of the United States ("HTSUS") is governed by the General Rules of Inter-

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

The GRIs are applied in numerical order, with GRI 1 providing, in pertinent part, that "classification shall be determined according to the terms of the headings and any relative section or chapter notes." GRI 1, HTSUS. GRIs 2 through 5 apply "provided such headings or notes do not otherwise require." *Id.*

After determining the correct four-digit heading, the court determines the correct subheading by applying GRI 6, HTSUS (directing determination of the subheading "according to the terms of those subheadings and any related subheading notes and, mutatis mutandis, to the above rules" [GRIs 1 through 5]).

D. Judicial Review in Tariff Classification Disputes

In adjudicating a tariff classification dispute, the court first considers whether "the government's classification is correct, both independently and in comparison with the importer's alternative." *Jarvis Clark Co. v. United States*, 733 F.2d 873, 878 (Fed. Cir. 1984) ("*Jarvis Clark*"). The plaintiff has the burden of showing that the government's classification of the subject merchandise was incorrect. *Id.*, 733 F.2d at 876. Subject to the plaintiff's rebuttal, factual determinations by Customs are presumed correct, *see* 28 U.S.C. § 2639(a)(1), but the presumption of correctness applies to issues of fact and not questions of law, *Goodman Mfg. L.P. v. United States,* 69 F.3d 505, 508 (Fed. Cir. 1995). If the plaintiff satisfies its burden of demonstrating that the government's classification was incorrect, the court must ascertain "the *correct* result, by whatever procedure is best suited to the case at hand." *Jarvis Clark*, 733 F.2d at 878 (footnote omitted).

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

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

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

E. Claims of the Parties

Upon liquidation, Customs classified Nutricia's imported products in subheading 2106.90.9998, HTSUS[2] ("Food preparations not elsewhere specified or included: Other: Other: Other: Other: Other: Other: Other: Other: Other: Other"), subject to duty at 6.4% *ad valorem*. Defendant maintains that this classification determination is correct.

Plaintiff claims classification of the products in subheading 3004.50.5040, HTSUS ("Medicaments (excluding goods of heading 3002, 3005 or 3006) consisting of mixed or unmixed products for therapeutic or prophylactic uses, put up in measured doses (including those in the form of transdermal administration systems) or in forms or packings for retail sale: Other medicaments containing vitamins or other products of heading 2936: Other: Other: Other"), free of duty.

In the alternative, plaintiff claims classification of the products in a special U.S. duty-free tariff classification provision within chapter 98, HTSUS, specifically, subheading 9817.00.96 ("Articles specially de-

[2] The products at issue were subject to the tariff provisions set forth in the version of the Harmonized Tariff Schedule of the United States ("HTSUS") that was in effect on the dates of entry. References to the HTSUS herein are to the 2014 version.

signed or adapted for the use or benefit of the blind or other physically or mentally handicapped persons; parts and accessories (except parts and accessories of braces and artificial limb prosthetics) that are specially designed or adapted for use in the foregoing articles: . . . Other").

The court first determines the correct classification of the five products according to the GRIs and the tariff provisions in chapters 1 through 97, HTSUS. It then addresses the issue of whether these products qualify for the special classification provision plaintiff claims in the alternative.

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

As required by GRI 1, HTSUS, the court first considers the terms of the headings and any relative section and chapter notes in ascertaining the correct four-digit heading for the classification of the imported products. The parties have identified the following candidate headings:

Heading 2106, HTSUS:	"Food preparations not elsewhere specified or included"
Heading 3004, HTSUS:	"Medicaments (excluding goods of heading 3002, 3005 or 3006) consisting of mixed or unmixed products for therapeutic or prophylactic uses, put up in measured doses (including those in the form of transdermal administration systems) or in forms or packings for retail sale"

The parties have not advocated, and the court has not identified, any other candidate headings within chapters 1 through 97, HTSUS.

1. Classification under Heading 3004 Is Precluded by Note 1(a) to Chapter 30

The terms of headings 3003 and 3004 are in parallel and similar in description, except that heading 3003 is limited to mixed products "*not* put up in measured doses or in forms or packings for retail sale," as follows:

Heading 3003, HTSUS:	"Medicaments (excluding goods of heading 3002, 3005 or 3006) consisting of two or more constituents which have been mixed together for thera-

> peutic or prophylactic uses, *not* put up in measured doses or in forms or packings for retail sale"

Heading 3003, HTSUS (emphasis added). Thus, the products of heading 3004, unless unmixed, would be classified under heading 3003 if imported in bulk form. Although the HTSUS does not define the heading term "medicament," the Explanatory Note to HS heading 30.03 states, in language equally applicable to heading 30.04, that "[t]his heading covers *medicinal preparations* for use in the internal or external treatment or prevention of human or animal ailments."[3] EN 30.03 (2014) (emphasis added).[4]

It could be argued that the products under consideration are medicaments because they are "for use in the internal . . . treatment . . . of human . . . ailments." *Id*. To that end, plaintiff maintains that "the subject products were conceived, designed, produced, marketed, and sold for 'therapeutic or prophylactic use' to treat persons with medical problems, which is the defining characteristic of a medicament." Pl.'s Br. 20. Plaintiff adds that "[m]edical professionals refer to the deployment of these products as 'nutritional **therapy**,' thus confirming their therapeutic use and value" and that "as FDA-regulated 'medical foods' the subject products are the 'medicine' that doctors will prescribe or recommend to treat children suffering from the referenced diseases." *Id*.

Nutricia argues that in order for defendant to prevail "it must demonstrate that the subject products are *not* medicaments" and that "[i]t cannot do so, because the tariff provisions, coupled with the record evidence, establish that the subject products are indeed medicaments." *Id*. The court does not agree with this analysis. Even if some definitions of the term "medicaments" were considered broad enough to encompass what plaintiff describes as "nutritional therapy" or "medical food" products, it would not follow that chapter 30, HTSUS necessarily includes these products. GRI 1 requires the court

[3] Similarly, dictionaries consider the term "medicament" synonymous with terms such as "medicinal substance" and "medication." As defendant points out, Webster's Third New International Dictionary and the Merriam-Webster Online Dictionary define "medication" as "a medicinal substance: MEDICAMENT." Def.'s Mem. in Supp. of its Cross-Mot. for Summary J. and Resp. in Opp'n to Pl.'s Mot. for Summary J. 14 (Oct. 28, 2022), ECFs No. 80 (Conf.), 81 (Public); *Medication*, WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY UNABRIDGED (2002); *Medication*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/medication (last visited Dec. 4, 2023). The Oxford English Dictionary defines "medicament" as "a *substance used for medical treatment*; a medicine, remedy." *Medicament*, OXFORD ENGLISH DICTIONARY, https://www.oed.com/dictionary/medicament_n?tab=meaning_and_use#37536447 (last visited Dec. 4, 2023) (emphasis added).

[4] Citations to the Explanatory Notes of the Harmonized Commodity Description and Coding System are to the 2014 edition.

first to determine classification according to "any relative section and chapter notes," as well as the terms of the headings when interpreted according to intended meaning. GRI 1, HTSUS. To rule in favor of plaintiff's claim for classification under heading 3004, the court would need to agree with plaintiff's argument that its preferred classification under heading 3004 is not precluded by a pertinent chapter note, note 1(a) to chapter 30, HTSUS. But the court must reject that argument.

Note 1(a) to chapter 30, HTSUS expressly excludes from chapter 30, and therefore from heading 3004, "[f]oods or beverages (such as dietetic, diabetic or fortified foods, food supplements, tonic beverages and mineral waters), other than nutritional preparations for intravenous administration (section IV)." The reference to "section IV" indicates that the products described in the note, i.e., "foods . . . other than nutritional preparations for intravenous administration," are to be classified in section IV of the HTSUS, which includes chapter 21, rather than in section VI (which includes chapter 30).

In making an exception to the general exclusion that it applies to chapter 30, note 1(a) specifically references "*nutritional* preparations for intravenous administration." This term necessarily is interpreted to include nutritional preparations administered intravenously to treat or manage a medical condition, typically in a hospital or similar clinical setting. *See* EN 30.03 (specifying that the heading includes "[n]utritional preparations for intravenous administration only, i.e., by injection or drip into a vein."). The implication of this narrow exception to the general exclusion created by note 1(a) to chapter 30, HTSUS is that other "nutritional preparations," e.g., those formulated to be taken orally by persons with specific medical conditions, possibly are within that general exclusion.

Because Nutricia's imported products are not for intravenous administration, the question is whether these products are "foods or beverages" within the meaning of those terms as used in note 1(a) to chapter 30, HTSUS. The note identifies "dietetic" and "diabetic" foods or beverages as an example of goods that are within the exclusion from chapter 30 created by note 1(a), connoting that even foods specialized for intended use by persons whose medical condition requires a specialized diet fall within the scope of that exclusion. In describing the products encompassed by that exclusion, the chapter note does not distinguish what plaintiff would call "medical foods" from other foods, except for the narrow class of goods comprised of nutritional preparations for intravenous administration.

The uncontested facts demonstrate that the note 1(a) exclusion to chapter 30 applies to the products at issue in this litigation. Plaintiff

itself describes the five products as "Medical Foods, which are a unique class of products defined and regulated by the Food and Drug Administration under the Orphan Drug Act, 21 U.S.C. § 360ee." Pl.'s Br. 1. As plaintiff points out, § 360ee defines the term "Medical Food" as "[a] *food* which is formulated to be consumed or administered enterally under the supervision of a physician and which is intended for the specific dietary management of a disease or condition for which distinctive nutritional requirements, based on recognized scientific principles, are established by medical evaluation." *Id*. (quoting 21 U.S.C. § 360ee) (emphasis added).

The HS Explanatory Notes, which although not part of U.S. law are indicative of the intended meaning of heading terms and section and chapter notes, further indicate that note 1(a) to chapter 30 precludes classification of Nutricia's products under heading 3004. The Explanatory Notes for headings 30.03 and 30.04, which are essentially identical, provide as follows:

> The provisions of the heading text do not apply to foodstuffs or beverages such as dietetic, diabetic or fortified foods, tonic beverages or mineral waters (natural or artificial), which fall to be classified **under their own appropriate headings**. This is essentially the case as regards food preparations containing only nutritional substances. The major nutritional substances in food are proteins, carbohydrates and fats. Vitamins and mineral salts also play a part in nutrition.
>
> Similarly foodstuffs and beverages containing medicinal substances are **excluded** from the heading if those substances are added solely to ensure a better dietetic balance, to increase the energy-giving or nutritional value of the product or to improve its flavour, always provided that the product retains its character of a foodstuff or a beverage.
>
> Moreover, products consisting of a mixture of plants or parts of plants or consisting of plants or parts of plants mixed with other substances, used for making herbal infusions or herbal "teas" (e.g., those having laxative, purgative, diuretic or carminative properties), and claimed to offer relief from ailments or contribute to general health and well-being, are also **excluded** from this heading (**heading 21.06**).
>
> Further, this heading **excludes** food supplements containing vitamins or mineral salts which are put up for the purpose of maintaining health or well-being but have no indication as to use for the prevention or treatment of any disease or ailment. These products which are usually in liquid form but may also be

> put up in powder or tablet form, are generally classified in **heading 21.06** or **Chapter 22**.
>
> On the other hand, the heading covers preparations in which the foodstuff or the beverage merely serves as a support, vehicle or sweetening agent for the medicinal substances (e.g., in order to facilitate ingestion).

EN 30.03, EN 30.04. These Explanatory Notes indicate that note 1(a) to chapter 30 was intended to draw a bright line between the medicaments of chapter 30 and the foods, including specialized foods taken orally by persons with medical needs (including, for example, diabetics), that are to be classified elsewhere in the HS nomenclature. Under the guidance provided by these ENs, a preparation in which "nutritional substances" are present only to support a "medicinal substance" (as described in the last paragraph quoted above) would be classified under HS heading 30.03 or 30.04. Such a product is to be distinguished from a product comprised entirely of nutritional substances (described in the first paragraph quoted above), or in which medicinal substances are present "solely to ensure a better dietetic balance" or "to increase the energy-giving or nutritional value of the product," EN 30.03, EN 30.04 (described in the second paragraph quoted above), which would not. According to this guidance, it is not sufficient for classification within heading 3003 or 3004, HTSUS that a preparation be formulated to treat or manage a medical condition: it must do so by administering a "medicinal substance." If, instead, the management of the condition is effected solely by a combination of "nutritional substances," the preparation is excluded from heading 3003 and 3004 (and from chapter 30 in the entirety) by note 1(a) to chapter 30, HTSUS. As shown by the uncontested facts, Nutricia's products fit that description.

Plaintiff acknowledges that the five products provide "*nutritional* therapy." Pl.'s Br. 28 (emphasis added). All of the ingredients in each of Nutricia's products (described below) are "nutritional substances." Four of the products in question, "MSUD Lophlex® LQ," "Periflex® Infant," "Periflex® Junior," and "Neocate® Junior," treat one or more medical conditions by means of specially-formulated combinations of multiple amino acids and other ingredients, as described below. Proteins are included within the scope of the term "nutritional substances." *See, e.g.*, EN 30.04. Citing an expert witness report, plaintiff recognizes that "[p]roteins are essential to the growth and function of all living organisms, and are comprised of varying sequences of twenty different amino acids." Pl.'s Br. 5 (citing *Plaintiff's Expert*

Report of Dr. Jonah Essers at 9 (May 27, 2022), Pl.'s Br. Ex. 1 ("*Essers Report*")). Plaintiff adds that "[h]umans source proteins (amino acids) by ingesting plant or animal-based foods." *Id*. The fifth product, Ketocal® Liquid, also contains amino acids and manages intractable or refractory epilepsy and Glucose Transporter Type 1 deficiency by providing "a 'ketogenic' diet that is high in fat, low in carbohydrates, and contains controlled proportions of protein." Pl.'s Br. 13 (citing Pl.'s Br. Ex. 5E, at 2).

Nutricia does not contend, and the report of its own expert witness would rebut an assertion that, amino acids are outside of the common and ordinary meaning of the term "nutritional substances." *See* Pl.'s Br. 5 (explaining that humans source amino acids "by ingesting plant or animal-based foods" and, citing *Essers Report* at 9, that "[p]roteins are essential to the growth and function of all living organisms"). The other ingredients in each of the five products, described below, also are nutritional substances.

Plaintiff states that MSUD Lophlex® LQ contains a combination of 15 amino acids that does not include the "branch chain" amino acids ("BCAA"), which are leucine, valine, and isoleucine. Pl.'s Br. 7. Nutricia explains that BCAA, if present in the diet in more than minimal amounts, are toxic to children who have branched-chain alpha ketoacid dehydrogenase complex (BCKDC) deficiency (also called Maple Syrup Urine Disease or MSUD), an inborn error of the metabolism. *Id*. at 6–7 (citations omitted). The product is formulated to "provide the minimal amount of BCAA needed for life, without providing any excess that elicits toxicity." *Id*. at 8 (citing *Essers Report* at 10). Plaintiff adds that "[o]ther ingredients provided in the formula include: water, apple, grape, blackcurrent [*sic*] and elderberry juice concentrates, which are included to provide carbohydrates needed for energy and taste." *Id*. (citing *Essers Report* at 18 and Pl.'s Br. Ex. 7). Packaging for MSUD Lophlex® LQ, in 4.2-fluid-ounce "pouches," is labeled as "Mixed Berry Blast" and provides as follows:

> A leucine, isoleucine and valine-free, berry flavored ready-to-drink medical food containing mixed fruit juices from concentrate, amino acids, vitamins, trace elements, and some minerals. Contains docosahexaenoic acid (DHA). For the dietary management of proven Maple Syrup Urine Disease (MSUD) in individuals 4 years and older, including pregnant women (in conjunction with standard folic acid supplementation).

Pl.'s Br. Ex. 20A. The label also states: "Contains 44% fruit juice from concentrate and natural flavors."[5] *Id*.

Plaintiff states that Periflex® Infant and Periflex® Junior are used to treat infants and children, respectively, who have Phenylketonuria (PKU), "an inborn error of metabolism," the "prevailing treatment" for which "is a diet low or absent in foods that contain phenylalanine, which is a common amino acid, and the inclusion of certain supplements to provide the minimum amount of phenylalanine required for synthesis of body proteins." *Id*. at 8–9 (quoting Pl.'s Br. Ex. 9 and citing *Essers Report* at 11–12, 19–20, 24).

Periflex® Infant contains a combination of 17 amino acids that does not include phenylalanine and is not naturally found in foods. *Id*. at 9 (citing *Essers Report* at 19 and Pl.'s Br. Ex. 11). "Other ingredients in Periflex® Infant, include: essential vitamins, minerals, fats and carbohydrates."[6] *Id*. at 10 (citing *Essers Report* at 20 and Pl.'s Br. Ex.

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[5] The ingredients of MSUD Lophlex® LQ are listed on the label as follows:

> **Ingredients**: Water, apple juice from concentrate (34.1%), grape juice from concentrate (6.9%), blackcurrant juice from concentrate (2.5%), L-lysine acetate, L-proline, citric acid, L-tyrosine, L-arginine, glycine, L-serine, L-aspartic acid, L-alanine, L-threonine, corn syrup solids, L-cystine, L-phenylalanine, dicalcium phosphate, L-histidine, elderberry juice from concentrate (0.6%), maltodextrin, magnesium acetate, N-acetyl L-methionine, L-tryptophan, choline bitartrate, C. cohnii oil*, sugar, microcrystalline cellulose, natural flavor, fruit concentrate (apple, blackcurrant, radish), L-ascorbic acid, taurine, guar gum, lecithin, xanthan gum, M-inositol, potassium sorbate (preservative), artificial sweetener: sucralose, ferrous lactate, artificial sweetener: acesulfame potassium, sodium benzoate (preservative), zinc sulfate, L-carnitine, niacinamide, DL-alpha tocopheryl acetate, calcium D-pantothenate, manganese sulfate, cupric sulfate, thiamine chloride hydrochloride, pyridoxine hydrochloride, vitamin A palmitate, riboflavin, folic acid, potassium iodide, ascorbyl palmitate, mixed tocopherols, sodium molybdate, D-biotin, sodium selenite, chromium chloride, phylloquinone, vitamin D3, cyanocobalamin.
>
> * A source of docosahexaenoic acid (DHA)

Mem. of Law & Authorities in Supp. of Pl.'s Mot. for Summary J. Ex. 20A (Aug. 31, 2022), ECF Nos. 73 (Conf.), 74 (Public) ("Pl.'s Br.").

[6] The ingredients of Periflex® Infant are listed on the label as follows:

> **Ingredients**: Corn syrup solids, refined vegetable oil (high oleic sunflower, soy, coconut), calcium phosphate dibasic, L-arginine L-aspartate, tri-potassium citrate, L-leucine, L-lysine acetate, L-tyrosine, L-glutamine, L-proline, L-valine, glycine, L-isoleucine, CAEM (an emu[l]sifier), L-threonine, L-serine, L-histidine, L-alanine, sodium chloride, l-cystine, L-tryptophan, L-methionine, magnesium acetate, magnesium L-aspartate, potassium chloride, M. alpina oil*, choline bitartrate, M-inositol, C. cohnii oil**, L-ascorbic acid, ferrous sulfate, zinc sulfate, taurine, L-carnitine, niacinamide, sunflower oil, DL-alpha tocopherol acetate, calcium-d-pantothenate, cupric sulfate, manganese sulfate, pyridoxine hydrochloride, riboflavin, vitamin A acetate, thiamine chloride hydrochloride, ascorbyl palmitate, potassium iodide, chromium sulfate, mixed tocopherols, DL-alpha tocopherol, phylloquinone, sodium molybdate, folic acid, sodium hydrogen selenite, D-biotin, vitamin D3, cyanocobalamin.
>
> * A source of arachidonic acid(ARA)
>
> ** A source of docosahexaenoic acid (DHA)

Pl.'s Br. Ex. 20B.

11). Sample packaging in a 14-ounce canister is labeled as a powdered infant formula, as follows:

> Periflex Infant is a phenylalanine-free, iron-fortified infant formula containing a balance[d] mixture of other essential and non-essential amino acids, carbohydrate, fat, vitamins, minerals and trace elements. Periflex Infant also contains DHA and ARA, which are found in breast milk and are important for infant brain and eye development.

Id. at Ex. 20B. "Directions for Preparation and Use" instruct the consumer to "add five level scoops" to 5 fluid ounces of "warm or cool sterile water." *Id*.

Periflex® Junior contains a combination of 18 amino acids and also "essential vitamins, minerals, fats and carbohydrates."[7] *Id*. at 10 (citing *Essers Report* at 20–21 and Pl.'s Br. Ex. 14). Sample packaging in a 16-ounce canister is labeled as follows:

> **Periflex Junior** is a phenylalanine-free powder containing a balanced mixture of the other essential and non-essential amino acids, carbohydrate, fat, vitamins, minerals and trace elements. For the dietary management of phenylketonuria in toddlers and young children.

Id. at Ex. 20C. The "Directions for Preparation and Use" inform the consumer that "[i]ntake is to be determined by a healthcare professional" and instruct the consumer to "add the prescribed amount of powder" according to specified dilution guidelines. *Id*.

Plaintiff's motion describes Neocate® Junior as a product "used to treat patients who suffer from: (1) Eosinophilic Esophagitis (EoE), (2) Short Bowel Syndrome (SBS), . . . as well as other diseases and disorders." *Id*. at 10 (citing *Essers Report* at 25–29). It contains a combination of 19 amino acids, "targeting the unique biology of a specific disease state." *Id*. at 12 (citing *Essers Report* at 20–21 and Pl.'s Br. Ex. 16). "Other ingredients in the formula include: essential

[7] The ingredients of Periflex® Junior are listed on the label as follows:

> **Ingredients**: Corn syrup solids, canola oil, high oleic safflower oil, L-glutamine, L-proline, L-asparagine, L-lysine hydrochloride, tripotassium citrate, L-tyrsoine, L-leucine, disodium hydrogen phosphate, L-valine, L-serine, L-isoleucine, tricalcium citrate, tricalcium phosphate, L-alanine, maltodextrin, L-threonine, sugar, magnesium hydrogen phosphate, L-citrulline, L-arginine, L-cystine, choline bitartrate, taurine, fractionated coconut oil, CAEM (an emulsifier), L-histidine, L-methoionine, L-tryptophan, L-ascorbic acid, M-inositol, ferrous sulfate, zinc sulfate, L-carnitine, DL-alpha tocopheryl acetate, manganese sulfate, niacinamide, calcium D-pantothenate, cupric sulfate, thiamine chloride hydrochloride, pyridoxine hydrochloride, riboflavin, vitamin A acetate, folic acid, potassium iodide, chromium chloride, sodium selenite, sodium molybdate, phylloquinone, D-biotin, vitamin D3, cyanocobalamin.
>
> Pl.'s Br. Ex. 20C.

vitamins, minerals, fats and carbohydrates."[8] *Id*. (citing *Essers Report* at 21 and Pl.'s Br. Ex. 16).

A Neocate® Junior package, a 14.1-ounce canister, is labeled as follows:

> **Neocate Junior** provides complete or supplemental nutritional support for children with gastrointestinal impairment due to cow milk allergy or other medical conditions of the gastrointestinal tract.

Id. at Ex. 20D. The label also states:

> Amino Acid-Based Nutritionally Complete Powdered Formula
> Hypoallergenic
>
> For the dietary management of cow and soy milk allergy, multiple food protein intolerance, eosinophilic esophagitis, short bowel syndrome, and conditions of gastrointestinal tract impairment and malabsorption requiring an elemental diet
>
> A Medical Food
> Unflavored
> Powder – Add Water

Id. The "Directions for Preparation and Use" inform the consumer: "Suggested intake to be determined by a healthcare professional" and instruct the consumer to "add the prescribed amount of **Neocate Junior** " according to specified dilution guidelines. *Id*.

The fifth product, Ketocal® Liquid, "is unique in that it provides a 4:1 ratio of fat calories to 'non-fat' protein and carbohydrate calories." *Id*. at 13 (citing *Essers Report* at 21). It "is used to treat patients who suffer from: (1) Intractable/Refractory Epilepsy, [or] (2) Glucose Transporter Type 1 Deficiency (GLUT 1)" who require a "'ketogenic' diet that is high in fat, low in carbohydrates, and contains controlled

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[8] The ingredients of Neocate® Junior are listed on the label as follows:

> **Ingredients**: Corn syrup solids (52%), refined vegetable oil (palm kernel and/or coconut oil (8%), canola oil (8%), high oleic safflower oil (8%)), L-arginine (2.4%), L-glutamine (2.3%), L-lysine L-aspartate (2%), and less than 2% of each of the following: tripotassium citrate, calcium phosphate dibasic, L-leucine, L-phenylalanine, L-proline, silicon dioxide, L-valine, glycine, L-isoleucine, N-acetyl-L-methionine, L-threonine, mono and diglycerides, sodium chloride, L-histidine, L-serine, L-alanine, magnesium acetate, calcium phosphate tribasic, choline bitartrate, L-tryptophan, L-tyrosine, diacetyl tartaric acid esters of mono & diglycerides, M-inositol, L-ascorbic acid, L-cystine, propylene glycol alginate, taurine, ferrous sulfate, L-carnitine, zinc sulfate, DL-alpha tocopheryl acetate, niacinamide, calcium D-pantothenate, magnesium sulfate, cupric sulfate, riboflavin, thiamine chloride hydrochloride, pyridoxine hydrochloride, vitamin A acetate, folic acid, potassium iodide, chromium chloride, sodium molybdate, sodium selenite, phylloquinone, biotin, vitamin D3, cyanocobalamin.
>
> Pl.'s Br. Ex. 20D.

proportions of protein." *Id*. at 12–13 (citing Pl.'s Br. Ex. 5E, at 1–3). Plaintiff states that "[t]he fats in Ketocal® are: Refined vegetable oil (high oleic sunflower, soy, palm), alpina oil, C. Cohnii oil, mono and diglycerides, and soy lecithin" and that "[c]arnitine and taurine are added to further optimize digestion and metabolism." *Id*. at 13 (citing *Essers Report* at 21). "Other ingredients are: water, proteins, minimal carbohydrates, vitamins, minerals and fiber."[9] *Id*. at 14 (citing Pl.'s Br. Ex. 18).

An 8-ounce package of the product is labeled as Ketocal® 4:1 LQ Multi Fiber and states: "A ready-to-feed 4:1 ratio ketogenic formula, for the dietary management of intractable epilepsy." *Id*. at Ex. 20E.

The descriptions and labeling of Nutricia's products demonstrate that each of these five products is comprised entirely of "nutritional substances." *See* EN 30.03, EN 30.04 (distinguishing between "nutritional substances" and "medicinal substances"). Note 1(a) to chapter 30, HTSUS, by plain meaning and as interpreted according to EN 30.03 and EN 30.04, excludes from chapter 30 all such products. GRI 1 requires the court to give effect to note 1(a) to chapter 30 and thereby exclude Nutricia's products from the scope of heading 3004, HTSUS.

Nutricia argues that note 1(a) to chapter 30, HTSUS does not defeat its claim for classification under heading 3004, essentially on the premise that this case presents a special situation under which chapter note 1(a) to chapter 30 must be disregarded. According to plaintiff's argument, the court should compare the heading the government advocates, heading 2106, HTSUS, with its preferred heading, heading 3004, HTSUS, and choose the latter based on the "relative specificity" of the two headings according to GRI 3(a), HTSUS ("The heading which provides the most specific description shall be pre-

[9] The ingredients of vanilla-flavored Ketocal® Liquid are listed on the label of outer packaging (containing 27 8-ounce individual containers) as follows:

> **Ingredients**: water, refined vegetable oil (high oleic sunflower, soy, palm), sodium caseinate (milk), whey protein concentrate (milk), soy fiber, corn starch, inulin, CAEM (an emulsifier), artificial flavor, dipotassium phosphate, gum arabic, calcium chloride, m. alpina oil*, magnesium acetate, potassium chloride, c. cohnii oil**, microcrystalline cellulose, sugar, fructooligosaccharide, L-ascorbic acid, calcium phosphate monobasic, mono and diglycerides, trisodium citrate, sodium hydroxide, choline chloride, L-cystine, calcium phosphate dibasic, artificial sweetener: sucralose, propylene glycol alginate, ferrous lactate, L-carnitine, taurine, M-inositol, L-tryptophan, zinc sulfate, DL-alpha tocopheryl, soy lecithin, niacinamide, calcium D-pantothenate, manganese sulfate, ascorbyl palmitate, cupric sulfate, thiamine chloride hydrochloride, pyridoxine hydrochloride, riboflavin, vitamin A acetate, mixed tocopherols, DL-alpha tocopherol, folic acid, potassium iodide, chromium chloride, sodium selenite, sodium molybdate, phylloquinone, D-biotin, vitamin D3, cyanocobalamin.
>
> *A source of Arachidonic Acid (ARA)
>
> ** A source of docosahexaenoic acid (DHA)

Pl.'s Br. Ex. 20E. A package of unflavored Ketocal® Liquid is also illustrated. *Id*.

ferred to headings providing a more general description."). By elevating GRI 3(a) over GRI 1, which takes precedence, this argument misinterprets the GRIs.

Plaintiff bases its argument on note 1(f) to chapter 21, HTSUS, which excludes from chapter 21 (and therefore from heading 2106) "products of heading 3003 or 3004." According to Nutricia's argument, "[t]he chapter 21 and 30 notes are mutually exclusive" and "[t]he [Court of Appeals for the] Federal Circuit has held that when there are two mutually exclusive chapter notes, the product must be classified according to the terms of the headings, GRI 1 and GRI 3(a), and the most specific provision prevails." Pl.'s Br. 37 (citing *Bauer Nike Hockey USA, Inc. v. United States*, 393 F.3d 1246, 1252–53 (Fed. Cir. 2004) (citing *Sharp Microelectronics Tech., Inc. v. United States*, 122 F.3d 1446, 1450–51 (Fed. Cir. 1997))). *See also* Pl.'s Resp. to Def.'s Cross-Mot. for Summary J. and Reply to Def.'s Resp. to Pl.'s Mot. for Summary J. 17 (Dec. 2, 2022), ECF Nos. 86 (Conf.), 83 (Public) ("Pl.'s Resp.") ("Note 1(a) cannot be used to exclude products from chapter 30 in this case because Note 1(f) to chapter 21 excludes goods classified under heading 3004 from chapter 21.").

According to plaintiff, "when there are mutually exclusive chapter notes classification is first determined according to the relative specificity of the competing headings' text." *Id*. (quoting *Bauer Nike Hockey USA, Inc.*, 393 F.3d at 1252 n.6) ("Resorting to the exclusionary note before applying the rule of specificity . . . would yield the somewhat arbitrary result that the subject merchandise could be classified under different chapters based solely on which chapter the analysis began.").

Plaintiff's "relative specificity" argument is misguided in failing to give effect to GRI 1, which directs the inquiry to the terms of the headings and the relative section and chapter notes, with the section or chapter notes and the heading terms given equal consideration. A critical flaw in plaintiff's argument is that note 1(a) to chapter 30, which limits the scope of heading 3004 so as to exclude plaintiff's goods, and note 1(f) to chapter 21, which limits the scope of heading 2106, are not "mutually exclusive."

Note 1(a) to chapter 30, HTSUS excludes from that chapter a defined class or kind of goods: "[f]oods or beverages . . . other than nutritional preparations for intravenous administration." In contrast, note 1(f) to chapter 21, HTSUS, which states that chapter 21 "does not cover: . . . Yeast put up as a medicament or other products of heading 3003 or 3004," excludes by name one class or kind of goods (yeast put up as a medicament) but, as is pertinent here, also ex-

cludes the "products *of* heading 3003 or *3004*" (emphasis added). In doing so, note 1(f) to chapter 21, HTSUS requires a classification determination to be made *before* it can be decided *whether* the exclusion in note 1(f) to chapter 21 applies. Therefore, the court must consider the scope of heading 3004 as interpreted according to note 1(a) to chapter 30 as well as considering the effect, if any, of note 1(f) to chapter 21. When it does so, it must conclude that there is no occasion to apply note 1(f) to chapter 21 where, as here, a good is excluded from heading 3004 by operation of note 1(a) to chapter 30. In other words, because note 1(a) to chapter 30 precludes the court from considering heading 3004 as a candidate heading for Nutricia's products, GRI 1 eliminates heading 3004 from consideration, and the issue of relative specificity of the competing headings, which is the subject of GRI 3(a), does not arise. The choice between heading 3004 and heading 2106 is determined conclusively by GRI 1, not GRI 3(a).

The problem addressed in *Bauer Nike Hockey USA, Inc.*, under which the "arbitrary result that the subject merchandise could be classified under different chapters based solely on which chapter the analysis began," 393 F.3d at 1252 n.6, is not presented by this case. The court has begun its analysis by first considering heading 3004, which is plaintiff's preferred alternative to the government's classification. But the same result would obtain were the court to consider heading 2106 in the first instance. Note 1(f) to chapter 21, HTSUS would require the court, in doing so, to decide whether Nutricia's products actually *are* products of heading 3004. The court must apply GRI 1 in making this determination, which entails giving effect to note 1(a) to chapter 30, under which heading 3004 is eliminated from consideration and there is no occasion to apply note 1(f) to chapter 21. The court, therefore, must reject the premise of plaintiff's argument, under which note 1(a) to chapter 30, HTSUS essentially is disregarded.

In support of its argument in favor of classification under heading 3004, plaintiff also argues that heading 3004 is a "use" provision (or "principal use" provision) and that the court, in determining the classification of the goods at issue, therefore must apply additional U.S. rule of interpretation 1(a), HTSUS ("a tariff classification controlled by use (other than actual use) is to be determined in accordance with the use in the United States at, or immediately prior to, the date of importation, of goods of that class or kind to which the imported goods belong, and the controlling use is the principal use."). Pl.'s Br. 29 (citations omitted). Plaintiff argues that "[e]ach of the products is used as nutrition therapy to treat young children with specific and dangerous medical conditions or disorders" and "have no

other use." *Id*. at 30 (citation omitted). According to Nutricia's argument, the products at issue are of the same class or kind as medicaments and, accordingly, must be classified by operation of additional U.S. rule of interpretation 1(a) as medicaments under heading 3004, HTSUS. *Id*. (citations omitted).

Heading 3004 (like heading 3003) arguably contains language implicating use but is based on an *eo nomine* tariff term, "Medicaments . . . ." In any event, plaintiff's argument overlooks that in this instance there is no occasion to apply additional U.S. note of interpretation 1(a) (which applies only "[i]n the absence of special language or context which otherwise requires") because heading 3004 is precluded from consideration by GRI 1. GRI 1 requires the court to apply note 1(a) to chapter 30 to exclude Nutricia's imported products from chapter 30, HTSUS and, therefore, from heading 3004, HTSUS regardless of whether heading 3004 possibly could be considered to be a use provision.

2. Heading 2106 Is the Correct Heading for Nutricia's Products

Based on the uncontested facts as taken from the submissions of the parties in support of their cross-motions for summary judgment, there can be no genuine dispute over whether the five "medical foods" at issue in this case, being specially-formulated combinations of nutritional substances, are "food preparations." The next question, then, is whether any tariff provision excludes the products at issue from chapter 21, HTSUS, or specifically, from heading 2106, HTSUS. The court concludes there is not.

Note 1 to chapter 21 ("Miscellaneous edible preparations") excludes from the chapter certain foods and food preparations but does not exclude "medical foods" such as those at issue in this case. In addition, the Explanatory Note to HS heading 21.06 lists various classes or kinds of products covered by the heading and distinguishes from them some that are not covered. The EN provides as follows:

> Provided that they are not covered by any other heading of the Nomenclature, this heading covers:
>
> * * *
>
> (16) Preparations, often referred to as food supplements, based on extracts from plants, fruit concentrates, honey, fructose, etc. and containing added vitamins and sometimes minute quantities of iron compounds. These preparations are often put up in packagings with indications that they maintain general health or well-being. *Similar preparations, however, intended for*

> *the prevention or treatment of diseases or ailments are* ***excluded (heading 30.03 or 30.04)****.*

EN 21.06 ¶ 16 (emphasis added). The issue presented by this EN is whether the reference in the third sentence to "[s]imilar preparations" could be read broadly to describe the products at issue in this case. Plaintiff argues that the court should interpret the third sentence to apply to its medical food products, resulting in classification under heading 3004 rather than heading 2106, HTSUS. Pl.'s Br. 39. The court disagrees.

The paragraph quoted above from EN 21.06 addresses "food supplements" and "[s]imilar preparations." It must be read in context with HS note 1(a) to chapter 30 (and, accordingly, with note 1(a) to chapter 30, HTSUS), which expressly excludes all "food supplements" from chapter 30. Thus, food supplements fall within chapter 21, while certain products that are "similar" to food supplements (but are to be distinguished from food supplements) and are intended to treat a specific disease or ailment are "medicaments" or "medicinal substances" within the intended scope of HS heading 30.03 or 30.04. A food or beverage intended to treat a specific disease or ailment is not within that scope, unless it is based on a "medicinal substance" that, as instructed by EN 30.03 and EN 30.04, is not "added solely to ensure a better dietetic balance, to increase the energy-giving or nutritional value of the product or to improve its flavour." EN 30.03, EN 30.04.

As shown by the ingredient statements (presented above), each of the products at issue in this litigation is formulated from a large number of different nutritional substances but is not based on a "medicinal substance" as required for classification within heading 3003 or 3004, HTSUS. The implied premise of the argument Nutricia makes in reliance on EN 21.06 is that its imported products should not be considered to be "foods" or "food supplements" within the meaning of note 1(a) to chapter 30, HTSUS. But the facts plaintiff itself puts forth in support of its summary judgment motion, discussed at length above, demonstrate that these are food products, comprised of nutritional substances, that note 1(a) to chapter 30, HTSUS excludes from that chapter.

In summary, the five products at issue are "food preparations" and are not "medicaments" of heading 3004, HTSUS. Because no other heading within chapters 1 to 97 of the HTSUS specifies or includes these food preparations, heading 2106 ("Other food preparations, not elsewhere specified or included") is the correct heading by operation of GRI 1.

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

The products at issue are not "[p]rotein concentrates or textured protein substances" of subheading 2106.10, HTSUS and thus are classified in six-digit subheading 2106.90, HTSUS ("Other:"). The uncontested facts do not demonstrate that they are described by any of the eight-digit subheadings between 2106.90.03 and 2106.90.95, HTSUS, inclusive. Therefore, the correct eight-digit subheading is subheading 2106.90.99, HTSUS ("Food preparations not elsewhere specified or included: Other: Other: Other: Other: Other: Other), subject to duty at 6.4% *ad valorem*. This is the tariff classification Customs determined upon the liquidation of the entries and the tariff classification defendant advocates in support of its cross-motion for summary judgment.

H. Subheading 9817.00.96, HTSUS Does Not Apply to Nutricia's Products

Plaintiff claims, in the alternative, that even if its products are not "medicaments" of heading 3004, HTSUS, they still would qualify for duty-free treatment under a special tariff provision, subheading 9817.00.96, HTSUS, which applies to "[a]rticles specially designed or adapted for the use or benefit of the blind or other physically or mentally handicapped persons; parts and accessories (except parts and accessories of braces and artificial limb prosthetics) that are specially designed or adapted for use in the foregoing articles: . . . Other."

In support of its argument that the persons for whom its medical foods are produced are "physically or mentally handicapped persons," Nutricia directs the court's attention to U.S. note 4(a) to subchapter XVII, chapter 98, HTSUS, which defines the term "physically or mentally handicapped persons" as follows:

> For purposes of subheadings 9817.00.92, 9817.00.94 and 9817.00.96, the term "blind or other physically or mentally handicapped persons" includes any person suffering from a permanent or chronic physical or mental impairment which substantially limits one or more major life activities, such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, or working.

The court finds no merit in plaintiff's alternate classification claim. U.S. note 4(b) to subchapter XVII, chapter 98, HTSUS provides that subheading 9817.00.96 does not cover "(i) articles for acute or transient disability; (ii) spectacles, dentures, and cosmetic articles for individuals not substantially disabled; (iii) therapeutic and diagnos-

tic articles; or (iv) medicine or drugs." Plaintiff bases its argument on the premise that the persons for whom its medical foods are produced are "physically or mentally handicapped persons" and that these food products, even if not considered "medicine or drugs," nevertheless are not "therapeutic . . . articles" within the meaning of U.S. note 4(b)(iii) to subchapter XVII, chapter 98, HTSUS.

Defendant argues that the medical foods are "therapeutic" within the meaning of the note. Def.'s Br. 31. The undisputed facts provide some support for that argument. Plaintiff informs the court—and it is not contested—that the five products are "indicated for use in the treatment of a variety of diseases, predominantly in very young children," that "in some instances they are the only, or primary, available treatment to ameliorate these severe and sometimes fatal conditions" and that "[m]edical professionals refer to the deployment of these products as 'nutritional **therapy**,' thus confirming their therapeutic use and value." Pl.'s Br. 20.

Nevertheless, plaintiff urges the court to give the word "therapeutic" a different, and narrower, meaning when construing U.S. note 4(b)(iii) to subchapter XVII, chapter 98, HTSUS. According to Nutricia's argument, the word "therapeutic" as it appears in U.S. note 4(b) to subchapter XVII, chapter 98, HTSUS is confined to those articles that heal or cure a disability rather than treat or manage it. Pl.'s Resp. 34. Plaintiff argues that "U.S. note 4(a) and subheading 9817.00.96 were implemented as part of the Educational, Scientific, and Cultural Materials Importation Act of 1982, which implemented the Nairobi Protocol" and that "[t]hese provisions were intended to liberally and broadly encourage the importation of articles for hand[ica]pped persons." *Id*. (citations omitted).

In support of its argument, Nutricia quotes *Richards Medical Co. v. United States*, 910 F.2d 828, 831 (Fed. Cir. 1990) ("Congress intended to encourage the importation of that merchandise which is designed to compensate for, or help adapt to, the handicapped condition. At the same time, Congress did not want to allow duty-free importation of merchandise which is used to heal or cure the condition causing the handicap."). Pl.'s Resp. 35. The facts of the case (decided under the previous Tariff Schedule of the United States but involving an antecedent provision to subheading 9817.00.96, HTSUS) are inapposite. The Court of Appeals for the Federal Circuit ("Court of Appeals") was considering whether the duty-free provision at issue applied to an imported hip prosthesis. The court recognized that the term "'therapeutic' has many different meanings and is subject to both broad and narrow interpretations." *Richards Medical Co.*, 910 F.2d at 830. Reading the term narrowly in light of the intent of the provision, the Court of Appeals affirmed a factual finding of the Court of Interna-

tional Trade in the decision being appealed, under which the prosthetic hip allowed a patient to "better compensate for the handicap" but did not cure the patient of an underlying condition, such as arthritis. Based on that finding, the Court of Appeals concluded that the imported article was not "therapeutic" so as to preclude classification within the duty-free provision.

The flaw in plaintiff's alternate classification claim does not turn on whether the medical foods are other than "therapeutic," in the narrow sense of that term as urged upon the court by Nutricia. Instead, the error in plaintiff's classification analysis is its overly broad construction of the terms of the duty-free provision, considered on the whole. Read in conjunction with U.S. note 4(a) to subchapter XVII, chapter 98, HTSUS, the duty-free provision in subheading 9817.00.96 is limited to "[a]rticles specially designed or adapted for the use or benefit" of a "handicapped" person, i.e., "a person suffering from a permanent or chronic physical or mental impairment which substantially limits one or more major life activities, such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, or working." Plaintiff interprets the terms "handicapped" and "physical or mental impairment" so broadly as to include virtually *any* serious medical condition, despite the words of limitation used to delineate the scope of the provision. Moreover, plaintiff interprets the term "[a]rticles specially designed or adapted for . . ." so broadly as to include "foods" or "beverages" designed to treat or manage (but not cure) such medical condition, provided they are not "medicines or drugs." The weakness in plaintiff's argument lies in its tortured interpretation of each of these terms, considered together and in context. Nothing in the terms of subheading 9817.00.96, HTSUS provides or even connotes that Congress, addressing the needs of "the blind or other mentally or physically handicapped persons" for "articles specially designed or adapted" for their "use or benefit," intended the scope of the subheading to be so broad as to cover foods, food supplements, or nutritional substances or ingredients of any type.[10] The court, therefore, rejects plaintiff's alternate claim for classification of the five products in subheading 9817.00.96, HTSUS.

[10] Illustrative of the limited scope of the provision is the formulation of the related subheadings 9817.00.92 and 9817.00.96, HTSUS (which share the same general article description with subheading 9817.00.98) and are limited to physical articles ("Books, music, and pamphlets, in raised print" and "Braille tablets, cubarithms, and special apparatus, machines, presses, and types") as opposed to substances (e.g., liquids or powders) or foods. Under plaintiff's interpretation, for example, a food or food supplement specially designed to manage (but not cure) a severe visual impairment would qualify under the provision even though subheadings 9817.00.92 and 9817.00.96, HTSUS would not describe it.

III. CONCLUSION

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

Dated: December 4, 2023
New York, New York

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

Slip Op. 23–171

SOUTHERN CROSS SEAFOODS, LLC, Plaintiff, v. UNITED STATES, and NATIONAL MARINE FISHERIES SERVICE, Defendants.

Before: Timothy M. Reif, Judge
Court No. 22–00299

[Concluding that the court lacks subject matter jurisdiction and inviting parties to file motions within 21 days of this opinion to transfer the action to the appropriate district court.]

Dated: December 7, 2023

David E. Bond, *Earl W. Comstock*, *Lucius B. Lau*, *Cristina M. Cornejo*, White & Case, LLP, of Washington, D.C., for plaintiff Southern Cross Seafoods, LLC.

Sosun Bae, Senior Trial Counsel, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, D.C., for defendant United States. With her on the brief were *Brian M. Boynton*, Principal Deputy Assistant Attorney General, *Patricia M. McCarthy*, Director, *L. Misha Preheim*, Assistant Director.

Keith A. Hagg, Attorney-Advisor, National Oceanic Atmospheric Administration, Office of General Counsel of Silver Spring, M.D. for defendant National Marine Fisheries Service.

OPINION AND ORDER

Reif, Judge:

Before the court is a motion by the United States ("the government") and the National Marine Fisheries Service ("NMFS")[1] (collectively, "defendants") to dismiss the complaint of Southern Cross Seafoods, LLC ("plaintiff" or "Southern Cross") brought under 28 U.S.C. § 1581(i)(1)(C) and (D) for lack of subject matter jurisdiction pursuant to United States Court of International Trade ("USCIT" or "the Court") Rule 12(b)(1). Defs.' Mot. Dismiss at 1, ECF No. 25.

Plaintiff seeks a declaratory judgment against the denial of plaintiff's application for preapproval and any future applications for preapproval of its imports of Patagonian toothfish or *Dissostichus eleginoides* ("toothfish") from the Food and Agriculture Organization of the United Nations Statistical Subarea 48.3 in the South Georgia fishery ("Subarea 48.3"). Corrected Compl. ¶¶ 1, 9, 12, 54, ECF No. 14. The denial was due to the lack of a conservation measure ("CM") in force for the Convention on the Conservation of Antarctic Marine Living Resources ("CAMLR Convention"). *Id.* Plaintiff also challenges the actions of NMFS under the Administrative Procedure Act ("APA"), 5 U.S.C. § 706(2). *Id.* ¶¶ 8–9, 56, 58.

[1] NMFS is a federal agency within the National Oceanic and Atmospheric Administration ("NOAA"). Corrected Compl. ¶ 15. NOAA is situated within the U.S. Department of Commerce ("Commerce"). *Id.*

In their motion to dismiss, defendants argue that plaintiff's action does not arise out of a law providing for an "embargo" or other "quantitative restriction" under 28 U.S.C. § 1581(i)(1)(C) or (D) and that, even if plaintiff's action did so arise, the Court lacks subject matter jurisdiction because the district courts have exclusive jurisdiction pursuant to 16 U.S.C. § 2440. Defs. Mot. Dismiss at 1, 5–6. Plaintiff opposes the motion to dismiss. *See* Pl.'s Resp. in Opp'n to Defs.' Mot. Dismiss ("Pl. Resp."), ECF No. 26. For the reasons discussed below, the court concludes that it lacks subject matter jurisdiction.

BACKGROUND

I. Factual background

The objective of the CAMLR Convention is "the conservation of Antarctic marine living resources." Convention on the Conservation of Antarctic Marine Living Resources art. II, ¶ 1, May 20, 1980, 33 U.S.T. 3476, 1329 U.N.T.S. 47 ("CAMLR Convention"). "For the purposes of this Convention, the term 'conservation' includes rational use." *Id.* at art. II, ¶ 2. Member countries of the Commission for the Conservation of Antarctic Marine Living Resources ("CCAMLR" or "the Commission") establish conservation measures for Subarea 48.3 by consensus. Corrected Compl. ¶ 2; *see* CAMLR Convention art. IX, ¶ 1.f, 33 U.S.T. at 3483, 1329 U.N.T.S. at 51. Conservation measures include, inter alia, "the designation of the quantity" of species that may be harvested as well as the designation of harvesting seasons and the regulation of harvesting methods. CAMLR Convention art. IX, ¶ 2.a-i, 33 U.S.T. at 3483–84, 1329 U.N.T.S. at 52. The United States implements the CAMLR Convention through the Antarctic Marine Living Resources Convention Act of 1984 ("AMLRCA"), 16 U.S.C. §§ 2431, *et seq.*[2] Commerce has promulgated regulations to

[2] 16 U.S.C. § 2431 sets forth the intent of Congress in the implementation of the Convention:

> (a) Findings The Congress finds that—
>
> (1) the Convention on the Conservation of Antarctic Marine Living Resources establishes international mechanisms and creates legal obligations necessary for the protection and conservation of Antarctic marine living resources;
> (2) the Convention incorporates an innovative ecosystem approach to the management of Antarctic marine living resources, including standards designed to ensure the health of the individual populations and species and to maintain the health of the Antarctic marine ecosystem as a whole;
> (3) the Convention serves important United States environmental and resource management interests;
> (4) the Convention represents an important contribution to United States long term legal and political objectives of maintenance of Antarctica as an area of peaceful international cooperation;

implement AMLRCA. *See* 50 C.F.R. § 300.100–116.

Under CCAMLR CM 31–01 (1986), "the Commission shall, at its 1987 Meeting, adopt limitations on catch, or equivalent measures, binding for the 1987/88 season. . . . For each fishing season after 1987/88, the Commission shall establish such limitations or other measures, as necessary, [for Subarea 48.3]." CCAMLR CM 31–01 (1986). The CCAMLR did not adopt a catch limit or equivalent measures for Subarea 48.3 for the 2021/22 fishing season because "Russia blocked consensus to adopt proposed CM 41 02." Letter from Alexa Cole, Director, Office of Int'l Affairs, Trade, and Commerce, Nat'l Marine Fisheries Service, to Daniel Thomas, Southern Cross Seafoods, LLC ("NMFS Denial Letter") (Sept. 15, 2022) at 2, PR 83; *see* Corrected Compl. ¶ 4.

On August 8, 2022, Commerce received plaintiff's application for preapproval to import into the United States toothfish harvested from Subarea 48.3 in June and July 2022. NMFS Denial Letter at 1; *see* Application for Pre-Approval Certificate to Import Frozen Toothfish, PR 56 (including application dated July 27, 2022, and postmark dated August 4, 2022).

On September 15, 2022, NMFS denied Southern Cross' application for preapproval ("the NMFS denial"). Decision Mem., PR 20; NMFS Denial Letter at 1. NMFS commented that statements made in the Commission demonstrate that failure to establish such a catch limit "effectively closes the fishery." NMFS Denial Letter at 2 (footnote omitted). NMFS noted that a "conclusion that fishing could proceed in the absence of a measure would also be inconsistent with decades of CCAMLR practice." *Id*. at 2–3. As such, Commerce did not issue a preapproval certificate because "the toothfish at issue was harvested in contravention of CCAMLR CM 31–01." *Id*. at 4 (citing 50 C.F.R. § 300.105(h)(2)). Commerce explained further that, without a catch limit in effect, issuance of the preapproval application would be contrary to 50 C.F.R. § 300.105(d) and (h)(2):

> In the absence of any measure affirmatively establishing a catch limit and other fishery-specific requirements for the current season, fishing in Subarea 48.3 was not authorized under CCAMLR conservation measures. Therefore, as provided in the regulations, at 50 CFR § 300.105(d) and (h)(2), NMFS may not issue a pre-approval certificate.

(5) United States basic and directed research programs concerning the marine living resources of the Antarctic are essential to achieve the United States goal of effective implementation of the objectives of the Convention; and

(6) the United States has important security, economic, and environmental interests in developing and maintaining a fleet of icebreaking vessels capable of operating effectively in the heavy ice regions of Antarctica.

16 U.S.C. § 2431.

> Denial of this application is consistent with the AMLRCA regulations and U.S. obligations under the CCAMLR Catch Documentation Scheme (CM 10–05) which prohibits [sic] the importation of toothfish harvested in a manner inconsistent with CCAMLR conservation measures.

Id.

II. Procedural history[3]

On October 12, 2022, plaintiff filed its original complaint. Compl., ECF No. 6. On October 25, 2022, plaintiff corrected its complaint. Corrected Compl. The complaint as corrected challenges the denial by NMFS pursuant to 50 C.F.R. § 300.105 of the application by Southern Cross for preapproval to import toothfish harvested from Subarea 48.3. *Id.* ¶ 1. Plaintiff argues that the government's denial of plaintiff's preapproval application was "in error" and a violation of the APA because the toothfish were not "harvested or exported in violation of any CCAMLR conservation measure in force" or by an illegal, unreported and unregulated fishery or vessel. *Id.* ¶¶ 7–8.

On December 19, 2022, defendants moved to dismiss the complaint. Defs. Mot. Dismiss. In their motion to dismiss, defendants argue that the Court lacks subject matter jurisdiction over the action brought by plaintiff. Defs. Mot. Dismiss ¶ 1. On January 13, 2023, plaintiff opposed the motion. Pl. Resp. On January 27, 2023, defendants filed their reply. Defs.' Reply in Supp. Mot. Dismiss ("Defs. Reply Br."), ECF No. 28.

JURISDICTION AND STANDARD OF REVIEW

Plaintiff alleges that the Court has exclusive jurisdiction under 28 U.S.C. § 1581(i)(C) and (D). Corrected Compl. ¶¶ 10–12. 28 U.S.C. § 1581(i) is the Court's "residual" jurisdictional provision. *Fujitsu Gen. Am., Inc. v. United States*, 283 F.3d 1364, 1371 (Fed. Cir. 2002) (citing

[3] On December 6, 2022, the court denied plaintiff's motion to expedite briefing and consideration. Order Denying Mot., ECF No. 21. On June 20, 2023, plaintiff moved to supplement the administrative record. Pl.'s Mot. Suppl. Admin. R., ECF No. 37. On July 24, 2023, defendants opposed plaintiff's motion to supplement the administrative record. Defs.' Mot. Opp'n. Mot. Suppl. Admin. R., ECF No. 42. On October 5, 2023, the court denied in part plaintiff's motion to supplement the administrative record and ordered defendants to explain their position concerning a specific category of documents. Order Mot. Supp. Admin. R., ECF No. 47. On November 6, 2023, defendants filed their explanation pursuant to the court's order and adequately explained their position regarding the inconsistency identified by the court in its order. Defs.' Exp. Order Mot. Supp. Admin. R., ECF No. 48. On November 14, 2023, plaintiff stated that "all pending matters relating to its motion to supplement the administrative record have been resolved." Pl.'s Resp. Defs.' Exp. Order Mot. Supp. Admin. R. at 1, ECF No. 49.

Conoco, Inc. v. United States Foreign-Trade Zones Bd., 18 F.3d 1581, 1584 n.4 (Fed. Cir. 1994)), and allows the Court to "take jurisdiction over designated causes of action founded on other provisions of law." *Norcal/Crosetti Foods, Inc. v. United States*, 963 F.2d 356, 359 (Fed. Cir. 1992) (citing *Nat'l Corn Growers Ass'n v. Baker*, 840 F.2d 1547, 1557 (Fed. Cir. 1988). Defendants state that this Court lacks subject matter jurisdiction because the denial of plaintiff's preapproval application is not an embargo under 28 U.S.C. § 1581(i). Defs. Mot. Dismiss at 1. Additionally, defendants state that regardless of whether the instant action constitutes an embargo within the meaning contemplated in section 1581(i), CCAMLR cases fall within the exclusive jurisdiction of the district courts. *Id.*; *see* 16 U.S.C. § 2440.

Whether a court has subject matter jurisdiction to hear an action is a "threshold" inquiry. *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94–95 (1998). "Without jurisdiction the court cannot proceed at all in any cause. Jurisdiction is power to declare the law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause." *Id.* (citing *Ex parte McCardle*, 74 U.S. 506, 514 (1869)); *accord Salmon Spawning & Recovery Alliance v. United States*, 33 CIT 515, 519, 626 F. Supp. 2d 1277, 1281 (2009) (citing *Ex parte McCardle*, 74 U.S. at 514). The party "seeking the exercise of jurisdiction . . . ha[s] the burden of establishing that jurisdiction exists." *Bush v. United States*, 717 F.3d 920, 924–25 (Fed. Cir. 2013) (citing *Keener v. United States*, 551 F.3d 1358, 1361 (Fed. Cir. 2009)).

DISCUSSION

I. Whether the denial of the preapproval application by NMFS constitutes an embargo or other quantitative restriction

A. Legal framework

The USCIT's residual jurisdiction statute states in relevant part:

> (1) In addition to the jurisdiction conferred upon the Court of International Trade by subsections (a)–(h) of this section and subject to the exception set forth in subsection (j) of this section, the Court of International Trade shall have exclusive jurisdiction of any civil action commenced against the United States, its agencies, or its officers, that arises out of any law of the United States providing for—
>
> . . .

> (C) embargoes or other quantitative restrictions on the importation of merchandise for reasons other than the protection of the public health or safety; or
>
> (D) administration and enforcement with respect to the matters referred to in subparagraphs (A) through (C) of this paragraph and subsections (a)–(h) of this section.

28 U.S.C. § 1581(i)(1)(C)-(D). "[T]he Court will not have jurisdiction under section 1581(i)(3)[4] in the absence of a law providing for an embargo."[5] *Salmon Spawning*, 33 CIT at 519, 626 F. Supp. 2d at 1282 (citing *Friedman v. Kantor*, 21 CIT 901, 904, 977 F. Supp. 1242, 1246 (1997)).

The Supreme Court has stated that "the ordinary meaning of 'embargo,' and the meaning that Congress apparently adopted in the statutory language 'embargoes or other quantitative restrictions,' is a governmentally imposed quantitative restriction—of zero—on the importation of merchandise." *K Mart,* 485 U.S. at 185.[6] The Supreme Court added: "[N]ot every governmental importation prohibition is an embargo." *Id.* at 187; *Native Fed'n of Madre De Dios River & Tributaries v. Bozovich Timber Prods.*, 31 CIT 585, 593 n.11, 491 F. Supp. 2d 1174, 1181 n.11 (2007) (citing *K Mart*, 485 U.S. at 187); *see Salmon Spawning*, 33 CIT at 519, 626 F. Supp. 2d at 1282 ("That restriction must be more than a mere 'condition[] of importation.'" (quoting *K Mart*, 485 U.S. at 189)). The Supreme Court continued: "To hold otherwise would yield applications of the term 'embargo' that are unnatural, to say the least." *K Mart*, 485 U.S. at 187.[6]

The Supreme Court made clear that it was drawing a distinction between governmental importation prohibitions and embargoes: "Congress likewise declined to grant the Court of International Trade exclusive jurisdiction over importation prohibitions that are not embargoes." *Id.* at 189. The Supreme Court added, "Congress did not commit to the Court of International Trade's exclusive jurisdiction *every* suit against the Government challenging customs-related laws

[4] The version of the USCIT's jurisdictional statute at 28 U.S.C. § 1581(i)(3) and (4) analyzed in *Salmon Spawning* corresponds in substance to the current 28 U.S.C. § 1581(i)(1)(C) and (D). *Compare* 28 U.S.C. § 1581(i)(3) and (4) with current version at 28 U.S.C. § 1581(i)(1)(C) and (D).

[5] The Supreme Court in *K Mart* ultimately held that there was no embargo in that case because, under the trademark law at issue (19 U.S.C. § 1526(a)), "[t]he private party, not the Government, by deciding whether and how to exercise its private right, determines the quantity of any particular product that can be imported." *K Mart Corp. v. Cartier, Inc.,* 485 U.S. 176, 185 (1988). Therefore, the Government did not have "*any* control over the extent or the nature of § 526(a)'s prohibition." *Id.* at 186.

[6] *See infra* Section I.C for a discussion of these examples provided by the Supreme Court.

and regulations." *Id.* Finally, the Supreme Court clarified that drawing this distinction was for the purpose of clarifying the "division of jurisdiction between the Customs Court (now the Court of International Trade) and the district courts and to 'ensure . . . uniformity in the judicial decisionmaking process.'" *Id.* at 188 (citing H.R. Rep. No. 96–1235, at 20 (1980), U.S. Code Cong. & Admin. News 1980, pp. 3729, 3731). That is the very issue presented to the court in the instant action.

The USCIT has noted that "by choosing the word 'embargoes' over the phrase 'importation prohibitions' in Section 1581(i)(3), Congress created a circumscribed subclass of importation prohibitions that falls within the [USCIT's] jurisdiction." *Native Fed'n*, 31 CIT at 593, 491 F. Supp. 2d at 1181–82 (quoting *K Mart,* 485 U.S. at 189) (citing *Earth Island Inst. v. Brown*, 28 F.3d 76, 77 (9th Cir. 1994)). In addition, "Congress declined to grant [the USCIT] jurisdiction to review challenges to 'conditions of importation' as distinct from those involving embargoes." *Id.* at 593, 491 F. Supp. 2d at 1182 (quoting *K Mart*, 485 U.S. at 189).

At issue in this case, AMLRCA provides inter alia that it is "unlawful . . . to . . . import . . . any Antarctic marine living resource . . . harvested in violation of a conservation measure in force with respect to the United States pursuant to article IX of the Convention or in violation of any regulation promulgated under this chapter." 16 U.S.C. § 2435(3). In addition, Commerce regulations implementing AMLRCA specify the circumstances under which NFMS will issue a preapproval certificate for the importation of a shipment of toothfish:

> NMFS may issue a preapproval certificate for importation of a shipment of frozen *Dissostichus* species if the preapproval application form is complete and NMFS determines that the activity proposed by the applicant meets the requirements of the Act and that the resources were not harvested in violation of any CCAMLR conservation measure or in violation of any regulation in this subpart. No preapproval will be issued for *Dissostichus* species without verifiable documentation that the harvesting vessel reported to C–VMS continuously and in real-time from port-to-port, regardless of where such *Dissostichus* species were harvested.

50 C.F.R. § 300.105(d). The regulations also provide that "NMFS will *not* issue a preapproval certificate for any shipment of *Dissostichus* species . . . [d]etermined to have been harvested or transshipped in contravention of any CCAMLR Conservation Measure in force at the

time of harvest or transshipment . . . .” *Id.* § 300.105(h)(2) (emphasis supplied).

B. Positions of the parties

Before the court is defendants’ motion to dismiss. Accordingly, the court starts with defendants’ arguments.

Defendants argue that the CAMLR Convention, AMLRCA and the regulations under which NMFS denied Southern Cross’ preapproval application do not provide for an embargo. Defs. Mot. Dismiss at 6–7 (quoting 16 U.S.C. § 2435(3)); *see* Defs. Reply Br. at 3–4 (citing 16 U.S.C. § 2435; *Salmon Spawning*, 33 CIT at 519–21, 626 F. Supp. 2d at 1282–83; 50 C.F.R. § 300.105(h)(2)). Specifically, defendants allege that the denial, “made pursuant to 50 C.F.R. § 300.105(h), is not an embargo, and does not ‘arise[] out of any law of the United States providing for’ an embargo.” Defs. Mot. Dismiss at 5 (quoting 28 U.S.C. § 1581(i)(1)(C)). Defendants add: “In choosing to circumscribe a subclass of importation prohibitions that come within this Court’s jurisdiction, ‘Congress declined to grant this Court jurisdiction to review challenges to conditions of importation as distinct from those involving embargoes.’” *Id.* at 6 (quoting *Native Fed’n*, 31 CIT at 592–93, 491 F. Supp. 2d at 1181–82 (citing *K Mart,* 485 U.S. at 189)).[7]

Defendants insist that NMFS “made a case-specific determination” based on AMLRCA and did not “prohibit trade outright.” *Id.* at 7; *see* Defs. Reply Br. at 3 (“*K Mart Corp.* makes evident that a condition of trade is not an embargo even if a case-specific application of that condition might lead to a situation where importation of a product is prevented.”).[8] Defendants note that the regulation at issue “allow[s]” but does not require NMFS to issue a preapproval certificate. Defs. Reply Br. at 4 (citing NMFS Denial Letter). Defendants conclude that “NMFS followed its regulations and determined the conditions in which importation is lawful . . . .” Defs. Mot. Dismiss at 7; *see* Defs. Reply Br. at 6 (maintaining that the “regulation and statute at issue . . . do not prohibit trade outright”); *see also* Oral Arg. Tr. at 30:12–31:13 (arguing on behalf of defendants that “compliance with” conservation measures, such as those providing for a requirement as to fishing gear, represents a “condition on importation”).

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[7] *See K Mart*, 485 U.S. at 195 (Scalia, J., dissenting) (“The Court points out . . . that it may sometimes be difficult to distinguish a condition on importation from a prohibition on importation containing exceptions. That may be true, but since we are agreed that only prohibitions and not conditions come within the meaning of embargo, that ambiguity will have to be grappled with under the Court’s view of things no less than under mine.”).

[8] At oral argument, defendants noted: “By [p]laintiff’s theory, any time a countermeasure [sic] of any type is violated and therefore a certificate is denied, that would constitute an embargo, and that’s simply not a tenable outcome.” Oral Arg. Tr. at 13:19–22.

As support, defendants note the common meaning of an embargo that the Supreme Court outlined in *K Mart* and highlight the Supreme Court's provision of examples supporting the Supreme Court's conclusion that "[n]ot every governmental importation prohibition is an embargo." Defs. Mot. Dismiss at 5–6 (quoting *K Mart*, 485 U.S. at 185). Defendants add that "just as the preapproval certificate that was denied in this case could only be issued pursuant to certain requirements, the permits and licenses described in *K Mart* would have required compliance with certain substantive conditions or requirements." Defs. Reply Br. at 2. Likewise, defendants note that the USCIT in *Native Federation* found that a requirement under the Endangered Species Act ("ESA") for compliance with "certain permitting and documentation requirements" under the Convention on International Trade in Endangered Species of Wild Fauna and Flora ("CITES") did not entail an embargo. Defs. Mot. Dismiss at 6 (citing *Native Fed'n*, 31 CIT at 586, 593–94, 491 F. Supp. 2d at 1176, 1182); *see* Defs. Reply Br. at 5–6 (comparing the "importation conditions" noted in *Native Federation* with those in 50 C.F.R. § 300.105(d)).

In addition, defendants distinguish the sources that plaintiff raises to the court on the basis that they "all appear to expressly confer blanket authority to prohibit import of products." Defs. Reply Br. at 2–3 (citing Pl. Resp. at 13–14). Further, defendants argue that the NMFS determination was not a "blanket ban on toothfish importation." *Id.* at 6. Defendants allege that the denial is not a quantitative restriction either because there is no "quota" or "limit on the quantity of a product that may be imported or exported." *Id.* at 6–7 (citing *Maple Leaf Fish Co. v. United States*, 762 F.2d 86, 88 (Fed. Cir. 1985); *Best Foods, Inc. v. United States*, 50 Cust. Ct. 94, 95, 218 F. Supp. 576, 577 (1963); *Bethlehem Steel Corp. v. United States*, 28 CIT 154, 159 n.8, 316 F. Supp. 2d 1309, 1314 n.8 (2004)). Defendants also argue that this Court does not have jurisdiction under 28 U.S.C. § 1581(i)(1)(D) if this Court lacks jurisdiction under § 1581(i)(1)(C) because there is no embargo or quantitative restriction. *Id.* at 4–5 (citing *Salmon Spawning*, 33 CIT at 520–21, 626 F. Supp. 2d at 1283).

Plaintiff argues that this Court has jurisdiction pursuant to 28 U.S.C. § 1581(i)(1)(C) because the decision to deny the preapproval application is an embargo under *K Mart* or, alternatively, a "quantitative restriction." Pl. Resp. at 1–2 (citing *K Mart*, 485 U.S. at 185); *see id.* at 7–8 (arguing that 16 U.S.C. § 2435(3) is "a law providing for"

such embargo or restriction).[9] Plaintiff notes the language of the letter that Commerce sent to Southern Cross and an email from a NOAA employee — both of which reference prohibition — to support Southern Cross' position. *See id.* at 12 (citing NMFS Denial Letter at 4; Email from K. Dawson, NOAA, to D. Thomas, Southern Cross Seafoods, LLC (July 28, 2022) ("Dawson Email"), PR 12).

Plaintiff asserts that the language of AMLRCA, 16 U.S.C. § 2435(3), and the language of 19 C.F.R. § 12.60 (1987) — which the Supreme Court noted in *K Mart* to be an example of an "embargo[] . . . to further interests relating to . . . ecology" — is fundamentally the same. Pl. Resp. Br. at 11–12; *K Mart*, 485 U.S. at 184. 19 C.F.R. § 12.60 prohibits the importation of most sea otter skins taken contrary to the Provisional Fur Seal Agreement of 1942 between the United States and Canada:

> The transportation, importation, sale, or possession of the skins of fur seals or sea otters is prohibited if such skins were taken contrary to the provisions of section 2 of the act of February 26, 1944 (58 Stat. 100–104) or, the case of such skins taken under the authority of the act or any fur-seal agreement, if the skins are not officially marked and certified as required by section 2 of the act. Section 16 makes the act inapplicable to skins taken for scientific purposes under a special permit.

19 C.F.R. § 12.60 (1987).[10]

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[9] The AMLRCA regulations also provide in relevant part:

> (1) CCAMLR CDS document(s) must accompany all shipments of *Dissostichus* species as required in this section.
> (2) No shipment of *Dissostichus* species shall be released for entry into the United States unless accompanied by an accurate, complete, valid and validated CCAMLR CDS document.
> (3) *Dissostichus* species shall not be released for entry into the United States unless all of the applicable requirements of the CCAMLR Conservation Measures and U.S. regulations have been met.

50 C.F.R. § 300.106(a).

[10] Section 2 of the Provisional Fur Seal Agreement of 1942 between the United States and Canada provided that:

> It shall be unlawful, except as hereinafter provided, for any citizen or national of the United States, or person owing duty of obedience to the laws or treaties of the United States, or any vessel of the United States, or person belonging to or on such vessel, to engage in pelagic sealing or sea otter hunting in or on the waters of the North Pacific Ocean; or for any person or vessel to engage in sealing; or for any person or vessel to use any port or harbor or other place subject to the jurisdiction of the United States for any purpose connected in any way with the operation of pelagic sealing, sea otter hunting, or sealing; or for any person to transport, import, offer for sale, or have in possession at any port, place, or on any vessel subject to the jurisdiction of the United States, raw, dressed, or dyed skins of sea otters taken contrary to the provisions of this section or, where taken pursuant to section 3 of this Act, not officially marked and certified as

Plaintiff urges the court to "apply the same analysis" as in three decisions under which federal courts applied *K Mart* and found that there was an embargo: *Humane Soc'y of the United States v. Brown*, 19 CIT 1104, 1110, 1112, 901 F. Supp. 338, 344, 346 (1995); *Earth Island Inst. v. Christopher*, 6 F.3d 648, 649 n.1, 651–52 (9th Cir. 1993); and *Int'l Labor Rights Fund v. Bush*, 357 F. Supp. 2d 204, 205, 208–10 (D.D.C. 2004). Pl. Resp. at 13–14; *see also* Oral Arg. Tr. at 16:10–17:10 (noting on behalf of plaintiff similarities between the statutes at issue in those cases and the language at issue here). In addition, plaintiff distinguishes the *Native Federation* decision from the instant action. Pl. Resp. at 14–15. Specifically, plaintiff argues that the "regulations at issue in *Native Federation* merely *regulated* trade"— but did not bar it entirely — "based on the presentation of a valid export permit." *Id.* at 15 (emphasis supplied). In contrast, plaintiff states that "NMFS is not regulating trade in toothfish; NMFS is barring trade in toothfish from Subarea 48.3 entirely." *Id.*; *see* Oral Arg. Tr. at 31:16–20 (explaining on behalf of plaintiff that the provisions at issue in *Native Federation* "contemplated" trade). Plaintiff adds: "This is not a case where NMFS is barring Southern Cross's imports because those imports were unaccompanied by the required documents (*i.e.*, the [*Dissostichus* Catch Document] and [*Dissostichus* Export Document])." Pl. Resp. at 16.

Plaintiff alleges further that the Court has jurisdiction pursuant to 28 U.S.C. § 1581(i)(1)(D) based on the "administration and enforcement" of 16 U.S.C. § 2435(3). *Id.* at 8; *see* Oral Arg. Tr. at 17:15–21 (arguing on behalf of plaintiff that an "embargo is always enforced at the ports on an entry-by-entry basis").

C. Analysis

To determine whether the Court has jurisdiction over the instant action, the court considers: (1) whether the denial constitutes an embargo or other quantitative restriction on the importation of merchandise; (2) whether AMLRCA and its implementing regulations provide for such an embargo or other quantitative restriction; and (3) whether AMLRCA and its implementing regulations provide for the administration and enforcement of such an embargo or other quantitative restriction. For the reasons discussed below, the court concludes that (1) the denial pursuant to AMLRCA regulations, 50 C.F.R.

having been so taken, or raw, dressed, or dyed skins of fur seals taken in or on the waters of the North Pacific Ocean or on lands subject to the jurisdiction of the United States, except seal skins which have been taken under the authority of this Act or under the authority of the respective parties to any fur-seal agreement and which have been officially marked and certified as having been so taken.

Provisional Fur Seal Agreement of 1942, Canada-United States., Feb. 26, 1944, ch. 65, § 2, 58 Stat. 100, 101 (repealed 1966).

§ 300.105(d) and (h)(2), by NMFS of Southern Cross' preapproval application does not constitute an embargo or other quantitative restriction, and (2) neither AMLRCA, 16 U.S.C. § 2435(3), nor its regulations, 50 C.F.R. § 300.105(d) and (h)(2), provide for an embargo or other quantitative restriction, or the administration and enforcement thereof.

1. Whether NMFS' denial of plaintiff's preapproval application constitutes an embargo or other quantitative restriction

Plaintiff's action arises out of a challenge to the denial by NMFS of plaintiff's preapproval application. Corrected Compl. ¶ 1 ("This action concerns Defendants' unlawful denial of Southern Cross's application for preapproval to import [toothfish] . . . ."). Defendants argue that the Court does not have jurisdiction over the denial. Defs. Mot. Dismiss at 5 (quoting 28 U.S.C. § 1581(i)(1)(C)). Plaintiff argues that NMFS, by its denial of plaintiff's application, is "barring trade in toothfish from Subarea 48.3 entirely" such that the denial constitutes an embargo — "a governmentally imposed quantitative restriction—of zero", *K Mart*, 485 U.S. at 185 — or other quantitative restriction within the meaning of the statute. Pl. Resp. at 15; *see* Pl. Resp. at 8 (arguing that "NMFS's action is an 'embargo'" or else that "it is certainly a 'quantitative restriction on the importation of merchandise'"). The court is unpersuaded.

NMFS is not authorized under AMLRCA or its implementing regulations to institute a blanket ban on toothfish through the denial of an application for a preapproval certificate. *See generally* 16 U.S.C. §§ 2431, 2435; 50 C.F.R. § 300.105. Rather, NMFS "*may* issue a preapproval certificate" if certain conditions are met, including that NMFS determines that the instant "resources were not harvested in violation of any CCAMLR conservation measure." 50 C.F.R. § 300.105(d) (emphasis supplied). Similarly, NMFS "will not issue a preapproval certificate" for a toothfish harvest or transshipment determined to be "in contravention of" any conservation measure. 50 C.F.R. § 300.105(h)(2). Moreover, "the proper focus of an analysis of jurisdiction under 28 U.S.C. § 1581(i) is the law upon which the plaintiffs' action is based, and whether that law (rather than the specific claims set forth by the plaintiff) provides for an embargo." *Int'l Labor Rights Fund*, 357 F. Supp. 2d at 209 n.3. The court addresses the statutes and regulations governing the instant action *infra* Section I.C.2.

The NMFS denial before the court pertained to one shipment of toothfish. As such, the denial does not constitute an embargo or other quantitative restriction.

The NMFS denial of plaintiff's preapproval certificate was specific to plaintiff's application: "[NMFS] is denying issuance of a preapproval certificate *for this shipment of toothfish* for the reasons outlined below." NMFS Denial Letter at 1 (emphasis supplied). The NMFS denial also stated the foundational legal predicate for the application of AMLRCA by NMFS, namely that "fishing in Subarea 48.3 was not authorized under CCAMLR conservation measures" and that "the toothfish at issue was [sic] harvested in contravention of CCAMLR CM 31–01." NMFS Denial Letter at 4; *see* NMFS Denial Letter at 3–4 (quoting 50 C.F.R. § 300.105(d)). As such, NMFS determined not to issue a preapproval certificate to Southern Cross because NMFS determined that the *specific* toothfish shipment at issue was "harvested or transshipped in contravention of a[] CCAMLR Conservation Measure in force at the time of harvest or transshipment." *See* NMFS Denial Letter at 4[11] (quoting 50 C.F.R. § 300.105(h)(2)).

Similarly, in a different context, Southern Cross inquired of NMFS whether Southern Cross could import fish from another part of the South Georgia waters. NMFS responded in a manner consistent with its explanation in the letter denying the preapproval application in the instant case: "[a]ny final determination would, as always, be made upon submission of an application for preapproval to import a specific shipment." Dawson Email.[12]

Accordingly, the NMFS denial is not an embargo or other quantitative restriction within the meaning of 28 U.S.C. § 1581(i).

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[11] It is notable that the language of subsection (h)(2), applied by NFMS in this case, is distinct *even from* the language of subsection (h)(1) of the same section of the same statute. Compare 50 C.F.R. § 300.105(h)(1) with 50 C.F.R. § 300.105(h)(1). Subsection (h)(1) provides that NMFS will not issue a preapproval certificate for *any* shipment of *Dissostichus* species . . . [i]dentified as originating from Statistical Area 51 or Statistical Area 57 in the eastern and western Indian Ocean outside and north of the Convention Area", 50 C.F.R. § 300.105(h)(1) (emphasis supplied) whereas subsection (h)(2) expressly requires NMFS to tie denial of a preapproval application to only those shipments ""[d]etermined to have been harvested or transshipped *in contravention of any CCAMLR Conservation Measure in force at the time of harvest or transshipment*." Again, subsection (h)(2) expressly contemplates and provides for import of shipments from the identified region subject only to the conditions of meeting the terms of the conservation measure whereas subsection (h)(1) applies a restriction not tied to the terms of a conservation measure.

[12] Moreover, plaintiff's contention that NMFS "will prohibit all toothfish imported from Subarea 48.3" is conjecture. Pl. Resp. at 15 (emphasis omitted). The AMLRCA regulations provide for a process by which the United States can determine not to accept a conservation measure. 16 U.S.C. § 2434(a). The U.S. government could change its position with respect to the requirement of adhering to conservation measures for the approval or preapproval of applications to import toothfish from Subarea 48.3.

2. Whether AMLRCA and its implementing regulations provide for embargoes or other quantitative restrictions

i. Embargoes

In light of plaintiff's request for declaratory judgment applicable to future preapproval applications, the court turns to whether the applicable statute and regulations provide for an embargo. Corrected Compl. ¶¶ 9, 12, 51 (citing 28 U.S.C. § 2201(a), which authorizes "any court of the United States . . . [to] declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought"). Plaintiff argues that the NMFS denial of plaintiff's preapproval application amounts to an embargo based on what plaintiff argues is the provision for an embargo under AMLRCA, 16 U.S.C. § 2435(3). Pl. Resp. at 1–2.

The court examines first the applicable statutes and regulations in the instant action, then considers the case law in which this Court and other courts have concluded that the statutes before them envisaged embargoes and consequently fell within the jurisdiction of this Court. The court concludes that AMLRCA and its implementing regulations provide "conditions of importation" and the potential for other types of "governmental importation prohibition[s]" that do not constitute embargoes. *See K Mart*, 485 U.S. at 187.

AMLRCA, its implementing regulations and the CAMLR Convention all "anticipate[] trade in" toothfish. *Native Fed'n*, 31 CIT at 595, 419 F. Supp. 2d at 1183. Under AMLRCA, "[i]t is unlawful . . . to . . . import . . . any Antarctic marine living resource . . . harvested in violation of a conservation measure in force with respect to the United States pursuant to article IX of the Convention . . . ." 16 U.S.C. § 2435(3). *See also* 50 C.F.R. § 300.114(d). AMLRCA regulations by their terms "regulate[] . . . *[t]he import*. . . into the United States of any Antarctic marine living resource." 50 C.F.R. § 300.100(b)(2) (emphasis supplied); *see* 50 C.F.R. § 300.104(a)(1) ("A person *may import* . . . AMLR into the United States only under a NMFS-issued International Fisheries Trade Permit (IFTP)." (emphasis supplied)). Under the AMLRCA regulations, imports of toothfish must have a preapproval certificate, which NMFS may issue. *See* 50 C.F.R. § 300.105(d); *see also* 50 C.F.R. § 300.104(a)(2) (providing that frozen toothfish shipments "must also be accompanied by . . . a preapproval certificate"); 50 C.F.R. § 300.106(e)(1) (defining toothfish import requirements). For NMFS to issue such a preapproval certificate, NMFS must be able to determine that a condition has been met, namely that the toothfish were not "harvested in violation of any

CCAMLR conservation measure." *Id.* § 300.105(d); *see id.* § 300.105(h)(2).

Under the CAMLR Convention, as noted *supra* Section I, "'conservation' includes *rational use*." CAMLR Convention, art. II.2 (emphasis supplied); *see* CAMLR Convention art. IX.2(c) ("The conservation measures . . . include . . . the designation of the quantity which may be harvested from the populations of regions and sub-regions"). In addition, Congress found that "the Convention incorporates an innovative ecosystem approach to the *management* of Antarctic marine living resources . . . ." 16 U.S.C. § 2431(a)(2) (emphasis supplied). Further, when certain conditions are met, NMFS "*may* issue a preapproval certificate for importation of a shipment of frozen [toothfish]." 50 C.F.R. § 300.105(d) (emphasis supplied). As such, to the extent that the provisions amount to a "governmental importation prohibition," they are nonetheless not embargoes. *K Mart*, 485 U.S. at 187. Instead, the regulation delineates the preapproval framework for the importation of toothfish that is harvested in compliance with CCAMLR conservation measures and that meets certain other prerequisites. *See* 50 C.F.R. § 300.105(d).

In *K Mart*, the Supreme Court addressed two instances of governmental importation prohibitions that did not constitute embargoes: (1) a regulation requiring a permit and appropriate "tagging" for milk and cream importation, 485 U.S. at 187 (quoting 19 C.F.R. § 12.7(a)-(b) (1987)[13]); and (2) a regulation requiring inspection for meat product importation, *id.* (quoting 19 C.F.R. § 12.8 (1987)[14]). The Supreme Court reasoned that "[t]o hold [that every governmental importation prohibition is an embargo] would yield applications of the term 'embargo' that are unnatural, to say the least." *Id.* The Supreme Court illustrated such an application by explaining that the "prohibitory nature" of the milk and cream regulations "would convert licensing and tagging requirements into embargoes on unlicensed or improperly tagged dairy products." *Id.* Similarly, the Supreme Court noted that the meat product inspection requirement "would magically become an embargo of uninspected (but not necessarily tainted) meat." *Id.*

AMLRCA establishes as a condition of importation that the shipment be harvested in compliance with CCAMLR conservation mea-

[13] The regulation provides in relevant part that "the importation into the United States of milk and cream is prohibited unless the person by whom such milk or cream is shipped or transported into the United States holds a valid permit from the Department of Health and Human Services." 19 C.F.R. § 12.7(a) (1987). In addition, the regulation outlines tagging requirements and adds: "Customs officers shall not permit the importation of any milk or cream that is not tagged in accordance with such regulations." *Id.* § 12.7(b).

[14] The regulation provides in relevant part that "meat . . . products shall not be released from Customs custody prior to inspection . . . ." 19 C.F.R. § 12.8(a) (1987).

sures. 16 U.S.C. § 2435(3). AMLRCA provides the authority for NMFS to deny a pre-approval application on the grounds that this condition has not been met. 16 U.S.C. § 2436(b) (providing the authority to the Secretary of Commerce to promulgate regulations to implement conservation measures); 50 C.F.R. § 300.105 (implementing regulation of the statute). This denial may constitute a prohibition on importation of the imports in question. 50 C.F.R. § 300.105(h)(2). As the Supreme Court found in *K Mart,* such a prohibition may not "magically" become an embargo of imports that do not meet the conditions of AMLRCA. In sum, the conditional regulatory language of AMLR parallels that of the statute and regulations for milk and meat importation, which the Supreme Court previously discussed did not constitute embargoes within the jurisdiction of the USCIT. *See K Mart*, 485 U.S. at 187.

That conclusion is further supported by the USCIT's holding in *Native Federation*. 31 CIT 585, 491 F. Supp. 2d 1174. Similar to AMLRCA, the statute at issue in *Native Federation* stated that it was "unlawful . . . to engage in any trade in any specimens contrary to the provisions of the Convention." 16 U.S.C. § 1538(c)(1). In addition, under the ESA regulations, imports of bigleaf mahogany are required to be accompanied by an export permit. *Native Fed'n,* 31 CIT at 594, 491 F. Supp. 2d at 1182 (citing 50 C.F.R. § 23.12(a)(2)(i)[15]). The USCIT in *Native Federation* looked to the language of CITES and the ESA to guide the Court's reasoning that the regulation — including, in certain instances, a prohibition — of mahogany imports did not constitute an embargo:

> By entering into [CITES], the United States did not agree to end trade in CITES-listed species, nor did it elect to do so by enacting Section 9(c) to implement the Convention. On the contrary, the aim of CITES and the provisions of the ESA that implement it is to *permit trade* in certain species in a controlled, sustainable manner.

Id. at 597–98, 491 F. Supp. 2d at 1185 (emphasis supplied) (citing CITES Proclamation of the Contracting States, 27 U.S.T. at 1090). The *Native Federation* court concluded that the section of the ESA applicable to bigleaf mahogany did not "forbid" or "completely ban" trade but rather "regulate[s]" such trade through permit require-

[15] 50 C.F.R. part 23 was revised and "reorganized the sections and added provisions from certain applicable resolutions and decisions adopted by the CITES Conference of the Parties (CoP) at its second through thirteenth meetings (CoP2 -CoP13)." 72 Fed. Reg. 48,402–01. The 2007 version of the regulation reflects a later version of the Final Rule in which 50 C.F.R. § 23.11–12 are condensed.

ments. *Id.* at 593–94, 491 F. Supp. 2d at 1182–83. For the category of species under which bigleaf mahogany falls, the ESA and CITES, "while restricting trade, do not restrict the quantity of imports to zero." *Id.* at 598, 491 F. Supp. 2d at 1185–86 (citing *K Mart*, 485 U.S. at 185).[16]

The AMLRCA regulations spell out specific requirements for preapproval certification, much like the CITES and ESA regulations at issue in *Native Federation* set out requirements for permitting. *Compare* 50 C.F.R. § 300.105(d) (requiring that the "preapproval application form is complete and NMFS determines that the activity proposed by the applicant meets the requirements of the Act and that the resources were not harvested in violation of any CCAMLR conservation measure or in violation of any regulation") *with* 50 C.F.R. § 23.12(a)(2)(i) (requiring "a valid foreign export permit issued by the country of origin").

Plaintiff raises four examples to support its argument that AMLRCA and its regulations, as applied by NMFS, provide for an embargo. Pl. Resp. at 12–14 (citing 19 C.F.R. § 12.60 (1987); *Humane Soc'y*, 19 CIT 1104, 901 F. Supp. 338*; Earth Island*, 6 F.3d 648; *Int'l Labor Rights Fund*, 357 F. Supp. 2d. 204).

AMLRCA and its implementing regulations are distinct from the examples of embargoes that plaintiff provides. *See* 19 C.F.R. § 12.60 (1987); *K Mart*, 485 U.S. at 184 (describing 19 C.F.R. § 12.60 (1987) as an embargo); *Humane Soc'y,* 19 CIT at 1112–1113, 901 F. Supp. at 346 (explaining that 16 U.S.C. § 1826a, which "prohibit[s] the importation" of fishing-related products, confers jurisdiction to this Court under the provision for residual jurisdiction because § 1826a lists embargo language); *Earth Island*, 6 F.3d at 652 (concluding that the 16 U.S.C. § 1537(b) implemented a ban on importation of shrimp products and "prohibit[ed]" shrimp imports that did not comply with regulations protecting sea turtles and holding that those terms corresponded to the embargo language conferring jurisdiction on the USCIT); *Int'l Labor Rights*, 357 F. Supp. 2d at 207 (holding that the language of 19 U.S.C. § 1307, stating that goods produced by forced

[16] To reach this conclusion, the court highlighted several aspects of the ESA and CITES statutes and their similarity to aspects in the Supreme Court's decision in *K Mart* : (1) the flexibility under the CITES language for parties to "adopt stricter measures," weighing against a ban; (2) the similarity between the regulations noted in *K Mart* that provide for "conditions of importation" — milk permits and meat inspections — to CITES/ESA regulations; (3) that the CITES/ESA regulation "anticipates trade in those species, [which include bigleaf mahogany,] on the condition that 'the requirements in ... [50 C.F.R. § 23.12(a)(2)(i)] are met,' i.e., the presentation of a valid foreign export permit;" and (4) the "qualitatively different" nature of the other examples of embargoes because they do not have a "simple permitting scheme" but instead have "stringent statutory requirements" and "prohibit trade outright albeit with limited exceptions." *Id.* at 595–96, 491 F. Supp. 2d at 1183–85 (quoting 50 C.F.R. § 23.11(a)).

labor and "importation thereof is hereby *prohibited*," constituted embargo language conferring jurisdiction on this Court) (emphasis supplied). The court analyzes each in turn.

The first example that plaintiff references is 19 C.F.R. § 12.60 (1987), which the Supreme Court in *K Mart* referred to as providing for an embargo. 485 U.S. at 184; *see* Pl. Resp. at 12. The regulation in question prohibits the importation of "skins of fur seals or sea otters . . . if such skins were taken contrary to the provisions of section 2 of the [Provisional Fur Seal Agreement of 1942 between the United States of America and Canada]." 19 C.F.R. § 12.60 (1987). The regulation provides a limited exception for the import of sea otter skins and fur seals by "Indians, Aleuts, or other aborigines dwelling on the American coasts of the waters of the North Pacific Ocean." Provisional Fur Seal Agreement of 1942 (repealed 1944), ch. 65, § 3.[17]

The CAMLR Convention, AMLRCA and its implementing regulations expressly *envision and provide* that harvesting of Antarctic marine resources will and should occur. *See* CAMLR Convention art. II.2 (noting that "'conservation' includes rational use"), art. II.3 ("Any harvesting and associated activities in the area to which this Convention applies shall be conducted in accordance with the provisions of this Convention and with the following principles of conservation . . . ."), art. IX.2(c) (noting "the designation of the quantity [of species] which may be harvested"). AMLRCA implements the CAMLR Convention, 16 U.S.C. § 2431(b), and the AMLRCA regulations provide a framework under which importers can attain preapproval to import harvested Antarctic marine living resources, including frozen toothfish, if certain conditions are met. *See* 50 C.F.R. §§ 300.100(b)(2), 300.105. In sum, the Provisional Fur Seal Agreement of 1942 as addressed by the Supreme Court in *K Mart* is not apposite to the assessment of the CAMLR Convention, CCAMLR CMs and AMLRCA in the instant case. *K Mart,* 485 U.S. at 184.

Plaintiff next raises this Court's holding in *Humane Society* that the High Seas Driftnet Fisheries Enforcement Act ("HSDFEA") was within the USCIT's exclusive jurisdiction. Pl. Resp. at 13; *see Humane Soc'y*, 19 CIT at 1104, 1121, 901 F. Supp. at 340, 352. The Court in

[17] The Provisional Fur Seal Agreement of 1942 prohibited importing illegally taken skins, and forfeiture thereof:

> The importation or bringing into territory of the United States . . . of skins of fur seals or sea otters taken in the waters mentioned in section 632 of this title . . . except such as have been taken under the authority of the respective parties to the convention between the Governments of the United States, Great Britain, Japan, and Russia . . . to which the breeding grounds of such herds belong, and have been officially marked and certified as having been so taken, is hereby prohibited . . . .

Provisional Fur Agreement, 16 U.S.C. § 635 (repealed 1944). ch. 65, §18, 58 Stat. 104.

Humane Society exercised jurisdiction over plaintiff's action, concluding that the language of the HSDFEA explicitly provided authority for the Secretary of the Treasury at the direction of the president to implement a prohibition on imports of fish and fish products from nations that do not comply with the requirements of the HSDFEA. Pl. Resp. at 13; *see Humane Soc'y*, 19 CIT at 1104, 1112–1113, 901 F. Supp at 338, 340, 346, 352. Plaintiffs there alleged that defendants — the Secretary of Commerce and the Secretary of State — had failed to exercise their "responsibilities" under the HSDFEA to identify any country (in that case, Italy) that engaged in the proscribed fishing. *Id.* at 1105–06, 1111, 901 F. Supp. at 341, 345 (citing 16 U.S.C. § 1826a(b)(1)(A)-(B)). Upon such identification, the HSFDEA prohibited fish imports from that nation. *Humane Soc'y*, 19 CIT at 1110, 901 F. Supp. at 344 (citing 16 U.S.C. § 1826a(b)(3)[18] (delineating the procedure to instate a "[p]rohibition on imports of fish and fish products and sport fishing equipment"). The *Humane Society* court relied on *Earth Island* to conclude that the USCIT had exclusive jurisdiction over that action. *Id.* at 1112–13, 901 F. Supp at 346.

AMLRCA again stands in contrast to the statute — HSFDEA — before the court in *Humane Society*. The HSFDEA establishes a procedure to implement a blanket prohibition. AMLRCA, by contrast, does not do so; rather, it sets out the requirements necessary to import toothfish in compliance with the conservation measures adopted. AMLRCA prohibits the import of products *conditionally* and *only if* they are harvested in violation of regulations promulgated

[18] Specifically, 16 U.S.C. § 1826a authorizes the President to direct the Secretary of the Treasury to prohibit importation into the United States of fish and fish products and sport fishing equipment:

> (3) Prohibition on imports of fish and fish products and sport fishing equipment
>
> (A) Prohibition
> The President—
> (i) upon receipt of notification of the identification of a nation under paragraph (1)(A); or
> (ii) if the consultations with the government of a nation under paragraph (2) are not satisfactorily concluded within ninety days, shall direct the Secretary of the Treasury to prohibit the importation into the United States of fish and fish products and sport fishing equipment (as that term is defined in section 4162 of Title 26) from that nation.
>
> (B) Implementation of prohibition
> With respect to an import prohibition directed under subparagraph (A), the Secretary of the Treasury shall implement such prohibition not later than the date that is forty-five days after the date on which the Secretary has received the direction from the President.
>
> (C) Public notice of prohibition
> Before the effective date of any import prohibition under this paragraph, the Secretary of the Treasury shall provide public notice of the impending prohibition.

16 U.S.C. § 1826a(b)(3) (1995).

under this chapter. 16 U. S.C. § 2435. This approach is comparable to that involving the conditions on imports described in *Native Federation*, *supra* Section I.C.2.i. Specifically, 50 C.F.R. § 300.105 requires that importers of toothfish provide a "complete" preapproval application and that NMFS then "determine[] that the activity proposed by the applicant meets the requirements of the Act and that the resources were not harvested in violation of any CCAMLR conservation measure or in violation of any regulation in this subpart." 50 C.F.R. § 300.105(d). The language of the regulations is formulated in a way that *enables* the importation of toothfish so long as the conditions of the statute and regulations are met. The CMs of the CAMLR Convention in turn provide a framework and conditions such that importers that wish to import fish from the area may seek to do so. *See* 16 U.S.C. § 2435(3). For the foregoing reasons, the statute and holding in *Humane Society* are inapposite to the statute and regulations at issue in the instant action.

The third case that plaintiff presents to the court is the decision of the U.S. Court of Appeals for the Ninth Circuit ("Ninth Circuit") in *Earth Island*. Pl. Resp. at 13–14 (citing *Earth Island*, 6 F.3d at 649 n.1, 651–52). There, the Ninth Circuit held that the statute at issue, which banned shrimp imports from countries that did not protect sea turtles from commercial nets, was an embargo such that the USCIT had exclusive jurisdiction. *Earth Island,* 6 F.3d at 649, 651 (citing The Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, 1990, Pub.L. 101–162, Title VI, § 609, 103 Stat. 1037 (1989) (codified at 16 U.S.C. § 1537 note ("Section 609") (2000)).[19] Section 609 prohibited shrimp imports harvested with technology harmful to sea turtles unless the president otherwise certified to Congress that a country had taken steps to protect sea

[19] Section 609(b) provides for a prohibition on shrimp imports with exceptions — exceptions that must be recognized and certified by the President:

> (b)(1) IN GENERAL.—The importation of shrimp or products from shrimp which have been harvested with commercial fishing technology which may affect adversely such species of sea turtles shall be prohibited not later than May 1, 1991, except as provided in paragraph (2).
>
> (2) CERTIFICATION PROCEDURE.—The ban on importation of shrimp or products from shrimp pursuant to paragraph (1) shall not apply if the President shall determine and certify to the Congress not later than May 1, 1991, and annually thereafter that—
>
> (A) the government of the harvesting nation has provided documentary evidence of the adoption of a regulatory program governing the incidental taking of such sea turtles in the course of such harvesting that is comparable to that of the United States; and
> (B) the average rate of that incidental taking by the vessels of the harvesting nation is comparable to the average rate of incidental taking of sea turtles by United States vessels in the course of such harvesting; or
> (C) the particular fishing environment of the harvesting nation does not pose a threat of the incidental taking of such sea turtles in the course of such harvesting.

Section 609(b).

turtles. *Id.* at 649 n.1, 650. The Ninth Circuit focused on two subsections of the statute:

> Subsection (a) of 16 U.S.C. § 1537 requires the Secretary of State to initiate negotiations with foreign countries to develop treaties to protect sea turtles, and to report to Congress about such negotiations. Subsection (b) requires limitations on the importation of shrimp from nations that have not moved to protect sea turtles. If the President certifies that a country has undertaken measures to protect turtles, shrimp imports from that country are not banned.

Id. at 650 (citing Section 609(a)-(b)). The Ninth Circuit drew a parallel to the embargo on sea otter and fur seal skins identified in *K Mart* to hold that the "prohibitions on shrimp importation for environmental protection" were, similarly, within the USCIT's jurisdiction. *Id.* at 652.[20]

Section 609 is distinct in at least two respects from AMLRCA. First, Section 609 authorizes the executive to impose a nation-wide ban — an embargo — on importation of shrimp or products from shrimp from the specific country. Section 609(b). As the Ninth Circuit found in *Earth Island*, the Section 609 ban on shrimp importation exists *de facto* unless the president certifies affirmatively that a nation is in compliance with the requirements of the statute. 6 F.3d at 650. Sec-

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[20] Following the Ninth Circuit's decision, plaintiff refiled at the USCIT and several USCIT decisions ensued. *See Turtle Island Restoration Network v. Evans*, 284 F.3d 1282 (Fed. Cir. 2002); *see also Turtle Island Restoration Network v. Mallett*, 24 CIT 627, 110 F. Supp. 2d 1005 (2000). In one such decision, the USCIT explained that "the catch of vessels equipped with TEDs from nations without such comparable foundation [as in the U.S. program to require the use of TEDs] continues subject to embargo":

> This court was constrained to conclude in slip op. 99–32 yet again that paragraph (1) of section 609(b) is specifically contingent upon the certification procedure established by section 609(b)(2), which offers the only congressionally-approved breaches of the embargo, either via subparagraphs (A) and (B) or through (C). Paragraphs (b)(1) and (b)(2) are pari materia; they cannot be read independently, or out of the context adopted by Congress, including section 609(a), to slow or stanch the extinction of species of sea turtles. And so long as the U.S. government reports that the "foundation of the U.S. program" continues, with "limited exceptions", to be that "all other commercial shrimp trawl vessels operating in waters subject to U.S. jurisdiction in which there is a likelihood of intercepting sea turtles must use TEDs at all times", the catch of vessels equipped with TEDs from nations without such comparable foundation continues subject to embargo.

Turtle Island Restoration Network v. Mallett, 24 CIT at 631, 110 F. Supp. 2d at 1009. The Federal Circuit noted later that "the Ninth Circuit ruled that because 28 U.S.C. § 1581(i) vests exclusive jurisdiction over embargoes and other trade restrictions in the USCIT, an action to compel enforcement of the import prohibitions of section 609(b) could lie only with [the USCIT]." *Turtle Island Restoration Network v. Evans*, 284 F.3d 1282, 1287 (Fed. Cir. 2002) (citing *Earth Island,* 6 F.3d at 652). Ultimately, the Federal Circuit reversed in part the USCIT's decision in *Turtle Island Restoration Network v. Mallett* for reasons unrelated to jurisdiction. *See Turtle Island Restoration Network v. Evans*, 284 F.3d 1282, 1297.

tion 609 itself provides for the establishment of an embargo; the statute subsequently provides exceptions to the "ban on importation of shrimp" if the President certifies that the governments of harvesting nations meet listed requirements. Section 609(b). By contrast, subsection (h)(2) of the AMLRCA regulations does not create a nationwide or other ban on imports; rather, subsection (h)(2) expressly *permits* NMFS to preapprove certificates of importation of Antarctic marine living resources so long as they are not harvested in violation of CMs. *See* 50 C.F.R. § 300.105(h)(2). As noted, subsection (h)(2) does not preliminarily impose an embargo. *Id.*; 16 U.S.C. § 2435(3).

The second key distinction is that Section 609 and its implementing regulations establish a mechanism for the creation, application and administration of an embargo, whereas neither AMLRCA nor its implementing regulations do the same. Unlike the embargo in *Earth Island,* the action in the instant case that plaintiff would portray as an "embargo" is the result of plaintiff failing to meet the requirements of a NMFS preapproval application and NMFS' inability to approve the application for importation when plaintiff cannot show compliance with CMs. *See* NMFS Denial Letter at 3–4 (citing 50 C.F.R. § 300.105(d), (h)(2)). The provision of the statute and regulations in the instant action serve to *facilitate* importation of toothfish within the parameters of CCAMLR CMs, whereas the statute before the Ninth Circuit in *Earth Island* served to *prohibit* the importation of shrimp from an entire country if the country was found not to comply with shrimp trawl fishing protocols that protect sea turtles. *Earth Island,* F.3d at 649.

Further, the circumstances of the instant denial — based on the failure of the CCAMLR "to adopt catch limits or other measures as necessary in accordance with CM 31–01," NMFS Denial Letter at 3 — are distinct from the prohibition in Section 609. Section 609 prohibits shrimp importation harvested in a way that endangers sea turtles, whereas AMLRCA, prohibits importation of Antarctic marine living resources harvested in a way that does not comply with measures adopted by a committee pursuant an international convention. *Compare* Section 609, 16 U.S.C. § 1537(b), *with* AMLRCA, 16 U.S.C. § 2435(3). The inability of such a commission, the CCAMLR, to adopt, by consensus, "limitations [on catch] or other [equivalent] measures," CM 31–01, is not the equivalent of a limitation instituted affirmatively by a law of the United States government to effectuate an importation prohibition of zero. *See K Mart*, 485 U.S. at 185.

Last, plaintiff raises a decision of the U.S. District Court for the District of Columbia ("D.D.C."), *International Labor Rights Fund*, 357 F. Supp. 2d at 205, 208–10. The D.D.C. granted defendant's motion to

dismiss for lack of subject matter jurisdiction because plaintiffs' claims arose out of section 307 of the Tariff Act of 1930 ("Section 307"),[21] which expressly provides for an embargo on goods produced from forced labor. *Id*. at 206. On this basis, the D.D.C. concluded that the USCIT had exclusive jurisdiction over an action under Section 307:

> In contrast to the provision of the Tariff Act at issue in *K Mart*, Section 307 expressly "provides for" an "embargo" under 28 U.S.C. § 1581(i)(3), as defined by the Supreme Court. The plain language of Section 307 states that goods produced in a foreign country as a result of forced or convict labor "shall not be entitled to entry at any of the ports of the United States, and the importation thereof is hereby prohibited."

Id. at 208 (citing 19 U.S.C. § 1307). The D.D.C. added that "[n]either the interest in uniformity of judicial review, nor Congress' intent to reserve certain cases for the specific expertise of the CIT, would be served by retaining jurisdiction over the plaintiffs' claims." *Id.* at 209. The D.D.C. also found support for its position in the fact that the USCIT had exercised jurisdiction over Section 307 cases in the past. *Id.* at 209 (citing *McKinney v. U.S. Dep't of Treasury*, 9 CIT 315, 614 F. Supp. 1226 (1985); *China Diesel Imps., Inc. v. United States*, 18 CIT 515, 855 F. Supp. 380 (1994)).

The prohibition under Section 307 on importation of goods produced or manufactured by forced labor is distinct from the conditions on importation provided for by AMLRCA. Under Section 307, the importation of goods produced by forced labor is banned in its entirety, and the statute provides for the Secretary of the Treasury to prescribe

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[21] Section 307 of the Tariff Act of 1930, 19 U.S.C. § 1307, provided in relevant part that:

> All goods . . . mined, produced, or manufactured wholly or in part in any foreign country by convict labor or/and forced labor or/and indentured labor under penal sanctions shall not be entitled to entry at any of the ports of the United States, and the importation thereof is hereby prohibited, and the Secretary of the Treasury is authorized and directed to prescribe such regulations as may be necessary for the enforcement of this provision. The provisions of this section relating to goods, wares, articles, and merchandise mined, produced, or manufactured by forced labor or/and indentured labor, shall take effect on January 1, 1932; but in no case shall such provisions be applicable to goods, wares, articles, or merchandise so mined, produced, or manufactured which are not mined, produced, or manufactured in such quantities in the United States as to meet the consumptive demands of the United States.

19 U.S.C. § 1307 (2000). Congress removed the "consumptive demand" clause, as part of the Trade Facilitation and Trade Enforcement Act in 2015, which Customs stated, would "[enhance Customs'] ability to prevent products made with forced labor from being imported." Trade Facilitation and Trade Enforcement Act of 2015, Pub. L. No. 114–25, § 910, 130 Stat. 122, 239.

regulations for the enforcement of the statute. 19 U.S.C. § 1307. By contrast, AMLRCA does not provide for the issuance of a ban on all imports of Antarctic marine living resources. Rather, as described *supra*, AMLRCA provides for mechanisms and legal obligations necessary for the protection and conservation of Antarctic marine living resources. 16 U.S.C. § 2431(a)(1). Under AMLRCA, were NMFS to determine that an importation of a shipment of Antarctic marine living resources was harvested in violation of a CCAMLR CM under the international framework for resource management established by the CAMLR Convention and implemented by AMLRCA, NMFS would be authorized to prohibit importation of that shipment. 16 U.S.C. § 2435. In contrast to the default ban provided for in Section 307, AMLRCA and its implementing regulations do not provide for such a ban; rather, the statute and regulations expressly provide for importation so long as importers meet delineated requirements so that harvesting of Antarctic living resources can be balanced with the underlying conservation efforts of the statute.[22] *Compare* Section 307 (prohibiting entry of all goods produced by forced labor), *with* 16 U.S.C. § 2435 (making unlawful the import of Antarctic marine living resources harvested in violation of the CAMLR Convention or in violation of regulations promulgated under the statute).

In the instant action, the court concludes that AMLRCA, 16 U.S.C. § 2431 *et seq.*, and the implementing regulations, 50 C.F.R. §§ 300.105(d), (h)(2), as invoked by NMFS, *see* NMFS Denial Letter at 4, *regulate* the import of toothfish in conjunction with international conservation efforts agreed to by the United States and adopted by consensus by the CCAMLR under the CAMLR Convention. The language in AMLRCA and its implementing regulations making it unlawful to import toothfish is expressly conditioned on the terms of the CAMLR Convention and the conservation measures adopted thereunder. The denial by NMFS of the preapproval application does not constitute an "embargo" under 28 U.S.C. § 1581(i)(1)(C).

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[22] For similar reasons, the Uyghur Forced Labor Prevention Act ("UFLPA"), Pub. L. No. 117–78, 135 Stat. 1525 (2021), is also distinguished from AMLRCA. *See Ninestar Corp. v. United States*, 47 CIT __, __, Slip Op. 23–169, at 17, 19 (Nov. 30, 2023) (holding that the UFLPA is a law providing for embargoes within the meaning of 28 U.S.C. § 1581(i) and closely related to section 307). On December 1, 2023, plaintiff filed a notice of subsequent authority, arguing that the *Ninestar* decision supports the conclusion that a "[g]overnment action that bars the importation of individual shipments is an embargo within the meaning of 28 U.S.C. § 1581(i)." Pl.'s Notice Sub. Auth. at 2, ECF No. 50. The court concludes that the UFLPA is distinct from AMLRCA in that the UFLPA provides for an embargo of goods that are from the Xinjiang Uyghur Autonomous Region of the People's Republic of China or are produced by entities associated with that region. The UFLPA allows for exceptions to the default ban by delineating a rebuttable presumption that the import prohibition applies to goods from or associated with the region. Pub. L. No. 117–78, § 3, 135 Stat. at 1529.

ii. "Other quantitative restrictions"

Defendants argue further that NMFS' denial of plaintiff's preapproval application is not an "other quantitative restriction[]" on the importation of toothfish within the meaning of AMLRCA. *See* Defs. Mot. Dismiss at 6–7. On this point, plaintiff does not present any specific arguments but only asserts without support or legal analysis: "even if not an embargo, it is certainly a 'quantitative restriction on the importation of merchandise.'" Pl. Resp. at 8.

NMFS' denial of plaintiff's preapproval application does not constitute an "other quantitative restriction[]." 28 U.S.C. § 1581(i)(1)(C). Just as the denial of plaintiff's preapproval application does not arise out of a law providing for an embargo, similarly, the denial does not arise out of a law providing for "other quantitative restrictions on the importation of merchandise." *Id.* As described, the Supreme Court defined an embargo in *K Mart* as a "governmentally imposed quantitative restriction—of zero." 485 U.S. at 185. By extension, under that interpretation, the common meaning[23] of the term "quantitative restriction" would appear to be a governmentally imposed quantifiable limit that is *not* zero. *See, e.g.*, *Best Foods, Inc.*, 50 Cust. Ct. at 95, 218 F. Supp. at 577 (noting that 7 U.S.C. § 624 authorizes the imposition of what the court describes as "fees or quantitative restrictions (quotas)"); *Bethlehem Steel Corp.*, 28 CIT at 159 n.8, 316 F. Supp. 2d at 1314 n.8 (stating that a "quantitative restriction agreement" under 19 U.S.C. § 1671c(c)(3) is "an agreement by a foreign government to limit the volume of imports of the merchandise at issue into the United States—that is, an agreement establishing a quota"); *Maple Leaf Fish Co.*, 762 F.2d at 88 (referencing a report by the U.S. International Trade Commission that, the court said, "recommended import relief taking the form of quantitative restrictions, *or import quotas*, for a 3-year period" (emphasis supplied)); *American Ass'n of Exps. & Imps.-Textile & Apparel Grp. v. United States*, 751 F.2d 1239, 1244 (Fed. Cir. 1985) (describing 7 U.S.C. § 1854 (1982) as "a law providing for quantitative restrictions on textiles" and referring to "quotas established under the authority of [that] section");[24] *see also R.J.F. Fabrics, Inc. v. United States*, 10 CIT 735, 741, 743, 651 F.

[23] As the Supreme Court in *K Mart* focused on the common meaning of "embargo," so too does this court focus on the common meaning of "quantitative restriction." *See K Mart*, 485 U.S. at 189; *see also Conoco*, 18 F.3d at 1581.

[24] Under the statute at issue in *American Ass'n of Exporters & Importers-Textile & Apparel Group*, 7 U.S.C. § 1854 (1982), the President is permitted to negotiate agreements "limiting the export from such countries and the importation into the United States" of certain products. 751 F.2d at 1241 (quoting 7 U.S.C. § 1854 (1982)). In the instant action, no such provision authorizing the President to impose limits on imports appears in AMLRCA, 16 U.S.C. § 2435, or its implementing regulations, 50 C.F.R. § 300.105.

Supp. 1431, 1435, 1436–37 (1986) (finding that "jurisdiction exists under § 1581(i) since plaintiff's cause of action arises out of the administration and enforcement of a quantitative restriction on imported goods" where the "action requires a determination as to country of origin of merchandise excluded for possible violations of quota requirements").

Further, there are no "catch limits or other measures" in place pursuant to CMs with respect to the harvest of the toothfish at issue in this case. NMFS Denial Letter at 3; *see* Corrected Compl. ¶ 22 ("The most recently-adopted catch limits were for the 2019/2020 and 2020/2021 seasons . . . ." (citing CM 41–02 ¶ 4 (2019–2021))).[25]

In sum, AMLRCA and its implementing regulations do not impose a non-zero numerical or quantitative limit or quota on the importation of toothfish. *See generally* 16 U.S.C. § 2435(3); 50 C.F.R. § 300.105(d), (h)(2). Moreover, NMFS did not specify any such limit in its denial. *See generally* NMFS Denial Letter.

The denial by NMFS of the preapproval application does not constitute an "other quantitative restriction[]" under 28 U.S.C. § 1581(i)(1)(C).

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[25] The laws at issue address violations of CCAMLR conservation measures and do not address explicitly violations of toothfish catch limits. *See* 16 U.S.C. § 2435(3); 50 C.F.R. § 300.105(d), (h)(2). Moreover, CCAMLR conservation measures may be broader than just quantity designations; conservation measures may address not only the quantity of a species that may be harvested but also other aspects of harvesting, such as the designation of harvesting seasons and the regulation of harvesting methods. CAMLR Convention art. IX(2)(a)-(i). Article IX states in relevant part:

> 2. The *conservation measures* referred to in paragraph 1(f) above *include* the following:
> (a) the *designation of the quantity* of any species which may be harvested in the area to which this Convention applies;
> (b) the designation of regions and sub-regions based on the distribution of populations of Antarctic marine living resources;
> (c) the *designation of the quantity* which may be harvested from the populations of regions and sub-regions;
> (d) the designation of protected species;
> (e) the designation of the size, age and, as appropriate, sex of species which may be harvested;
> (f) the designation of open and closed seasons for harvesting;
> (g) the designation of the opening and closing of areas, regions or subregions for purposes of scientific study or conservation, including special areas for protection and scientific study;
> (h) regulation of the effort employed and methods of harvesting, including fishing gear, with a view, inter alia, to avoiding undue concentration of harvesting in any region or sub-region;
> (i) the taking of such other conservation measures as the Commission considers necessary for the fulfilment of the objective of this Convention, including measures concerning the effects of harvesting and associated activities on components of the marine ecosystem other than the harvested populations.

CAMLR Convention art. IX(2)(a)-(i) (emphasis supplied).

iii. "Administration and enforcement" with respect to the denial

Plaintiff has failed to establish jurisdiction under 28 U.S.C. § 1581(i)(1)(C) based on the existence of an embargo or other quantitative restriction. Accordingly, the Court does not have jurisdiction under § 1581(i)(1)(D) over the "administration and enforcement" of any such embargo or quantitative restriction.

"[S]ection 1581(i)(4) as it relates to section 1581(i)(3) provides [that] the Court of International Trade [has] . . . jurisdiction over cases that arise out of any law providing for the administration and enforcement of an embargo." *Sakar Int'l, Inc. v. United States*, 516 F.3d 1340, 1346 (Fed. Cir. 2008). In *Native Federation*, this Court explained with respect to the statute at issue in that case: "Since Section 9(c) does not provide for an embargo, Section 1581(i)(4) does not provide an independent basis for jurisdiction." 31 CIT at 598, 491 F. Supp. 2d at 1186 (citing *Retamal v. U.S. Customs & Border Prot.*, 439 F.3d 1372, 1375 (Fed. Cir. 2006)); *see also Salmon Spawning*, 33 CIT at 521, 626 F. Supp. 2d at 1283–84 ("[W]here a law fails to invoke the Court's jurisdiction under § 1581(i)(3) because it is not an embargo or other quantitative restriction . . . no jurisdiction remains for the Court under § 1581(i)(4)." (citing *Native Fed'n*, 31 CIT at 598, 491 F. Supp. 2d at 1186)). Similarly, as discussed *supra* Section I.C.2 and 3, AMLRCA, 16 U.S.C. § 2435, and its implementing regulations, 50 C.F.R. § 300.105, do not provide for an embargo or other quantitative restriction on the importation of merchandise. The denial by NMFS of the preapproval application does not constitute an embargo or other quantitative restriction and does not reflect the administration or enforcement of an embargo or other quantitative restriction under AMLRCA or its implementing regulations. As such, the Court does not have jurisdiction independently under section 1581(i)(1)(D).

II. Whether the Court has exclusive jurisdiction over this action

Plaintiff and defendants dispute whether this Court or the district courts have exclusive jurisdiction over the instant action. *Compare*- Defs. Mot. Dismiss at 8–12; Defs. Reply Br. at 7–16, *with* Pl. Resp. at 8–11, 16–21. Parties' arguments pertain to two potentially conflicting jurisdictional statutes: 28 U.S.C. § 1581(i), described *supra* Section I.A, and 16 U.S.C. § 2440, which states that "[t]he district courts of the United States shall have exclusive jurisdiction over any case or controversy arising under the provisions of this chapter [governing 16 U.S. Code Chapter 44A - AMLRC] or of any regulation promulgated

under this chapter." *See* Defs. Mot. Dismiss at 8–12; Pl. Resp. at 8–11, 16–21; Defs. Reply Br. at 7–16.

The court will not consider whether its jurisdiction is exclusive over the action, because the court concludes, *supra* Section I, that it does not have jurisdiction over this action under 28 U.S.C. § 1581(i) due to the lack of an embargo or other quantitative restriction.

III. Transfer of action

If the "court finds that there is a want of jurisdiction, the court shall, if it is in the interest of justice, transfer such action or appeal to any other such court . . . in which the action or appeal could have been brought at the time it was filed or noticed." 28 U.S.C. § 1631; *see Salmon Spawning*, 33 CIT at 518, 626 F. Supp. 2d at 1281 (citing 28 U.S.C. § 1631). "It is in the interest of justice to transfer an action if it preserves a party's right to be heard on its potentially meritorious claim." *Salmon Spawning*, 33 CIT at 518, 626 F. Supp. 2d at 1281 (citing *Galloway Farms, Inc. v. United States*, 834 F.2d 998, 1000 (Fed. Cir. 1987)). During oral argument, plaintiff stated that the Southern District of Florida would be the proper district court for transfer of the case. Oral Arg. Tr. at 82:6–14. Defendants did not adopt a definitive position, stating that "if the Court decides it doesn't have jurisdiction and if the Court decides it's appropriate, [the government] wouldn't oppose transfer of the action to the appropriate District Court." Oral Arg. Tr. at 82:17–24.

The court invites parties to file motions to transfer under 28 U.S.C. § 1631 to the appropriate district court. *Dalton v. Southwest Marine, Inc.*, 120 F.3d 1249, 1250 (Fed. Cir. 1997) ("[S]ection 1631 is a remedial statute designed to eliminate any prejudice that results from filing in an improper forum.").

CONCLUSION

For the reasons discussed, the court does not have subject matter jurisdiction over the instant action and invites parties to file within 21 days of this opinion and order a motion to transfer. 28 U.S.C. § 1631. In the motions to transfer, the court directs parties to indicate which district court has jurisdiction over the underlying action. Absent parties' confirmation of their view as to the proper district court for transfer of this action, the court will enter a dismissal of the action and judgment will enter accordingly.

Dated: December 7, 2023
New York, New York

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

U.S. Court of Appeals for the Federal Circuit

SAHA THAI STEEL PIPE PUBLIC COMPANY LIMITED, THAI PREMIUM PIPE COMPANY LTD., Plaintiffs-Appellees PACIFIC PIPE PUBLIC COMPANY LIMITED, Plaintiff v. UNITED STATES, Defendant WHEATLAND TUBE COMPANY, Defendant-Appellant

Appeal No. 2022–1175

Appeal from the United States Court of International Trade in Nos. 1:18-cv-00214-JCG, 1:18-cv-00219-JCG, 1:18-cv-00231-JCG, Judge Jennifer Choe-Groves.

Decided: December 4, 2023

JAMES P. DURLING, Curtis, Mallet-Prevost, Colt & Mosle LLP, Washington, DC, argued for plaintiffs-appellee Saha Thai Steel Pipe Public Company Limited. Also represented by JAMES BEATY, DANIEL L. PORTER.

ROBERT GOSSELINK, Trade Pacific PLLC, Washington, DC, for plaintiff-appellee Thai Premium Pipe Company Ltd.

ELIZABETH DRAKE, Schagrin Associates, Washington, DC, argued for defendant-appellant. Also represented by MICHELLE ROSE AVRUTIN, CHRISTOPHER CLOUTIER, WILLIAM ALFRED FENNELL, JEFFREY DAVID GERRISH, LUKE A. MEISNER, ROGER BRIAN SCHAGRIN.

Before HUGHES, LINN, and STARK, *Circuit Judges*.

HUGHES, *Circuit Judge*.

Defendant-Appellant Wheatland Tube Company appeals a decision from the Court of International Trade affirming a second remand determination by the Department of Commerce calculating certain anti-dumping margins for certain welded carbon steel pipes without any particular market situation adjustments.[1] Because the Court of International Trade properly determined that the agency was not allowed to make a particular market situation adjustment to the cost of production when determining antidumping margins, we affirm the trial court's decision to sustain the agency's second remand results.

I

A

Under the Tariff Act of 1930, as amended, Commerce conducts antidumping duty investigations to determine whether goods are

[1] The Department of Commerce did not participate in this appeal.

being sold at less-than-fair value. *See* 19 U.S.C. § 1673. For this analysis, the agency compares the price at which the merchandise is sold in the United States (export price) to a "normal value" benchmark. Export price is defined as the price at which the merchandise is first sold in the United States. *See id.* § 1677a(a).

The objective when calculating normal value is to find a value that provides a fair comparison to the export price. *Id.* § 1677b(a). By default, the agency uses the price at which the merchandise is sold for consumption in the exporting country. *See id.* § 1677b(a)(1)(B)(i). The price used is the price "in the ordinary course of trade." *Id.* Section 1677(15), as amended by the Trade Preferences Extension Act of 2015 (TPEA), defines the "ordinary course of trade" as excluding (A) sales in the exporting country that are made at prices below the cost of production ("sales below cost"), (B) certain sales between affiliates, and (C) "[s]ituations in which . . . the particular market situation prevents a proper comparison with the export price or constructed export price." *Id.* § 1677(15).

Sales below cost are excluded from the normal value, and only "the remaining sales of the foreign like product in the ordinary course of trade" are used. § 1677b(b)(1)(B). To determine whether a sale is below cost, the cost of production is calculated according to § 1677b(b)(3) and includes "the cost of [materials, fabrication, and processing of] the foreign like product, during a period which would ordinarily permit the production of that foreign like product in the ordinary course of business." § 1677b(b)(3)(A). Section 1677b(f) also governs the calculation of the cost of production, requiring that "[c]osts shall normally be calculated based on the records of the exporter or producer of the merchandise, if such records . . . reasonably reflect the costs associated with the production and sale of the merchandise." § 1677b(f)(1)(A).

If the agency cannot determine the normal value of the subject merchandise based on price, then § 1677b(e) authorizes the agency to calculate a constructed value based on costs. TPEA amendments allow the agency to consider a particular market situation (PMS) affecting costs when doing so:

> [I]f 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.

§ 1677b(e)(3). However, as we held in *Hyundai Steel Co. v. United States*, 19 F.4th 1346, 1352–55 (Fed. Cir. 2021), the TPEA amendment to § 1677b(e), which deals with calculating constructed value, does not automatically carry over to § 1677b(b), which deals with calculating the cost of production. Thus, our binding case law establishes that the agency cannot use PMS adjustments for cost of production calculations under the statutory framework.

B

Wheatland Tube Company is a domestic producer of various steel pipes. During the 2018 administrative review of imports of circular welded carbon steel pipes (CWPs) from Thailand, Wheatland intervened and alleged that there was a PMS in Thailand that distorted the costs of hot rolled steel coil. Hot rolled steel coil accounts for roughly 80% of the cost of production of CWPs, since the coils are used to make the pipes.

In the underlying antidumping review of CWPs, the agency initially found that respondents Saha Thai Steel and Thai Premium Pipe's costs of production were distorted by the PMS caused by the hot rolled steel coil costs, which prevented the proper comparison of the normal value with export price or constructed value. Then, the agency determined that it had the authority under the TPEA to account for the PMS in its cost analysis and made upward adjustments to the costs of production for each of the Thai steel companies in this review. This later impacted the antidumping duty rates assigned to each company. The trial court disagreed, finding that Congress intended for PMS adjustments to be available only for calculations of constructed value and not for calculations of costs of production. In so finding, the trial court relied on our decision in *Hyundai Steel*, where we held that the agency could not use PMS adjustments in calculating costs of production. The trial court remanded to the agency to revise its calculations and analysis in accordance with the relevant statutes.

In its first remand determination, the agency continued to find that "a PMS exist[ed] in Thailand that distort[ed] the price of hot rolled coil." J.A. 13. The agency then disagreed with the trial court's finding and continued to use a PMS adjustment when calculating the cost of production, determining that the PMS caused home market sale prices to be outside the ordinary course of trade. J.A. 20. The agency also concluded that the existence of a PMS prevented the proper comparison of normal value based on home market prices with export prices or constructed export prices, and then based the normal value on constructed value. J.A. 20–21.

After the first remand determination, the trial court again found that "Commerce did not follow the statutory framework in this case," and again remanded to the agency to remove the cost-based PMS determination and recalculate the weighted-average dumping margins without a PMS adjustment. J.A. 51. Under protest, in its second remand determination, the agency recalculated the dumping margins without making any PMS adjustments. The CIT upheld this second remand determination.

On appeal, Wheatland seeks to reinstate the agency's first remand determination, where the agency used a PMS adjustment to calculate the cost of production. We have jurisdiction under 28 U.S.C. § 1295(a)(5).

II

"We review a decision of the Court of International Trade evaluating an antidumping determination by Commerce by reapplying the statutory standard of review that the Court of International Trade applied in reviewing the administrative record. We will uphold Commerce's determination unless it is unsupported by substantial evidence on the record or otherwise not in accordance with the law." *Peer Bearing Co.-Changshan v. United States*, 766 F.3d 1396, 1399 (Fed. Cir. 2014) (citation omitted); 19 U.S.C.§ 1516a(b)(1)(B)(i).

III

Wheatland argues that this case can be distinguished from *Hyundai Steel* because in that case, we said that 19 U.S.C. § 1677b(a)(1) "specifically gives Commerce the tools to ensure a proper comparison with the export price." 19 F.4th at 1355 (internal quotations omitted). Wheatland further argues that the agency relied on one of the subsections of § 1677b(a)(1) to adjust the cost of production upward to account for a PMS by framing it as a constructed value calculation. Appellant's Br. 26. We are not persuaded.

Wheatland ignores the actual holding of *Hyundai Steel*, where we explicitly stated that the amendment authorizing PMS adjustments for constructed value calculations was *not* added to the section of the statute addressing cost of production calculations. 19 F.4th at 1352–53. We thus found that Congress did not intend to authorize the agency to incorporate PMS adjustments for cost of production calculations. We also explained that "[i]n enacting the TPEA, Congress did not leave a gap for Commerce to fill with regard to adjusting the costs of production. Rather, Congress simply and unambiguously allowed for a PMS adjustment to constructed value but not to the costs of production for purposes of the sales-below-cost test." *Id.* at 1354.

Hyundai Steel is indistinguishable from this case and is controlling. That the agency presented its cost of production calculation as a constructed value calculation—by using the phrase "ordinary course of trade" to explain why it incorporated a PMS adjustment—does not change the fact that the statute simply does not authorize PMS adjustments to cost of production calculations. The agency cannot use constructed value language found in § 1677b(e) as a backdoor to slip in a PMS adjustment for cost of production calculations. The trial court correctly found that the agency's second remand determination—removing all PMS adjustments from the cost of production calculation—was consistent with the statutory framework. We thus affirm.

IV

We have considered the rest of Wheatland's arguments and find them unpersuasive. We therefore affirm the Court of International Trade's decision sustaining the agency's second remand determination, which calculated cost of production without any PMS adjustments.

AFFIRMED

MAGID GLOVE & SAFETY MANUFACTURING CO. LLC, Plaintiff-Appellant
v. UNITED STATES, Defendant-Appellee

Appeal No. 2022–1793

Appeal from the United States Court of International Trade in No. 1:16-cv-00150-TCS, Senior Judge Timothy C. Stanceu.

Decided: December 6, 2023

LAWRENCE FRIEDMAN, Barnes, Richardson & Colburn, LLP, Chicago, IL, argued for plaintiff-appellant.

MARCELLA POWELL, Commercial Litigation Branch, Civil Division, Department of Justice, New York, NY, argued for defendant-appellee. Also represented by BRIAN M. BOYNTON, AIMEE LEE, PATRICIA M. MCCARTHY, JUSTIN REINHART MILLER; PAULA S. SMITH, Office of the Assistant Chief Counsel, United States Bureau of Customs and Border Protection, United States Department of Homeland Security, New York, NY.

Before MOORE, *Chief Judge*, REYNA and TARANTO, *Circuit Judges*.

REYNA, *Circuit Judge*.

Magid Glove & Safety Manufacturing Co. LLC ("Magid") appeals a decision of the United States Court of International Trade regarding the tariff classification of certain knit gloves with partial plastic coating. Because we conclude that the gloves are properly classified under heading 6116 of the Harmonized Tariff Schedule of the United States, we affirm.

HARMONIZED TARIFF SCHEDULE FRAMEWORK

The Harmonized Tariff Schedule of the United States ("HTSUS")[1] governs the classification of imported merchandise. *Schlumberger Tech. Corp. v. United States*, 845 F.3d 1158, 1163 (Fed. Cir. 2017). The HTSUS is organized by four-digit headings, and each heading may contain one or more six-digit or eight-digit subheadings. *See Orlando Food Corp. v. United States*, 140 F.3d 1437, 1439 (Fed. Cir. 1998). The headings set forth general categories of merchandise, while the subheadings provide a more particularized division of the merchandise within each category. *Wilton Indus., Inc. v. United States*, 741 F.3d 1263, 1266 (Fed. Cir. 2013). The headings and subheadings are enumerated in Chapters 1 through 99 across various sections of the HTSUS. *See R.T. Foods, Inc. v. United States*, 757 F.3d 1349, 1353 (Fed. Cir. 2014). The HTSUS further contains, among other things, the "General Rules of Interpretation" ("GRIs"), the "Additional United States Rules of Interpretation" ("ARIs"), and various section and chapter notes. *Id.*

[1] Because the subject gloves were imported in 2015, the parties cite to HTSUS (2015) (Rev.1). *See, e.g.*, J.A. 286, 291.

The GRIs and ARIs govern the interpretation of the HTSUS provisions to determine proper classification of merchandise. *Carl Zeiss, Inc. v. United States*, 195 F.3d 1375, 1379 (Fed. Cir. 1999). The GRIs are applied numerically, such that once proper classification is determined via a particular GRI, the classification inquiry terminates and the remaining successive GRIs become inoperative. *StarKist Co. v. United States*, 29 F.4th 1359, 1361 (Fed. Cir. 2022). According to GRI 1, a court first construes the terms of the heading and any relative section or chapter notes, to determine whether the merchandise at issue is classifiable under that heading. *Orlando Food*, 140 F.3d at 1440. After determining the appropriate heading, the court then proceeds to identify the appropriate subheading. *See id.*; *see also* GRIs 1 & 6,[2] HTSUS.

BACKGROUND

At issue are eight models of knit textile gloves with partial plastic (polyurethane) coating. The gloves consist of a shell made of man-made fibers that is directly knitted to shape on an industrial knitting machine. *See Magid Glove & Safety Mfg. Co. v. United States*, 567 F. Supp. 3d 1334, 1337 (Ct. Int'l Trade 2022) ("*Decision*"). The complete shell then goes through a dipping process, where the palm and portions of the fingers are coated with polyurethane. *Id.* at 1336. Magid markets these gloves for use in automotive, metal handling, and other industrial and commercial settings. *Id.* at 1337; J.A. 42–53 (product specifications).

The relevant HTSUS headings and subheadings for the classification of these imported gloves are:

> Heading 6116: Gloves, mittens and mitts, knitted or crocheted:
>
> Subheading 6116.10.55: Impregnated, coated or covered with plastics or rubber: Other: Without fourchettes: Other: Containing 50 percent or more by weight of cotton, man-made fibers or other textile fibers, or any combination thereof

J.A. 291.

> Heading 3926: Other articles of plastics and articles of other materials of headings 3901 to 3914:
>
> Subheading 3926.20.10: Articles of apparel and clothing accessories (including gloves, mittens and mitts): Gloves, mittens and mitts: Seamless

[2] Under GRI 6, "the classification of goods in the subheadings of a heading shall be determined according to the terms of those subheadings and any related subheading notes[.]" GRI 6, HTSUS.

J.A. 286.

In January 2015, Magid imported into the United States two entries of the subject gloves from China and South Korea. *Decision*, 567 F. Supp. 3d at 1336. The United States Customs and Border Protection ("CBP") classified the gloves under subheading 6116.10.55 of the HTSUS, subject to duty at 13.2% *ad valorem*. *Id.* at 1338. After the CBP liquidated the two entries of gloves, Magid filed a protest, contending that the gloves should have been classified under subheading 3926.20.10, a duty-free provision. *Id.* at 1336, 1338. The CBP denied Magid's protest. *Id.* at 1336.

Magid sued in the United States Court of International Trade ("CIT") challenging the denial of its protest. *See id.* The parties cross moved for summary judgment. *Id.* The CIT determined that the terms of heading 6116, "Gloves. . . knitted or crocheted," more appropriately described the gloves at issue. *See, e.g.*, *id.* at 1340, 1342–43. The CIT explained that the terms of heading 3926 did not describe the subject gloves because, "while comprised in part of a plastic material (polyurethane), the gloves are not 'of plastics' or of other materials of headings 3901 to 3914 (which pertain to various plastics and similar substances in primary forms)." *Id.* at 1339.

The CIT rejected Magid's contention that Section XI[3] Note 1(h) excluded the subject gloves from heading 6116. *Id.* at 1340–43. Section XI Note 1(h) states that Section XI does not cover "[w]oven, knitted or crocheted fabrics, felt or nonwovens, impregnated, coated, covered or laminated with plastics, or articles thereof, of chapter 39 [('Plastics and Articles Thereof')]." J.A. 287. According to the CIT, the "express terms" of this note would exclude the gloves from heading 6116 "only if they are 'articles' *of*" knitted fabrics "impregnated, coated, covered or laminated" with plastics, and "only if those fabrics are classified within" Chapter 39. *Decision*, 567 F. Supp. 3d at 1340.

The CIT concluded that the gloves were not of such fabrics. *Id.* at 1342–43. In reaching that conclusion, the CIT examined provisions in Chapter 39 to determine what "fabrics" this chapter may encompass. *Id.* at 1341. The CIT found heading 3921 pertinent because it covered "some plastic sheet or film products that have a textile component and could be described as 'fabrics.'" *Id.* The CIT next consulted relative notes, including the limitation imposed by Chapter 39 Note

[3] Section XI ("Textiles and Textile Articles") covers, among other chapters, Chapter 61 ("Articles of Apparel and Clothing Accessories, Knitted or Crocheted") and the headings within Chapter 61, including heading 6116.

10[4] on the scope of such Chapter 39 "fabrics." *Id.* at 1342. Under Chapter 39 Note 10, the CIT explained, to fall within Chapter 39, "the knitted fabrics must be in uncut or basic rectangular form and thus cannot be in more complex shapes." *Id.*

Accordingly, the CIT determined that in order to be considered fabrics of Chapter 39, as required by Section XI Note 1(h), the fabrics must not only be "impregnated, coated, covered or laminated with plastics," but they must also be "in basic uncut or rectangular form." *Id.* (internal quotations omitted). Because the textile component of the gloves "is complete when it comes off the [knitting] machine," the CIT held that the gloves were not "of" fabrics encompassed by Chapter 39. *Id.* at 1342–43 (citation and internal quotations omitted; alteration in original). The CIT thus determined that Magid's gloves were not excluded from heading 6116 by Section XI Note 1(h). *Id.* at 1343.

After concluding that heading 6116 was the appropriate heading, the CIT then applied GRI 6 to arrive at subheading 6116.10.55 for the classification of the subject gloves. *Id.* at 1343–44. The CIT accordingly upheld the CBP's classification and granted summary judgment in the government's favor. *Id.* at 1344.

Magid timely appealed. We have jurisdiction under 28 U.S.C. § 1295(a)(5).

STANDARD OF REVIEW

We review *de novo* the CIT's grant of summary judgment and apply anew the standard used by the CIT to assess the subject classification. *Otter Prods., LLC v. United States*, 834 F.3d 1369, 1374–75 (Fed. Cir. 2016). Despite our *de novo* review, we begin our analysis with the CIT's opinion, which "is nearly always the starting point of our analysis." *Schlumberger*, 845 F.3d at 1162 (quoting *Nan Ya Plastics Corp. v. United States*, 810 F.3d 1333, 1341 (Fed. Cir. 2016)).

Proper classification of merchandise under the HTSUS requires a two-step process. First, we ascertain, without deference, the meaning of the specific terms within the relevant provisions. *Orlando*, 140 F.3d at 1439. Second, we determine whether the merchandise at issue falls within the description of those terms as properly interpreted. *Id.* This second step presents a factual inquiry that we review for clear error.

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[4] Chapter 39 Note 10 provides,

> In headings 3920 and 3921, the expression "*plates, sheets, film, foil and strip*" applies only to plates, sheets, film, foil and strip (other than those of chapter 54) and to blocks of regular geometric shape, whether or not printed or otherwise surface-worked, uncut or cut into rectangles (including squares) but not further worked (even if when so cut they become articles ready for use).

J.A. 283.

Id. Where, as here, there is no factual dispute regarding the nature, structure, and use of the merchandise, the proper classification turns on the first step. *Faus Grp., Inc. v. United States*, 581 F.3d 1369, 1372 (Fed. Cir. 2009).

DISCUSSION

On appeal, Magid challenges the CIT's classification of the subject gloves under heading 6116.[5] Appellant Br. 2–3. To support its proposed alternative heading 3926, Magid relies on Section XI Note 1(h) and contends that this note excludes the gloves from heading 6116. *Id.* at 16–18; Reply Br. 13–14. According to Magid, the CIT's interpretation of this note was erroneous because it failed to apply the reasoning in *Kalle USA, Inc. v. United States*, 923 F.3d 991 (Fed. Cir. 2019). Appellant Br. 11; Reply Br. 1. We disagree with Magid's arguments. For reasons discussed below, we conclude that the subject gloves were appropriately classified under heading 6116.

A. Knitted Gloves

To determine the tariff classification of merchandise, GRI 1 instructs us to consider first the "*terms of the headings*" and any relative section or chapter notes. GRI 1, HTSUS (emphasis added). As part of the legal text of the HTSUS, section and chapter notes have the force of statutory law. *See BenQ Am. Corp. v. United States*, 646 F.3d 1371, 1376 (Fed. Cir. 2011). Unlike section and chapter notes, the Explanatory Notes[6] are not legally binding, but they "may be consulted for guidance and are generally indicative of the proper interpretation of the various HTSUS provisions." *Id.*

Absent contrary legislative intent, we construe HTSUS terms based on their common and commercial meanings, which we presume to be the same. *Carl Zeiss*, 195 F.3d at 1379. And when determining which heading is more appropriate for classification, "a court should compare only the language of the headings and not the language of the subheadings." *Orlando Food*, 140 F.3d at 1440; *see also Schlumberger*, 845 F.3d at 1163 (noting that subheadings "cannot be used to expand the scope of their respective headings" (internal quotations omitted)).

The subject gloves involve two competing headings: (1) heading 3926: "Other articles of plastics and articles of other materials of headings 3901 to 3914"; and (2) heading 6116: "Gloves, mittens and

[5] Magid does not separately challenge classification under the relevant subheading.

[6] The Explanatory Notes are published by the World Customs Organization ("WCO"). *See Kahrs Int'l, Inc. v. United States*, 713 F.3d 640, 644 n.2 (Fed. Cir. 2013). They represent the WCO's official interpretation of the Harmonized Commodity Description and Coding System, the global system on which the HTSUS is based. *Id.*

mitts, knitted or crocheted." J.A. 286; J.A. 291. Of the two, we conclude that heading 6116 is the appropriate heading.

Heading 6116 plainly describes "[g]loves . . . knitted." J.A. 291. Magid does not seem to dispute that its imported products are "gloves" and that they are "knitted." *See* Appellant Br. 18. Magid also markets these products as "work glove[s]" and describes the construction of these products as "machine knit[ted]." *See* J.A. 42–53 (product specifications listing the products as "work glove[s]" and "machine knit"). So, the record shows that these "gloves" are machine "knitted," as heading 6116 describes. Heading 3926, in contrast, recites "articles of plastics," and the term "gloves" only appears in the terms of *subheading* 3926.20. J.A. 286. But a proper classification analysis starts with the terms of the headings, not the subheadings. *See Orlando Food*, 140 F.3d at 1440. In addition, a subheading cannot expand the plain meaning of the terms of a heading. *See Schlumberger*, 845 F.3d at 1163. Here, as the CIT noted, while the exterior of the gloves has a partial plastic coating, the gloves are not "of plastics," as heading 3926 recites. *See Decision*, 567 F. Supp. 3d at 1339. The terms of heading 3926 therefore do not describe the subject gloves.

The Explanatory Note to heading 6116 supports this interpretation. *See* J.A. 317. This note establishes that heading 6116 contemplates and covers knitted gloves with a non-knit component, whether in the shell or as covering. *See id.* Following a listing of several subheadings, the explanatory remarks of the note states that heading 6116 "covers all knitted or crocheted gloves," whether for males or females, short or long, and it further covers certain gloves in "unfinished" form.[7] *Id.* While the remarks provide that certain gloves with a fur component are excluded from heading 6116, they do not similarly exclude gloves with a partial plastic coating. *See id.* As the CIT explained, this note thus evidences the legislative intent that the terms of heading 6116 "include[] as a general matter those [gloves] to which a non-knitted component, such as a plastic layer, has been affixed." *Decision*, 567 F. Supp. 3d at 1340.

Contrary to Magid's contention, Section XI Note 1(h)does not exclude the subject gloves from Section XI and hence heading 6116. Under Section XI Note 1(h), Section XI does not cover "[w]oven, knitted or crocheted fabrics, felt or nonwovens, impregnated, coated, covered or laminated with plastics, or articles thereof, of chapter 39."

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[7] Before the explanatory remarks, the note lists: 6116.10 ("Impregnated, coated or covered with plastics or rubber, Other:"), 6116.91 ("Of wool or fine animal hair"),6116.92 ("Of cotton"), 6116.93 ("Of synthetic fibres"), and 6116.99 ("Of other textile materials"). *See* J.A. 317.

J.A. 287. That is, if the "fabrics" and "articles thereof" fall within Section XI Note 1(h), they would be excluded from Section XI by the operation of this note.

To ascertain the scope of such "fabrics" and "articles thereof" covered by this note, we begin with the plain language of Section XI Note 1(h). This note sets forth several qualifiers that collectively describe and limit the expression "fabrics." *Id.* The first two qualifiers are not in dispute: the "fabrics" must be "[w]oven, knitted or crocheted," and they must also be "impregnated, coated, covered or laminated with plastics." *Id.* The ending segment of the note, however, adds another qualifier which requires the "fabrics" be "of [C]hapter 39." *Id.* We therefore must, as the CIT did, look to Chapter 39 and locate pertinent provisions that may shed light on what "fabrics" Chapter 39 encompasses. This inquiry takes us to heading 3921 because this heading contemplates "Other plates, sheets, film, foil and strip, of plastics" combined with "textile materials" or "textile components." *See, e.g.*, subheading 3921.13 (covering items "[c]ombined with textile materials: Products with textile components . . ."); subheading 3921.90 (covering items "[c]ombined with textile materials . . ."). *Compare* heading 3921 (covering "[o]ther plates, sheets, film, foil and strip, of plastics"), *with* heading 3920 (covering "[o]ther plates, sheets, film, foil and strip, of plastics" that are "*not... combined with other materials*" (emphasis added)).

And as instructed by GRI 1, we then consider pertinent notes that inform or limit the scope of heading 3921 and the items it covers. *See* GRI 1, HTSUS. In this regard, we must give effect to the express limitation set forth in Chapter 39 Note 10, which states that the expression "plates, sheets, film, foil and strip" of heading 3921 "applies only to" those that are "uncut or cut into rectangles (including squares) but not further worked (even if when so cut they become articles ready for use)." J.A. 283. That is, the "fabrics" or textile materials heading 3921 may encompass must be "uncut or cut into rectangles (including squares) but not further worked." *Id.*

Taking the above into account, we agree with the CIT's conclusion that to fall within Section XI Note 1(h), the "fabrics" not only must be "impregnated, coated, covered or laminated with plastics," they must also be "in basic uncut or rectangular form." *Decision*, 567 F. Supp. 3d at 1342. The textile fabrics of the subject gloves are undisputedly not so, because they are in the advanced form of complete gloves when they come off the knitting machine. J.A. 58 (Magid representative testifying that "[t]he entire glove, finished glove, comes out of the knitting machine" and then goes through a dipping process). As the

CIT explained, because the textile fabrics of the gloves are knitted "directly from yarn [in]to an advanced shape," these gloves are not "of" a Chapter 39 fabric.[8] *Decision*, 567 F. Supp. 3d at 1342–43. The exclusion of Section XI Note 1(h) therefore does not apply to the subject gloves.

B. *Kalle* and "Completely Embedded"

Magid contends that the CIT erred in interpreting Section XI Note 1(h) by failing to follow *Kalle* to determine whether the gloves are "completely embedded" in plastics and therefore "excluded from HTSUS Section XI if the gloves are classifiable in Chapter 39." Reply Br. 1–2 (citing *Kalle*, 923 F.3d 991); *see also* Appellant Br. 11–16. In Magid's view, *Kalle* controls "the application of Section XI[] Note 1(h)" and requires an analysis of the subject gloves under the "completely embedded" test applied in that case. Reply Br. 1. We are not persuaded by these arguments.

Kalle involved the interpretation of the term "completely embedded in plastics," which appears in Chapter 59 Note 2(a)(3)[9] and addresses coverage and exclusions underheading 5903. *Kalle*, 923 F.3d at 994. The merchandise at issue in *Kalle* were certain sausage casings "comprised of a woven textile sheet that is coated with a layer of plastic on one side." *Id.* at 993. The importer contended that the casings should be classified under heading 3917 as plastics subject to a lower duty rate, rather than under heading 6307 as made-up textiles.[10] *Id.* On appeal, the parties agreed that the interpretation of the term "completely embedded in plastics" as used in Chapter 59 Note 2(a)(3)was determinative. *Id.* at 994. This court then interpreted the "completely embedded" language and affirmed the CIT's classification. *Id.* at 995–97.

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[8] On reply, Magid clarified its arguments and conceded that "[f]or the exclusion [in Section XI Note 1(h)] to apply, the Note also requires that the fabric or article be classifiable in Chapter 39." Reply Br. 2.

[9] Chapter 59 Note 2(a)(3) provides that,

> Heading 59.03 applies to: (a) Textile fabrics, impregnated, coated, covered or laminated with plastics, whatever the weight per square metre and whatever the nature of the plastic material (compact or cellular), other than: . . . (3) Products in which the textile fabric is either completely embedded in plastics or entirely coated or covered on both sides with such material, provided that such coating or covering can be seen with the naked eye with no account being taken of any resulting change of colour (Chapter 39).

J.A. 318.

[10] The two competing headings in *Kalle* were: heading 3917, which covers "[t]ubes, pipes and hoses and fittings therefor (for example, joints, elbows, flanges), of plastics;" and heading 6307, which covers "[o]ther made up articles, including dress patterns." *Kalle*, 923 F.3d at 993.

Kalle's "completely embedded" test does not apply to the classification here. None of *Kalle*'s competing headings, HTSUS chapters, or merchandise, are involved here. The term "completely embedded" does not appear in Section XI Note 1(h) or the two competing headings in this case. Magid concedes that the text of Chapter 59 Note 2(a)(3) "specifies that th[is] Note applies to Heading 5903," not to the headings at issue here. Reply Br. 13.We reject Magid's attempt to take the interpretation of a term within Chapter 59 Note 2(a)(3) out of context and apply it in a case involving different provisions and merchandise.[11]

* * *

Magid's proffered classification approach departs from GRI 1's instruction to start a proper classification analysis by focusing on the language of the headings. The partial plastic coating does not, as Magid contends, remove the gloves from heading 6116 and make them classifiable under Chapter 39 as articles of plastics. Further, Magid's approach would effectively eviscerate the subheadings under heading 6116 where the HTSUS drafters specifically address the very merchandise Magid imported. *See* J.A. 291 (subheading 6116.10 covering knitted gloves "[i]mpregnated, coated or covered with plastics or rubber"). We reject such an approach.

Accordingly, we conclude that the subject gloves are properly classified as "Gloves . . . knitted" under heading 6116.

CONCLUSION

Based on the foregoing, we hold that the CIT correctly classified Magid's imported gloves under heading 6116. We have considered Magid's remaining arguments and find them unpersuasive. Accordingly, the CIT's judgment is affirmed.

AFFIRMED

COSTS

No costs.

[11] Notably, Magid relies on *Kalle* for its appeal, but it simultaneously requests that this court reconsider *Kalle* en banc and overrule that case. Reply Br. 11–16; *id.* at 11 (Magid contending that *Kalle*'s "use of Chapter 59[] Note 2 to determine the scope of headings within Chapter 61 appears to be inconsistent with the instruction in [GRI 1]"). We find *Kalle* inapplicable for the classification at issue and decline to reach the merits of Magid's en banc request.

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