

# U.S. Customs and Border Protection



## **NOTICE OF ISSUANCE OF FINAL DETERMINATION CONCERNING THREE VEHICLE TRACKING DEVICES, A SATELLITE DEVICE, AN NFC READER, AND AN NFC KEYRING FOB**

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

**ACTION:** Notice of final determination.

**SUMMARY:** This document provides notice that U.S. Customs and Border Protection (CBP) has issued a final determination concerning the country of origin of three vehicle tracking devices, a satellite device, a near field communication (NFC) reader, and an NFC keyring fob. Based upon the facts presented, CBP has concluded that the country of origin of the three vehicle tracking devices, the satellite device, and the NFC reader is Canada for purposes of U.S. Government procurement. The country of origin of the NFC keyring fob will be determined by the country of origin of the contactless integrated circuit (IC), which is usually Taiwan, but if unavailable, then either Thailand or Singapore will be the source country and the country of origin for purposes of U.S. Government procurement.

**DATES:** The final determination was issued on November 25, 2020. A copy of the final determination is attached. Any party-at-interest, as defined in 19 CFR 177.22(d), may seek judicial review of this final determination within January 8, 2021.

**FOR FURTHER INFORMATION CONTACT:** Beth Jenior, Valuation and Special Programs Branch, Regulations and Rulings, Office of Trade, at (202) 325-0347.

**SUPPLEMENTARY INFORMATION:** Notice is hereby given that on November 25, 2020, pursuant to subpart B of part 177, U.S. Customs and Border Protection Regulations (19 CFR part 177, subpart B), CBP issued a final determination concerning the country of origin of three vehicle tracking devices, one satellite device, one NFC reader, and one NFC keyring fob imported by Geotab USA, Inc. (Geotab), which may be offered to the U.S. Government under an undesignated government procurement

contract. This final determination, Headquarters Ruling Letter H309128, was issued under procedures set forth at 19 CFR part 177, subpart B, which implements Title III of the Trade Agreements Act of 1979, as amended (19 U.S.C. 2511–18). In the final determination, CBP concluded that the country of origin of the three vehicle tracking devices, the satellite device, and the NFC reader is Canada for purposes of U.S. Government procurement. Regarding the NFC keyring fob, CBP concluded that the country of origin will be the country where the contactless integrated circuit is manufactured. In most cases, this will be Taiwan, but if the contactless integrated circuit cannot be sourced there, then it will be sourced from either Thailand or Singapore, and the corresponding sourcing country would then be the country of origin for purposes of U.S. Government procurement.

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

Dated: November 25, 2020.

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

HQ H309128

November 25, 2020

OT:RR:CTF:VS H309128 EGJ

CATEGORY: Origin

MR. JAMES LAY  
GEOTAB USA, INC.  
770 E PILOT RD., SUITE A  
LAS VEGAS, NV 89119

Re: U.S. Government Procurement; Country of Origin of Three Vehicle Tracking Devices, Satellite Device, NFC Reader, and NFC Keyring Fob; Substantial Transformation

DEAR MR. LAY

This is in response to your ruling request, dated February 6, 2020, requesting a final determination on behalf of Geotab USA, Inc. (“Geotab”) pursuant to subpart B of Part 177 of the U.S. Customs and Border Protection (“CBP”) Regulations (19 CFR part 177).

This final determination concerns the country of origin of three vehicle tracking devices, one satellite device, one near field communication (“NFC”) reader, and one NFC identification keyring fob. As a U.S. importer, Geotab is a party-at-interest within the meaning of 19 CFR 177.22(d)(1) and is entitled to request this final determination.

## FACTS

Geotab is a technology company which designs and imports vehicle tracking systems, and has submitted six different products for our review. The products’ descriptions, pictures, and manufacturing processes are set forth below.

### *Product Descriptions*

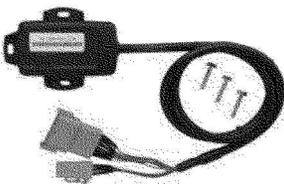
The first three products are telematics devices, which are designed to transmit vehicle tracking information over long distances. Specifically, the three products are:

- The GO9 device and its component harnesses;
- The GO9–NOGPSF, which is a GO9 device with the GPS permanently disabled, and its component harness; and
- The GR8 (ATT–GRLTEA1), which is a rugged version of the GO8 device that can be used for harsh conditions and installed on the exterior of a vehicle, for example on a truck trailer or on heavy equipment, and its component harness.

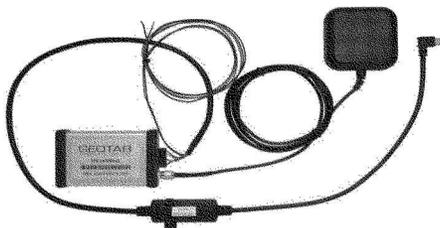
You state that the three vehicle tracking devices are very similar in design. When each end product is packaged, it includes the tracking device with one or more harnesses (communications and data cables), and other minor components, such as zip ties, mounting brackets, decals or stickers, and screws. A harness may be an external component that is plugged into the device or it may be a component built into the item. You have provided the following picture of the GO9 device, which does not have a built-in harness:



You have also provided the following picture of the GR8 device, which does have a built-in harness:



In addition, you have asked for a determination of the country of origin of a satellite device, which is an auxiliary item that plugs into a GO9 or GO8 device and that allows the GO9 or GO8 device to communicate over the satellite network when cellular connectivity is lost. The satellite add-on is a single device with two external components. Pictured below, it consists of the satellite device (the silver box on the lower left side), an IOX integrated receiver/decoder (IRD) (the rectangular unit at the bottom of the image), and an external antenna (the black square unit on the top right of the image), which are delivered connected together with a zip tie:



Finally, you have also requested a determination regarding an NFC reader and an NFC keyring fob, described as follows:

- An IOX NFC reader (IOX-NFC-READER), which allows dispatchers or managers to easily view where each driver is at any point in time and to monitor each driver as s/he operates a vehicle; and
- An NFC identification keyring fob (GEO-NFC FOB BLUE20), used in conjunction with the NFC reader to identify the individual driver operating a vehicle.

NFC technology allows two devices placed within a few centimeters of each other to exchange data. In order for this to work, both devices must be equipped with an NFC chip and an antenna.<sup>1</sup> According to your website, the

<sup>1</sup> See "Everything you need to know about NFC and mobile payments," CNET (September 9, 2014) available at <https://www.cnet.com/how-to/how-nfc-works-and-mobile-payments/>.

NFC reader plugs into the Geotab vehicle tracking device. Each authorized vehicle driver has an assigned NFC keyring fob with a specific serial number assigned to that driver. The driver swipes the NFC keyring fob across the NFC reader before beginning the trip so that the vehicle tracking device can register who is driving the vehicle. See “NFC Driver ID Technology: How to Use and Install,” (April 5, 2018) available at <https://www.geotab.com/blog/driver-id/>.

You state that the NFC reader is a single unit featuring a black rectangular casing and a long connecting wire. It is pictured below with the NFC keyring fob (the blue item with an attached key ring, second from the right) and other minor components, such as the mounting bracket and screws, double sided tape for installation (the red item), the NFC sticker (the item on the far right), and a zip tie. You note that the NFC keyring fob and the sticker are sold separately.



### *Three Vehicle Tracking Devices*

You state that the GO9, the GO9–NOGPSF, and the GR8 vehicle tracking devices all have a similar manufacturing process. Each device consists of both Canadian and non-Canadian components, and two main components of each product are a printed circuit board assembly (“PCBA”) and proprietary software. The PCBAs for each of these products are manufactured in Canada. Additionally, all of the PCBAs for these three devices are loaded with software developed in Canada. You have provided us with the details of the manufacturing process for the GO9 device as a representative example.

For the GO9 and other two devices, most of the components are imported into Canada from China. At a facility in Canada, the PCBAs are assembled from two major components: A main card and a daughter card. To produce these two boards, blank printed circuit boards are run through surface mount technology (“SMT”) machines and are populated with different components. The GPS device is surface mounted to the main board and an antenna is attached to the daughter board. Next, the two boards are combined together into a single PCBA.

The inert PCBAs are shipped from the manufacturing facility to Geotab’s facility which is also in Ontario, Canada. At Geotab’s facility, the following six processes are performed: (1) Programming and testing, (2) closing, (3) scanning, (4) packaging, (5) labeling, and (6) debugging. During the first programming and testing phase, Geotab loads the final firmware and configurations onto the PCBA’s subassembly. This firmware was also developed in Canada. Then a SIM card is placed into the subassembly and the unit is tested. Various labels are affixed to parts of the unit, including the casing. The subassembly is inserted into the casing, then the unit is tested, inspected,

and finally the casing is closed. Then the light pipe, labels, and decals are added. The device is placed in a box with its product literature and zip tie.

You note that the harness is a communication and data cable that is either hard-wired into the device or plugs into the device. The harness allows interaction between the device and the vehicle; it also provides connectivity to facilitate the transmission and collection of data. In many instances, an external harness is not necessary because the device can be plugged directly into the vehicle's On-Board Diagnostics ("OBD") port. You state the harnesses are subsidiary items, and that all of harnesses for these devices are currently sourced from China. You state that the devices are packaged together with their harnesses when they are shipped to the final customer in the United States.

#### *IOX Satellite Add-On*

Turning to the satellite device, it is made up of three major components which connect to each other via an electrical cord: The satellite box, an IOX integrated receiver/decoder ("IRD"), and an external antenna. The satellite box contains a PCBA, an internal antenna, and a modem. All of the discrete components of the satellite box are imported into Canada. The blank board is populated with the discrete components, including the modem, using SMT equipment at a facility in Canada. Then, the PCBA is shipped to Geotab's facility in Canada. At Geotab, the antenna is attached to the PCBA, which is then tested and packaged in its outer casing. This finished satellite box is the component that provides an alternative data connection based on a satellite signal when the GO device loses its cell tower based signal.

The IRD is the component which communicates and facilitates the data flow between the satellite box and the vehicle tracking device. The IRD is built in China, where it is loaded with proprietary software developed by Geotab in Canada. It is shipped to Canada to be packaged together with the satellite box. The final component is the external antenna, which is completely manufactured in China and shipped to Canada to be packaged together for shipment with the other two components.

#### *NFC Reader*

With regard to the NFC Reader, it contains two PCBAs, a main board, and an antenna board. Just like the components for the vehicle tracking devices, most of the components of these PCBAs are imported from China. At a Canadian facility, the blank imported boards are all populated with their components using SMT equipment. The two PCBAs and the two boards are combined together into a single assembly. The new PCBA subassembly is loaded with Geotab firmware developed in Canada. In addition, the NFC reader's harness from China is wired into the PCBA at this facility.

Next, the PCBA subassembly is shipped to Geotab's Ontario facility, where it is inserted between two plastic pieces which will form the outer casing. The unit is tested, labelled, and packaged with a mounting bracket and a zip tie for delivery to customers.

#### *NFC Fobs*

With regard to the NFC fobs, they are manufactured in Taiwan. Each fob is made up of the following parts, sourced in Taiwan: (1) Plastic casing, (2) an "Ultralight C—contactless ticket integrated circuit ("IC") chip," (3) coil/

antenna, (4) metal ring, and (5) label paint. However, you note that occasionally the manufacturer in Taiwan is unable to source the contactless IC in Taiwan. In those instances, the manufacturer will source the IC from either Thailand or Singapore. The fob's assembly always takes place in Taiwan.

After the finished fobs are imported into Canada, Geotab programs a serial number into each fob so that it can be uniquely identified. Then, Geotab marks the fobs and packages them into packs of 20 each for export.

## ISSUE

What is the country of origin of the three vehicle tracking devices, the satellite device, the NFC reader, and the NFC keyring fob for purposes of U.S. Government procurement?

## LAW AND ANALYSIS

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

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

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

*See also* 19 CFR 177.22(a).

The test for determining whether a substantial transformation will occur is whether an article emerges from a process with a new name, character or use, different from that possessed by the article prior to processing. *See Texas Instruments Inc. v. United States*, 69 C.C.P.A. 151 (1982). In order to determine whether a substantial transformation has occurred, CBP considers the totality of the circumstances and makes such determinations on a case-by-case basis. CBP has stated that a new and different article of commerce is an article that has undergone a change in commercial designation or identity, fundamental character, or commercial use. A determinative issue is the extent of the operations performed and whether the materials lose their identity and become an integral part of the new article. This determination is based on the totality of the evidence. *See National Hand Tool Corp. v. United States*, 16 CIT 308 (1992), *aff'd*, 989 F.2d 1201 (Fed. Cir. 1993).

### *Three Vehicle Tracking Devices and the NFC Reader*

In *Data General v. United States*, 4 CIT 182 (1982), the court determined that for purposes of determining eligibility under item 807.00, Tariff Schedules of the United States (predecessor to subheading 9802.00.80, Harmonized Tariff Schedule of the United States), the programming of a foreign PROM (Programmable Read-Only Memory chip) in the United States substantially transformed the PROM into a U.S. article. The court noted that the programs were developed by a U.S. project engineer with many years of experience in

“designing and building hardware.” In addition, the court noted that while replicating the program pattern from a “master” PROM may be a quick one-step process, the development of the pattern and the production of the “master” PROM required much time and expertise. The court noted that it was undisputed that programming altered the character of a PROM.

Accordingly, in some cases we have found that programming a device in the same country where the software was developed can constitute a substantial transformation. In HQ 558868, dated February 23, 1995, we determined that blank cards embedded with microchips were substantially transformed when they were imported into the United States and programmed into Secure ID cards using software developed in the United States. We took the view that the programming changed the blank card from a card with many potential applications into a card that could only be used to enable the user to log into a secured computer. *See also* HQ 735027, dated September 7, 1993 (programming imported blank media (EEPROM) with U.S. software in the United States substantially transformed it into media which prevented the piracy of software).

We note that all four of these devices contain software developed and downloaded onto them in Canada. In addition to the software, these four devices all contain PCBAs built in Canada. The blank boards and the various capacitors, resistors, and other elements are permanently combined together using SMT machines at a facility in Canada. We note that the PCBAs are made up of a variety of parts from different countries, including non-TAA countries such as China.

For the four relevant devices, we note that they are imported into Canada as bare boards, PCBA parts, external housing, and wire harnesses. When the PCBAs are built in Canada, programmed with Canadian software in Canada, and changed into a finished vehicle tracking device or NFC reader in Canada, we find that they have a different name, character, and use than the imported articles. Therefore, we find that the discrete parts of these four devices are substantially transformed in Canada. As such, the country of origin for the purposes of government procurement of the three vehicle tracking devices and the NFC reader is Canada.

#### *Satellite Device*

Unlike the vehicle tracking devices and reader, the satellite device is made up of three different components: The satellite box, the IRD, and the external antenna. The satellite box contains a PCBA populated in Canada, which incorporates a modem and an internal antenna. The satellite box is the part of the system which connects to the satellite system in the event the vehicle tracking device loses its connection to cellular tower signals. The IRD communicates with the vehicle tracking device, and the external antenna provides additional connectivity. Both the IRD and the external antenna are completely manufactured in China; however, the IRD is loaded with proprietary software developed in Canada.

As stated previously in our analysis of the tracking devices and NFC reader, we have found that in certain situations, manufacturing a PCBA constitutes a substantial transformation. With regard to the satellite box, we find that populating a bare board with a modem, an internal antenna, and enclosing it in the finished housing constitutes a substantial transformation.

The individual components lose their identities as modems, antennae, capacitors, and resistors—and have a new name, character, and use as a satellite device box.

With regard to the remaining two components, we find that their country of origin is China. Although Canadian software is downloaded onto the IRD in China, we note that they are entirely manufactured in China. In HQ H241177, dated December 3, 2013, we examined Ethernet switches assembled to completion in Malaysia and then shipped to Singapore, where U.S.-origin software was downloaded onto the switches. In that ruling, we noted that:

We find that the software downloading performed in Singapore does not amount to programming. Programming involves writing, testing and implementing code necessary to make a computer function in a certain way. See *Data General supra*. See also “computer program”, Encyclopedia Britannica (2013), (9/19/2013) <http://www.britannica.com/>, which explains, in part, that “a program is prepared by first formulating a task and then expressing it in an appropriate computer language, presumably one suited to the application.”

While the programming occurs in the U.S., the downloading occurs in Singapore. Given these facts, we find that the country where the last substantial transformation occurs is Malaysia, that is, where the major assembly processes are performed. The country of origin for purposes of U.S. Government procurement is Malaysia.

Like the Ethernet switches referenced above, downloading Canadian software onto the IRD in China is not sufficient to substantially transform the device. However, we note that both the IRD and the external antenna are packaged together with the satellite box to form a finished satellite device system. All three components of the satellite device system operate as a single system when exported to the United States; therefore, we must determine the singular country of origin for the entire system.

In determining the country of origin for the satellite device system, the Court of International Trade’s (“CIT”) analysis in *Uniroyal, Inc. v. United States* (“*Uniroyal*”) is instructive, wherein the CIT examined whether a finished shoe upper was substantially transformed when it was combined with the shoe’s outer sole. 3 CIT 220, 542 F. Supp. 1026 (1982), *aff’d* 702 F.2d 1022 (Fed. Cir. 1983). The CIT noted that “the upper—which in its condition as imported is already a substantially complete shoe—is readily recognizable as a distinct item apart from the outsole to which it is attached.” *Id.* at 224. In addition, the CIT cited to *Grafton Spools, Ltd. v. United States*, 45 Cust. Ct. 16 (1960), another substantial transformation case in which the U.S. Customs Court noted that purchasers of typewriter ribbons were buying the ribbon, and not the spool upon which the ribbon was wound. The CIT noted that “in *Grafton Spools* the ribbon and not the spool was the essence of the finished article, while here the upper is the essence of the completed shoe.” *Id.* at 226–227. In *Uniroyal*, the CIT ultimately concluded that adding the outer soles did not result in a substantial transformation of the uppers as the uppers were the very essence of the finished shoe.

In the satellite device system, we find that it is the satellite box which is the “very essence” of the finished system, while the other two devices perform subsidiary roles. The satellite box communicates with the satellite network when the vehicle tracking device loses its connection with cellular towers. The IRD facilitates the flow of information between the tracking device and

the satellite box, while the external antenna boosts connectivity. For all of these reasons, we find that the country of origin of the complete system will be the country of origin of the satellite box. For government procurement purposes, the country of origin of the satellite device system will be Canada, where the PCBAs were populated with various components.

### *NFC Keyring Fob*

With regard to the NFC fobs, each fob is made up of the following parts sourced in Taiwan: (1) Plastic casing, (2) an “Ultralight C—contactless ticket IC chip,” (3) coil/antenna, (4) metal ring, and (5) label paint. However, you note that occasionally the manufacturer in Taiwan is unable to source the contactless IC in Taiwan. In those instances, the manufacturer will source the IC from either Thailand or Singapore. The fob’s assembly always takes place in Taiwan.

In Headquarters Ruling Letter (“HQ”) H303864, dated December 26, 2019, an electric motor from China was shipped to Mexico for assembly with the impeller, the seal, and the plastic housing to form the finished pump assembly. In that case, we noted that the assembly was rather simple—it involved press fitting the parts into each other. Moreover, the electric motor was the most expensive and substantive part of the finished pump assembly. We found that it imparted the “very essence” of the pump assembly, as it turned the impeller and moved the fluid through the pump.

The question presented is whether the contactless IC is substantially transformed when it is assembled together with the other components. We note that in NFC technology, an NFC chip and an antenna are combined to transmit information across short distances. In this case, the driver’s serial ID number is transmitted to the NFC reader for tracking purposes. Therefore, the NFC chip is central to the function of the finished NFC fob.

Similar to the shoe upper in *Uniroyal*, the ribbon in *Grafton Spools*, and the electric motor in HQ H303864, we find that the NFC chip constitutes the “very essence” of the finished NFC fob. After the chip is assembled into the finished fob, its use remains unchanged. Therefore, we find that the country of origin of the NFC fob will be the country where the NFC chip is produced. In most cases, the country of origin will be Taiwan, but when the Ultralight C—contactless ticket IC is unavailable from Taiwan, then the country of origin of the NFC fob will be where the chip is sourced, which in this case is either Thailand or Singapore.

### **HOLDING**

The country of origin of the three telematics devices, the satellite devices, and the NFC reader for purposes of U.S. Government procurement is Canada.

The country of origin of the NFC keyring fob for purposes of U.S. Government procurement is the country of origin of the contactless IC, which is usually Taiwan. However, if the contactless IC is sourced from Thailand or Singapore, then the country of origin for procurement would be Thailand or Singapore as the case may be.

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

publication of the **Federal Register** Notice referenced above, seek judicial review of this final determination before the Court of International Trade.

*Sincerely,*

ALICE A. KIPPEL,  
*Executive Director  
Regulations & Rulings,  
Office of Trade.*

[Published in the Federal Register, December 9, 2020 (85 FR 79204)]



## GENERAL NOTICE

### 19 CFR PART 177

#### REVOCATION OF SEVEN RULING LETTERS AND MODIFICATION OF ONE AND REVOCATION OF TREATMENT RELATING TO THE TARIFF CLASSIFICATION OF FLOATING POOL LOUNGERS

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

**ACTION:** Notice of revoking of seven ruling letters, modifying one ruling letter and of revocation of treatment relating to the tariff classification of floating pool loungers.

**SUMMARY:** Pursuant to section 625(c), Tariff Act of 1930 (19 U.S.C. § 1625(c)), as amended by section 623 of title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that U.S. Customs and Border Protection (CBP) is revoking of seven ruling letters and modifying one ruling letter concerning tariff classification of floating pool loungers under the Harmonized Tariff Schedule of the United States (HTSUS). Similarly, CBP is revoking any treatment previously accorded by CBP to substantially identical transactions. Notice of the proposed action was published in the *Customs Bulletin*, Vol. 54, No. 40, on October 14, 2020. One comment was received in response to that notice.

**EFFECTIVE DATE:** This action is effective for merchandise entered or withdrawn from warehouse for consumption on or after February 21, 2021.

**FOR FURTHER INFORMATION CONTACT:** John Rhea, Food, Textiles and Marking Branch, Regulations and Rulings, Office of Trade, at (202) 325–0035.

**SUPPLEMENTARY INFORMATION:****BACKGROUND**

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

Pursuant to 19 U.S.C. § 1625(c)(1), a notice was published in the *Customs Bulletin*, Vol. 54, No. 40, on October 14, 2020, proposing to revoke seven ruling letters and modifying one ruling letter pertaining to the tariff classification of floating pool loungers. Any party who has received an interpretive ruling or decision (i.e., a ruling letter, internal advice memorandum or decision, or protest review decision) on the merchandise subject to this notice should have advised CBP during the comment period.

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

In New York Ruling Letter ("NY") N270096, dated November 24, 2014, and Headquarters Ruling Letter ("HQ") H145739, dated November 16, 2012, HQ 966929, dated March 23, 2004, HQ 965956, dated January 22, 2003, NY N179233, dated August 26, 2011, NY N042676, dated November 11, 2008, and NY M80804, dated February 6, 2006; and in NY N069035, dated July 30, 2009, CBP classified floating pool loungers in heading 6307, HTSUS, specifically in sub-heading 6307.90.98, HTSUS, which provides for "Other made up articles, including dresses: Other: Other: Other." CBP has reviewed NY N270096, HQ H145739, HQ 966929, HQ 965956, NY N179233, NY N042676, NY M80804, and NY N069035 and has determined the ruling letters to be in error. It is now CBP's position that floating pool

loungers are properly classified, in 3926, HTSUS, specifically in sub-heading 3926.90.7500, HTSUS, which provides for “Other articles of plastics and articles of other materials of headings 3901 to 3914: Other: Pneumatic mattresses and other inflatable articles, not elsewhere specified or included.”

Pursuant to 19 U.S.C. § 1625(c)(1), CBP is revoking NY N270096, HQ H145739, HQ 966929, HQ 965956, NY N179233, NY N042676, NY M80804, and is modifying NY N069035; and revoking or modifying any other ruling not specifically identified to reflect the analysis contained in HQ H304297, set forth as an attachment to this notice. Additionally, pursuant to 19 U.S.C. § 1625(c)(2), CBP is revoking any treatment previously accorded by CBP to substantially identical transactions.

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

Dated:

*For*  
CRAIG T. CLARK,  
*Director*  
*Commercial and Trade Facilitation Division*

*Attachment*

HQ H304297

December 8, 2020

OT:RR:CTF:FTM H304297 JER

CATEGORY: Classification

TARIFF NO.: 3926.90.75

MR. ERIC HANSEL  
REGULATORY COMPLIANCE MANAGER  
C.H. POWELL COMPANY  
478 WANDO PARK BLVD.  
MT. PLEASANT, SC 29464

RE: Revocation of NY N270096; classification of floating pool loungers

DEAR MR. HANSEL:

This is in response to your request, dated June 12, 2019, for reconsideration of New York Ruling Letter (“NY”) N270096, issued on November 24, 2014, to your client, Aqua Leisure Industries, concerning the classification of certain floating pool lounge merchandise under the Harmonized Tariff Schedule of the United States (“HTSUS”). In NY N270096, U.S. Customs and Border Protection (“CBP”) classified the imported floating pool lounge under heading 6307, HTSUS, in particular, under subheading 6307.90.9889, HTSUSA, as, “Other made up articles, including dresses: Other: Other, Other.”

In reaching our decision we have taken into consideration the decision in *Swimways Corp. v. United States*, 329 F. Supp. 3d 1313 (2018 Ct. Intl. Trade LEXIS 101), involving the classification of substantially similar floatation merchandise designed for use in swimming pools. For the reasons set forth in this ruling, we hereby revoke NY N270096.

Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. § 1625(c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act, Pub. L. No. 103–182, 107 Stat. 2057, 2186 (1993), notice of the proposed action was published on October 14, 2020, in Volume 54, Number 40, of the *Customs Bulletin*. One comment was received in support of this notice. Additionally, in the comment, it was asserted that NY E84859, dated August 5, 1999, involving the classification of therapeutic mattresses made of polyurethane coated nylon, should be modified in accordance with the rationale provided in the present decision. We have reviewed NY E84859 and find that the merchandise is not substantially similar to the merchandise NY N270096 and the other rulings to be revoked or modified. As such, CBP will not modify or revoke NY E84859.

**FACTS:**

NY 270096 described the floating pool lounge as follows:

The 44-inch Monterey Pool Lounge is a “composite good” consisting of both PVC (which is a form of plastic) and polyester mesh textile fabric. According to figures you provided, the PVC represents 30% by weight and 16% by value while the polyester mesh makes up 70% by weight and 84% by value of the lounge. While the mesh fabric constitutes the most weight and value and provides the full body support of the user giving the user the ability to sit or recline, we also have to consider that the PVC air chambers give the pool lounge the ability to float.

In your June 12, 2019 request for reconsideration, you described the merchandise as the 44-inch Monterey Pool Lounger, which consists of two [inflatable] PVC air bladder chambers at each end with a polyester mesh textile fabric insert. You also provided a sample of the Monterey Pool Lounger which we have reviewed.

**ISSUE:**

Whether the subject merchandise is classifiable under heading 3926, HTSUS, as an article of plastic, or under heading 6307, HTSUS, as other made-up textile articles.

**LAW AND ANALYSIS:**

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

The 2020 HTSUS provisions under consideration are as follows:

<b>3926</b>	Other articles of plastics and articles of other materials of headings 3901 to 3914:	*	*	*
3926.90	Other:	*	*	*
3926.90.7500	Pneumatic mattresses and other inflatable articles, not elsewhere specified or included			
<b>6307</b>	Other made up articles, including dress patterns:	*	*	*
6307.90	Other:			
	Other...			
6307.90.98	Other...	*	*	*

The Harmonized Commodity Description and Coding System Explanatory Notes (“ENs”) constitute the official interpretation of the Harmonized System at the international level. While neither legally binding or dispositive, the ENs provide a commentary on the scope of each heading of the HTSUS and are generally indicative of the proper interpretation of these headings. See T.D. 89–80, 54 Fed. Reg. 35127 (August 23, 1989).

The EN to 63.07 states, in relevant part, that:

This heading covers made up articles of any textile material which are **not included** more specifically in other headings of Section XI or elsewhere in the Nomenclature.

\* \* \*

At issue is the classification of a pool lounger described as the Monterey pool lounger, which is designed for floatation in a swimming pool, lakes and other water ways. The Monterey pool lounger consists of two inflatable PVC

air bladder chambers that keep the pool lounge afloat in the water and a polyester mesh textile fabric insert, which provides support for the user. The PVC bladders are best described by the terms of heading 3926, HTSUS, while the mesh textile insert is described by the terms of heading 6307, HTSUS. Inasmuch as the pool lounge presents with significant components made of separate materials described by two or more headings, both of which having different functions which contribute to the whole, the merchandise is considered a composite good. Hence, we must determine which if the two competing headings best describe the merchandise as a whole.

In NY N270096, CBP classified the Monterey pool lounge under heading 6307, HTSUS, finding that neither the PVC air bladders (3926, HTSUS) nor the textile mesh (6307, HTSUS) imparted the essential character of article in its entirety. Specifically, the decision in NY N270096 stated that: “While the mesh fabric constitutes the most weight and value and provides the full body support of the user giving the user the ability to sit or recline, we also have to consider that the PVC air chambers give the pool lounge the ability to float.” Likewise, CBP also noted that, “Without the inflatable PVC chambers, the lounge is not able to perform its main function as a pool or lake float.” See NY N270096. Accordingly, the decision in NY N270096 classified the Monterey pool lounge under the heading which occurred last in numerical order, heading 6307, HTSUS, in accordance with GRI 3(c).

You contend that the Monterey pool lounge should be classified under heading 3926, HTSUS, because, as you argue, it is the two plastic PVC air bladder components which impart the essential character of the overall pool lounge. You base your argument on the decision in *Swimways Corp. v. United States*; wherein the Court of International Trade (“CIT”) classified various models of “Spring Floats” and “Baby Spring Floats” designed for the flotation of users in swimming pools, lakes and similar bodies of water in heading 3926, HTSUS, as an article of plastic. You argue that the subject merchandise is substantially similar to the “Spring Floats” in the *Swimways Corp.* decision and that in light of the decision and legal analysis set forth by the CIT, CBP should reconsider its decision in NY N270096.

In *Swimways Corp.*, the “Spring Floats” consisted of an inflatable, polyvinyl chloride (“PVC”) bladder that when inflated with air, provided the flotation capacity for the article. The center of the “Spring Float” was a woven elastomer textile mesh which supported the user during flotation. *Swimways Corp.*, at 1317. In *Swimways Corp.* the CIT explained that although the merchandise consisted of component materials that were both significant, neither heading adequately described the article as a whole *Swimways Corp.*, at 1321–1322. Accordingly, the CIT resolved to determine which component or material imparted the essential character of the “Spring Float” in accordance with GRI 3(b). *Id.*, at 1322. The CIT noted that both the textile mesh and the PVC bladder contributed different significant functions; with the textile mesh providing support to its user and the PVC bladder providing the flotation characteristic. *Id.* Yet, the CIT concluded that the PVC bladder imparted the essential character of the article as a whole because the flotation function of the PVC bladder was essential to the functioning of the finished article. *Id.*, at 1324. The CIT explained that because the PVC bladder enabled the article to float in water, it was the component material that allowed the “Spring Float” to perform its primary function, fundamental to

its commercial identity as a “float.” *Id.* As such, the CIT determined that the “Spring Float” was classified in heading 3926, HTSUS, because it was the plastic component materials which imparted the essential character of the product.

Under our facts in this case, the textile mesh component provides support to the user; allowing them to sit and recline while afloat in the water and makes up 70% by weight and 84% by value of the pool lounge. The two PVC air bladders, once inflated with air, allow the pool lounge to perform its primary function, which is to float. In both instances, the headings which best describe the respective component material, each describe only a part of the component materials which together form the pool lounge as a whole. Because no single heading describes the subject pool lounge, this article cannot be classified in accordance with GRI 1. Instead, it is a composite good consisting of component materials which are classifiable under two separate headings which merit consideration. We note that when two or more competing headings are regarded as equally specific, classification is effected according to GRI 3(b).

Much like the “Spring Float” in *Swimways Corp.*, it is the plastic PVC air bladders that contribute predominantly to the fundamental function and commercial identity of the subject Monterey pool lounge. While the textile mesh component allows the user to sit and recline while afloat, it is the floatation characteristic of the product which distinguishes this product from a chair or recliner. Absent the performance of the plastic PVC air bladders, the pool lounge could not perform its fundamental function, which is to float. Accordingly, we find that the plastic PVC air bladders impart the essential character of the product as a whole. Thus, the Monterey pool lounges are classified according to the plastic component material of which the PVC air bladders are made.

Additionally, pursuant to the decision in *Swimways Corp.* we are revoking previous CBP rulings involving the classification of similar inflatable pool floatation merchandise designed for use in swimming pools, lakes and other water ways, based upon the analysis herein. The rulings listed below incorrectly concluded that either the textile component imparted the essential character of the product or that the merchandise should be classified under the heading that occurred last in numerical order, in accordance with GRI 3(c). In keeping with the decision in *Swimways Corp.*, it is now CBP’s position that plastic floatation component imparts the essential character of such products and therefore reliance on GRI 3(c) or classification of these products as a made up textile article, is incorrect. Moreover, we note that the underlying ruling of *Swimways Corp.*, HQ 965956, dated January 22, 2003, is revoked by operation law. Similarly, a subsequent case involving similar inflatable pool floats also imported by *Swimways*, in HQ H145739, dated November 16, 2012, is also revoked by operation of law.

#### **HOLDING:**

By application of GRI 3(b), we find that the pool lounge is provided for in heading 3926, HTSUS, specifically, under subheading 3926.90.75, HTSUS, which provides for: “Other articles of plastics and articles of other materials of headings 3901 to 3914: Other: Pneumatic mattresses and other inflatable articles, not elsewhere specified or included.” The 2020 column one, general rate of duty is 4.2% *ad valorem*.

**EFFECT ON OTHER RULINGS:**

NY N270096, dated November 25, 2015, is hereby Revoked.

Pursuant to the decision in *Swimways Corp.*, and the analysis herein, the following rulings are hereby Revoked: HQ H145739, dated November 16, 2012, HQ 966929, dated March 23, 2004, HQ 965956, dated January 22, 2003, NY N179233, dated August 26, 2011, NY N042676, dated November 11, 2008, and NY M80804, dated February 6, 2006.

Additionally, NY N069035, dated July 30, 2009, is hereby modified with respect to item number SA-3362.

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

*Sincerely,*

*For*

CRAIG T. CLARK,

*Director*

*Commercial and Trade Facilitation Division*



**GENERAL NOTICE**

**19 CFR PART 177**

**REVOCAION OF ONE RULING LETTER AND  
REVOCAION OF TREATMENT RELATING TO THE  
TARIFF CLASSIFICATION OF FOIL PRINT FABRIC**

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

**ACTION:** Notice of revocation of one ruling letter and of revocation of treatment relating to the tariff classification of foil print fabric.

**SUMMARY:** Pursuant to section 625(c), Tariff Act of 1930 (19 U.S.C. § 1625(c)), as amended by section 623 of title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103-182, 107 Stat. 2057), this notice advises interested parties that U.S. Customs and Border Protection (CBP) is revoking one ruling letter concerning tariff classification of foil print fabric under the Harmonized Tariff Schedule of the United States (HTSUS). Similarly, CBP is revoking any treatment previously accorded by CBP to substantially identical transactions. Notice of the proposed action was published in the *Customs Bulletin*, Vol. 54, No. 40, on October 14, 2020. No comments were received in response to that notice.

**EFFECTIVE DATE:** This action is effective for merchandise entered or withdrawn from warehouse for consumption on or after February 21, 2021.

**FOR FURTHER INFORMATION CONTACT:** John Rhea, Food, Textiles and Marking Branch, Regulations and Rulings, Office of Trade, at (202) 325-0035.

**SUPPLEMENTARY INFORMATION:**

**BACKGROUND**

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

Pursuant to 19 U.S.C. § 1625(c)(1), a notice was published in the *Customs Bulletin*, Vol. 54, No. 40, on October 14, 2020, proposing to revoke one ruling letter pertaining to the tariff classification of foil print fabric. Any party who has received an interpretive ruling or decision (i.e., a ruling letter, internal advice memorandum or decision, or protest review decision) on the merchandise subject to this notice should have advised CBP during the comment period.

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

In New York Ruling Letter ("NY") N267195, dated September 10, 2015, CBP classified foil print fabric in heading 6004, HTSUS, specifically in subheading 6004.10.85, HTSUS, which provides for "Knitted or crocheted fabrics of a width exceeding 30 cm, containing by weight 5 percent or more of elastomeric yarn or rubber thread, other than those of heading 6001: Containing by weight 5 percent or more of elastomeric yarn but not containing rubber thread, Other." CBP

has reviewed NY N267195 and has determined the ruling letter to be in error. It is now CBP's position that foil print fabric is properly classified, in heading 5903, HTSUS, specifically in subheading 5903.90.25, HTSUS, which provides for "Textile fabrics impregnated, coated, covered or laminated with plastics, other than those of heading 5902: Other: Of man-made fibers: Other: Other."

Pursuant to 19 U.S.C. § 1625(c)(1), CBP is revoking NY N267195 and revoking or modifying any other ruling not specifically identified to reflect the analysis contained in HQ H270911, set forth as an attachment to this notice. Additionally, pursuant to 19 U.S.C. § 1625(c)(2), CBP is revoking any treatment previously accorded by CBP to substantially identical transactions.

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

Dated:

*For*  
CRAIG T. CLARK,  
*Director*  
*Commercial and Trade Facilitation Division*

*Attachment*

HQ H270911

December 8, 2020

OT:RR:CTF:FTM H270911 JER

CATEGORY: Classification/Origin

TARIFF NO.: 5903.90.2500

MR. ROBERT LEO  
MEEKS, SHEPPARD, LEO & PILLSBURY  
570 LEXINGTON AVENUE, 24TH FLOOR  
NEW YORK, NY 10022

RE: Modification of NY N267195; classification of foil print fabric

DEAR MR. LEO:

This is in response to your request of October 12, 2015, for reconsideration of New York Ruling Letter (“NY”) N267195, issued on September 10, 2015, to your client, Nipkow & Kolbelt, Inc., concerning the classification of certain merchandise under the Harmonized Tariff Schedule of the United States (“HTSUS”) and the eligibility of the merchandise for preferential tariff treatment under the United States-Korea Free Trade Agreement (“UKFTA”). In NY N267195, U.S. Customs and Border Protection (“CBP”) classified the imported fabric under heading 6004, HTSUS, in particular, under subheading 6004.10.8500, HTSUS, as, “Knitted or crocheted fabrics of a width exceeding 30 cm, containing by weight 5 percent or more of elastomeric yarn or rubber thread, other than those of heading 6001: Containing by weight 5 percent or more of elastomeric yarn but not containing rubber thread, Other.” CBP also determined that the merchandise was not eligible for preferential tariff treatment under the UKFTA and found that the country of origin of fabric was the Republic of Korea (“South Korea”).

It is your contention that heading 6004, HTSUS, is not the proper heading because it does not describe the merchandise at issue. You contend that the merchandise is properly classified under heading 5903, HTSUS, as a textile fabric, which has been coated or covered with plastics. Upon additional review, we have found the classification under heading 6004, HTSUS, to be incorrect. In reaching our decision, we considered the information presented in your October 12, 2015 submission as well as the sample submitted to our office on March 19, 2020. For the reasons set forth below, we hereby revoke NY N267195 with respect to the classification of the foil-printed fabric and the eligibility of the subject merchandise for the preferential tariff treatment under the UKFTA and modify NY N267195 with respect to the analysis of the country of origin, utilizing the correct classification.

Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. § 1625(c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act, Pub. L. No. 103–182, 107 Stat. 2057, 2186 (1993), notice of the proposed action was published on October 14, 2020, in Volume 54, Number 40, of the *Customs Bulletin*. No comments were received in response to this notice.

**FACTS:**

In NY N267195, CBP described the subject merchandise, referred to as the Variflex Mystique fabric, as follows:

Style Varsiflex Mystique is a heavy knit fabric, foil-printed on one surface with a pattern of small dots arranged in a series of concentric semi-circles

in a swirling design reminiscent of a fingerprint’s whorl inside a loop. According to the information provided, this fabric is of weft knit construction, composed of 88% polyester and 12% spandex (elastomeric) yarns and weighing 306 g/m<sup>2</sup>. You state that this fabric will be imported into the United States in widths of 58 to 60 inches, and will be used for apparel.

NY N267195 described the manufacturing process of the Variflex Mystique fabric as follows: (1) Polyester yarns are imported into South Korea from Taiwan; (2) Elastomeric yarns are extruded in South Korea from resin chips from South Korea or China; (3) Fabric is knitted in South Korea; (4) Greige fabric is piece-dyed in South Korea; (5) Fabric is foil-printed with polyester plastic dots in South Korea; (6) All subsequent finishing operations are performed in South Korea; and, (7) Fabric is exported directly to the United States.

In your 2015 submission the Variflex Mystique fabric is described as being piece dyed and then coated with foil on one side with small closely spaced dots, approximately 0.25 millimeters (mm), which are composed of polyester plastic. The plastic application comprises approximately less than 70 percent by weight of the total weight of the material.

**ISSUE:**

- 1) Whether the subject merchandise is classifiable under heading 5903, HTSUS, as a textile fabric coated with plastic, or whether the subject merchandise is precluded from heading 5903, HTSUS, by application of Note 2(a)(4) to Chapter 59 and therefore classifiable under heading 6004, HTSUS.
- 2) Whether the subject merchandise qualifies for preferential tariff treatment under the UKFTA.
- 3) What is the country of origin of foil print fabric?

**LAW AND ANALYSIS:**

- 1) Whether the subject merchandise is classifiable under heading 5903, HTSUS, as a textile fabric coated with plastic, or whether the subject merchandise is precluded from heading 5903, HTSUS, by application of Note 2(a)(4) to Chapter 59 and therefore classifiable under heading 6004, HTSUS.

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

The 2020 HTSUS provisions under consideration are as follows:

<b>5903</b>	Textile fabrics impregnated, coated, covered or laminated with plastics, other than those of heading 5902:
	* * *
5903.90	Other:
	Of man made fibers:
	Other...
5903.90.25.00	Other...
	* * *

<b>6004</b>	Knitted or crocheted fabrics of a width exceeding 30 cm, containing by weight 5 percent or more of elastomeric yarn or rubber thread, other than those of heading 6001:
6004.10.00	Containing by weight 5 percent or more of elastomeric yarn but not containing rubber thread...
6004.10.0085	Other...
	*       *       *

U.S. Note 2(a)(4) to Chapter 59, HTSUS, provides, in pertinent part, as follows:

(a) Textile fabrics, impregnated, coated, covered or laminated with plastics, whatever the weight per square meter and whatever the nature of the plastic material (compact or cellular), other than:

(1) Fabrics in which the impregnation, coating or covering cannot be seen with the naked eye (usually chapters 50 to 55, 58 or 60); for the purposes of this provision, no account should be taken of any resulting change in color;

(2) Products which cannot, without fracturing, be bent manually around a cylinder of a diameter of 7 mm, at a temperature between 15 C and 30 C (usually chapter 39);

(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 color (chapter 39);

(4) Fabrics partially coated or partially covered with plastic and bearing designs resulting from these treatments (usually chapters 50 to 55, 58 or 60); [...]

\*       \*       \*

The Harmonized Commodity Description and Coding System Explanatory Notes (ENs) constitute the official interpretation of the Harmonized System at the international level. While neither legally binding or dispositive, the ENs provide a commentary on the scope of each heading of the HTSUS and are generally indicative of the proper interpretation of these headings. See T.D. 89–80, 54 Fed. Reg. 35127 (August 23, 1989).

The EN to 5903, HTSUS, states, in relevant part, that:

This heading covers textile fabrics which have been impregnated, coated, covered or laminated with plastics (e.g., poly(vinyl chloride)).

Such products are classified here whatever their weight per m<sup>2</sup> and whatever the nature of the plastic component (compact or cellular), **provided:**

(1) That, in the case of impregnated, coated or covered fabrics, the impregnation, coating or covering can be seen with the naked eye otherwise than by a resulting change in colour.

Textile fabrics in which the impregnation, coating or covering cannot be seen with the naked eye or can be seen only by reason of a resulting change in colour usually fall in **Chapters 50 to 55, 58 or 60**. Examples of such fabrics are those impregnated with substances designed solely to

render them crease-proof, moth-proof, unshrinkable or waterproof (e.g., waterproof gabardines and poplins). Textile fabrics partially coated or partially covered with plastics and bearing designs resulting from these treatments are also classified in **Chapters 50 to 55, 58 or 60.**

\* \* \*

In your request for reconsideration of NY N267195, you contend that the subject Variflex Mystique fabric is classifiable under heading 5903, HTSUS, because it is substantially similar to other fabrics, which CBP previously classified under heading 5903, HTSUS. In particular, you argue that the subject Variflex Mystique fabric is substantially similar to the Mystique fabric of NY N095385, dated March 9, 2010, wherein CBP classified the Mystique fabric under heading 5903, HTSUS, and specifically under sub-heading 5903.90.2500, HTSUS. In this regard, you maintain the decision in NY N267195 incorrectly determined that the placement of plastic dots in the swirling pattern of the fabric resulted in a visible design which precluded it from classification in heading 5903, HTSUS, pursuant to Note 2(a)(4) to Chapter 59.

Note 2(a)(4) to Chapter 59, precludes fabrics which are partially coated or partially covered with plastic and bearing designs which result from the partial coating or covering treatment of the plastic; such fabrics are usually classified in Chapters, 50, 55, 58 or 60. In NY N267195, CBP determined that the plastic coating of the subject Variflex Mystique fabric constituted dots, which formed a pattern.

According to our research, a pattern is a repeating of an element or motif used to create a unique decoration on fabrics. An example of an easily identifiable pattern is a checkered pattern or striped pattern. *Fabric & Textile Pattern Encyclopedia & Textile*, Ivy & Pearl Boutique (August 27, 2018), at <https://www.ivyandpearlboutique.com/fashion-and-news/fashion-school/fabric-and-textile-pattern-encyclopedia-complete-pattern-dictionary-illustrating-the-various-types-of-patterns-used-in-fabric-textile-and-clothing-design/>. All patterns can be categorized as geometric or organic. Geometric patterns can be further categorized as abstract patterns or a pattern of repeated shapes and sizes with no relationship to natural objects. Examples of geometric patterns include geometric shapes and plaids. *Id.* See also, *Fabric Patter: 100 Plus Different Prints and Patterns, Sew Guide*, at <https://sewguide.com/fabric-patterns/>.

Based upon a review of the sample submitted, the subject Variflex Mystique does not present characteristics, which remotely satisfy the definition of a pattern. There are no individually apparent or visible dots, which form a motif, repeated design or pattern. Instead, the Variflex Mystique presents as a foil printed fabric with a shiny metallic coating on one side. This shiny plastic coating is better described as having a solid lamé effect. The French term “lamé” once translated, means “metal plate.” In the textile industry, lamé fabric is defined as being a knit fabric with metallic coating on the surface. Lamé, *Fabric.com*, <https://www.fabric.com/fabric-type/lame>. Lamé fabric is also defined as being a shiny fabric with metallic threads, often gold or silver. *Freedictionary.com*, <https://www.thefreedictionary.com/lam%C3%A9>. In the instant case, the foil print coating consists of polyester plastic dots, which are approximately 0.25 mm in size, which are closely spaced on the surface area of the fabric. The 0.25 mm dots present as sprayed on glitter, creating a solid lamé effect or the visual effect of shiny metal or foil.

In previous rulings, CBP has consistently classified substantially similar fabric with a shiny metallic surface coating (i.e., lamé effect) under heading 5903, HTSUS. For example, in NY B83935, dated April 17, 1997, certain foil printed fabrics coated with 1mm dots were classified under heading 5903, HTSUS. Likewise, in NY N095385, CBP classified foil printed fabric identified as “Mystique” under heading 5903, HTSUS. The decision in NY N095385 stated that the fabric was being coated, foil printed, on one side with small closely spaced dots composed of polyester plastic. Moreover, in NY N095385, CBP noted that the “Mystique” dots did not form any kind of design or pattern, but rather created a solid lamé type effect across the surface. *See also*, NY E80224, dated April 19, 1999 (CBP classified fabric described as Slinky Fog Foil under heading 5903, HTSUS, as it was plastic coated, (foil printed) with a uniform silvery appearance on the surface area).

Much like, the fabric of NY N095385 and NY B83935, the surface side of the subject Variflex Mystique is coated with a shiny metallic coating which is uniform and visible. This shiny metallic coating (of .25mm plastic dots) does not create a pattern or design but instead, consists of features which are consistent with terms of heading 5903, HTSUS, as the subject fabric is coated with plastic or is otherwise foil printed. Therefore, the Variflex Mystique fabric is classified in subheading 5903.90.2500, HTSUS, which provides for: “Textile fabrics impregnated, coated, covered or laminated with plastics, other than those of heading 5902: Other: Of man-made fibers: Other: Other.”

2) Whether the subject merchandise qualifies for preferential tariff treatment under the UKFTA.

The requirements for eligibility for preferential tariff treatment under the UKFTA are set forth in General Note (GN) 33 of the HTSUS (19 U.S.C. § 1202). Under GN 33(b), HTSUS, and subject to the provisions of subdivisions (c), (d), (n), and (o) thereof, goods imported into the U.S. are eligible for duty-free treatment under the UKFTA if:

- (i) the good is wholly obtained or produced entirely in the territory of Korea or of the United States, or both;
- (ii) the good is produced entirely in the territory of Korea or of the United States, or both, and—
  - (A) each of the non-originating materials used in the production of the good undergoes an applicable change in tariff classification specified in subdivision (o) of this note; or
  - (B) the good otherwise satisfies any applicable regional value-content or other requirements set forth in such subdivision (o); and satisfies all other applicable requirements of this note and of applicable regulations; or
- (iii) the good is produced entirely in the territory of Korea or of the United States, or both, exclusively from materials described in subdivisions (i) or (ii), above.

With respect to textile and apparel articles, GN 33(d), HTSUS, states as follows:

- (i) For purposes of this note, a textile or apparel good provided for in subheadings 4202.12, 4202.22, 4202.32 or 4202.92, chapters 50 through 63, heading 7019 or subheading 9404.90 of the tariff schedule is an originating good if:

(A) each of the nonoriginating materials used in the production of the good undergoes an applicable change in tariff classification specified in subdivision (o) of this note as a result of production occurring entirely in the territory of Korea or of the United States, or both, or the good otherwise satisfies the applicable requirements of this note where a change in tariff classification for each nonoriginating material is not required, and

(B) the good satisfies any other applicable requirements of this note.

The provisions of subdivision (o) of this note shall not apply in determining the country of origin of a textile or apparel good for nonpreferential purposes.

As referenced above, the Variflex Mystique fabric is classified in subheading 5903.90, HTSUS. The applicable rule set forth in GN 33(o) for goods classified under Chapter 59 of the HTSUS provides:

A change to headings 5903 through 5908 from any other chapter, except from headings 5111 through 5113, 5208 through 5212, 5310 through 5311, 5407 through 5408 or 5512 through 5516.

Under the UKFTA there is another requirement that must be satisfied for a fabric to be originating. Elastomeric yarn is required to be wholly formed and finished in South Korea or the United States. General Note 33(d) provides in relevant part:

(iii) For purposes of this note, the expression “*wholly formed and finished*” means:

[...]

(B) when used in reference to yarns, all production processes and finishing operations, beginning with the extrusion of filaments, strips, film or sheets, and including drawing to fully orient a filament or slitting a film or sheet into strip, or the spinning of all fibers into yarn, or both, and ending with a finished yarn or plied yarn.

(iv) A textile or apparel good may be considered to be an originating good if—

(A) the total weight of all fibers and yarns that are used in the production of the component of the good that determines the tariff classification of the good and that do not undergo an applicable change in tariff classification is not more than 7 percent of the total weight of that component;

[...]

Notwithstanding the provisions of subdivision (d)(iv)(A), a good containing elastomeric yarns in the component of the good that determines the tariff classification of the good shall be considered to be an originating good only if such yarns are wholly formed and finished in the territory of Korea or of the United States.

(v) For purposes of this note, in the case of a good that is a yarn, fabric or fiber, the term “*component of the good that determines the tariff classification of the good*” means all of the fibers in the good.

Based on the facts provided, the non-originating polyester yarn meets the requisite tariff shift requirement of GN 33(o), as it is classified in heading 5402, HTSUS, and the finished foil print fabric is classified in subheading 5903.90, HTSUS.

However, a textile or apparel good containing elastomeric yarn in the component of the good that determines the tariff classification of the good shall be considered to be an originating good only if such yarns are wholly formed in the territory of a party to the UKFTA. Under our facts, the origin of the resin chips used to produce the elastomeric yarn by melting is either South Korea or China. The elastomeric yarn meets the above requirements of GN 33(d)(iii) because it is extruded (and thus wholly formed) in South Korea.

3) What is the country of origin of foil print fabric?

Section 334 of the Uruguay Round Agreements Act, codified at 19 U.S.C. § 3592, provides rules of origin for textiles and apparel entered, or withdrawn from warehouse, for consumption, on and after July 1, 1996. 19 C.F.R. § 102.21 implements section 334, and 19 C.F.R. § 102.0 refers to 19 C.F.R. § 102.21 for determining the country of origin of textile and apparel products. Pursuant to 19 C.F.R. § 102.21(c) the country of origin of a textile or apparel product will be determined by sequential application of the general rules set forth in paragraphs (c)(1) through (5).

Section, 102.21 (c)(1) provides that “the country of origin of a textile or apparel product is the single country, territory, or insular possession in which the good was wholly obtained or produced.” As the subject Variflex Mystique fabric is not wholly obtained or produced in a single country, territory, or insular possession, paragraph (c)(1) is inapplicable.

Paragraph (c)(2) provides, “Where the country of origin of a textile or apparel product cannot be determined under paragraph (c)(1) of this section, the country of origin of the good is the single country, territory, or insular possession in which each of the foreign materials incorporated in that good underwent an applicable change in tariff classification, and/or met any other requirement, specified for the good in paragraph (e) of this section.”

Section 102.21(e)(1) in pertinent part provides, “The following rules will apply for purposes of determining the country of origin of a textile or apparel product under paragraph (c)(2) of this section”:

**HTSUS Tariff shift and/or other requirements**

- 5901–5903 (1) Except for fabric of wool or of fine animal hair, a change from greige fabric of heading 5901 through 5903 to finished fabric of heading 5901 through 5903 by both dyeing and printing when accompanied by two or more of the following finishing operations: bleaching, shrinking, fulling, napping, decatizing, permanent stiffening, weighting, permanent embossing, or moireing; or,
- (2) If the country of origin cannot be determined under (1) above, a change to heading 5901 through 5903 from any other heading, including a heading within that group, except from heading 5007, 5111 through 5113, 5208 through 5212, 5309 through 5311, 5407 through 5408, 5512 through 5516, 5803, 5806, 5808, and 6002 through 6006, and provided that the change is the result of a fabric-making process.

Pursuant to 19 C.F.R. § 102.21 (b)(2), a fabric-making process is any manufacturing operation that begins with polymers, fibers, filaments (including strips), yarns, twine, cordage, rope, or fabric strips and results in a textile fabric.

In this case, the fabric is knitted in South Korea from polyester yarn produced in Taiwan and the elastomeric yarn, extruded and produced in South Korea from resin of South Korean or Chinese origin, which confers a tariff shift to heading 5903, HTSUS. Moreover, during the fabric making process the fabric is foil-printed with polyester plastic dots (which stem from the resin) in South Korea and all subsequent finishing operations occur in South Korea. Hence, because the change to subheading 5903.90, HTSUS, is a result of a fabric making process, the merchandise complies with the requisite tariff shift rule for heading 5903, HTSUS. Accordingly, the country of origin of the instant Variflex Mystique fabric is the country in which the fabric-making process occurs, that is, South Korea.

**HOLDING:**

By application of GRI 1 and Note 2(a)(4) to Chapter 59, HTSUS, we find that the instant Variflex Mystique fabric is provided for in heading 5903, HTSUS, specifically, under subheading 5903.90.2500, HTSUS, which provides for: “Textile fabrics impregnated, coated, covered or laminated with plastics, other than those of heading 5902: Other: Of man-made fibers: Other: Other.” The 2020 column one, general rate of duty is 7.5% *ad valorem*. We further find that, the subject merchandise qualifies for preferential tariff treatment under the UKFTA pursuant to GN 33(b). Finally, pursuant to 19 C.F.R. § 102.21(c)(2), the country of origin of the Variflex Mystique fabric is the Republic of Korea.

**EFFECT ON OTHER RULINGS:**

NY N267195, dated September 10, 2015, is hereby MODIFIED.

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

*Sincerely,  
For*

CRAIG T. CLARK,  
*Director*

*Commercial and Trade Facilitation Division*



# U.S. Court of International Trade

Slip Op. 20–170

NOVOLIPETSK STEEL PUBLIC JOINT STOCK COMPANY and NOVEX TRADING (SWISS) SA, Plaintiffs, v. UNITED STATES, Defendant, and NUCOR CORPORATION, Defendant-Intervenor.

Before: Claire R. Kelly, Judge  
Court No. 19–00172  
PUBLIC VERSION

[Sustaining the U.S. Department of Commerce’s final determination in the 2016–2017 administrative review of the antidumping duty order on certain hot-rolled flat-rolled carbon-quality steel products from the Russian Federation.]

Dated: November 30, 2020

*Valerie Ellis*, Curtis, Mallet-Prevost, Colt & Mosle LLP, of Washington, D.C., argued for plaintiffs Novolipetsk Steel Public Joint Stock Company and NOVEX Trading (Swiss) SA. Also on the briefs were *Daniel L. Porter*, *Tung Nguyen*, and *Kimberly Reynolds*.

*Kelly A. Krystyniak*, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, D.C., argued for defendant. Also on the brief were *Joseph H. Hunt*, Assistant Attorney General, *Jeanne E. Davidson*, Director, and *Tara K. Hogan*, Assistant Director. Of counsel was *Brandon J. Custard*, Attorney, Office of the Chief Counsel for Trade Enforcement and Compliance, U.S. Department of Commerce, of Washington, D.C.

*Cynthia C. Galvez* and *Christopher B. Weld*, Wiley Rein, LLP, of Washington, D.C., argued for defendant-intervenor Nucor Corporation. Also on the brief were *Alan H. Price* and *Jeffrey O. Frank*.

## **OPINION AND ORDER**

### **Kelly, Judge:**

Before the court is Plaintiffs Novolipetsk Steel Public Joint Stock Company (“NLMK”) and NOVEX Trading (Swiss) SA’s (“NOVEX”) Rule 56.2 motion for summary judgment on the agency record challenging several aspects of the U.S. Department of Commerce’s (“Commerce”) final determination in its 2016–2017 administrative review of the antidumping duty (“ADD”) order on certain hot-rolled flat-rolled carbon-quality steel products (“HRC”) from the Russian Federation (“Russia”). *See* [Pls.] Mot. J. Agency R., Feb. 13, 2020, ECF No. 26; *see also [HRC] from [Russia]*, 84 Fed. Reg. 38,948, 38,949 (Dep’t Commerce Aug. 8, 2019) (final results and rescission of [ADD] admin. review; 2016–2017) (“*Final Results*”) and accompanying Issues &

Decision Memo. for the [*Final Results*], A-821-809, (Aug. 2, 2019), ECF No. 21-5 (“Final Decision Memo”). Plaintiffs challenge Commerce’s decision to rescind its administrative review of NLMK as both contrary to law and unsupported by substantial evidence. *See* Pls.’ Opening Br. Supp. 56.2 Mot. J. Agency R. Confidential Version, Feb. 13, 2020, ECF No. 26-1 (“Pls.’ Br.”). Specifically, Plaintiffs contest Commerce’s decision to analyze the bona fides of NLMK’s sale of subject merchandise into the United States, *see id.* at 5-14, determination that NLMK’s U.S. sale is not bona fide, *see id.* at 14-46, and resultant decision to rescind the administrative review. *See id.* at 46-52. Plaintiffs also submit that Commerce’s rescission results in the impermissible application of facts available with an adverse inference (“adverse facts available” or “AFA”)<sup>1</sup> to NLMK. *See id.* at 52-55. For the following reasons, the court sustains Commerce’s decision to rescind the administrative review.

### BACKGROUND

On October 15, 1998, Commerce initiated a less-than-fair-value (“LTFV”) investigation of HRC from Russia. *See [HRC] from Brazil, Japan, and [Russia]*, 63 Fed. Reg. 56,607, 56,613 (Dep’t Commerce Oct. 22, 1998) (initiation of [ADD] investigations) (“*Initiation of ADD Investigations*”). On July 12, 1999, Commerce entered into a Suspension Agreement with the Ministry of Trade of the Russian Federation.<sup>2</sup> *See [HRC] from [Russia]*, 64 Fed. Reg. 38,642, 38,642 (Dep’t of Commerce July 19, 1999) (suspension of [ADD] investigation). However, at the request of petitioners, Commerce continued the investigation and made an affirmative final determination of sales at LTFV. *See [HRC] from [Russia]*, 64 Fed. Reg. 38,626, 38,626-27 (Dep’t Commerce July 19, 1999) (notice of final determination of sales at [LTFV]) (“*HRC from Russia*”). Given that Russia was considered a nonmarket economy at the time, Commerce calculated a country-wide, or Russia-

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<sup>1</sup> Parties and Commerce sometimes use the shorthand “AFA” or “adverse facts available” or “AFA” to refer to Commerce’s reliance on facts otherwise available with an adverse inference to reach a final determination. However, AFA encompasses a two-part inquiry pursuant to which Commerce must first identify why it needs to rely on facts otherwise available, and second, explain how a party failed to cooperate to the best of its ability as to warrant the use of an adverse inference when “selecting among the facts otherwise available.” *See* 19 U.S.C. § 1677e(a)-(b).

<sup>2</sup> Commerce is permitted “to suspend an [ADD] . . . investigation by accepting a suspension agreement[.]” *See* 19 C.F.R. § 351.208 (1999).

wide, dumping margin of 184.56 percent based on total AFA.<sup>3</sup> *See id.*, 64 Fed. Reg. at 38,641. Nonetheless, Commerce did not issue an ADD order because of the Suspension Agreement.

In 2014, years after granting Russia market economy status for purposes of applying U.S. antidumping laws, Commerce terminated the Suspension Agreement and issued the [ADD] order covering HRC from Russia. *See Termination of the Suspension Agreement on [HRC] from [Russia], Rescission of 2013–2014 Admin. Review, and Issuance of [ADD] Order*, 79 Fed. Reg. 77,455 (Dep’t Commerce Dec. 24, 2014) (“ADD Order”). Commerce set the cash deposit rate equal to margins calculated in the final determination of its initial investigation, using the 184.56 percent Russia-wide rate as the all-others rate.<sup>4</sup> *See HRC from Russia*, 64 Fed. Reg. at 38,641; *ADD Order*, 79 Fed. Reg. at 77,456.

On December 29, 2017, after making an entry and sale of HRC from Russia, Plaintiffs requested an administrative review of the *ADD Order*. *See* Compl. at ¶¶ 6–8, 10, Sept. 9, 2019, ECF No. 6; NLMK’s Req. for Admin. Review: [HRC] from Russia, PD 3, bar code 3656817–01 (Dec. 29, 2017).<sup>5</sup> Commerce initiated this administrative

<sup>3</sup> In antidumping proceedings, Commerce estimates the “weighted average dumping margin for each exporter and producer individually investigated” and the “all-others rate for all exporters and producers not individually investigated.” 19 U.S.C. §§ 1673b(d)(1)(A), 1673d(c)(1)(B)(i); *see also* 19 C.F.R. §§ 351.205, 351.210 (2018). The all-others rate is the “amount equal to the weighted average of the estimated weighted average dumping margins established for exporters and producers individually investigated, excluding any zero and de minimis margins, and any margins determined entirely under section 1677e of this title” (i.e., based on facts available). 19 U.S.C. § 1673d(c)(5); *see also id.* at § 1677e.

In proceedings involving a nonmarket economy, Commerce presumes exporters and producers are under foreign government control with respect to export activities, and will assign a single “country-wide” rate unless a respondent demonstrates it qualifies for a separate rate. *See Yangzhou Bestpak Gifts & Crafts Co. v. United States*, 716 F.3d 1370, 1373 (Fed. Cir. 2013) (“*Yangzhou*”) (citing *Sigma Corp. v. United States*, 117 F.3d 1401, 1405 (Fed. Cir. 1997)); *see also* 19 C.F.R. § 351.107(d) (1999).

Here, Commerce selected Novolipetsk Iron & Steel Corporation (“NISCO”) as a mandatory respondent in its initial investigation. *See Initiation of ADD Investigations*, 63 Fed. Reg. at 56,607; [HRC] from [Russia], 64 Fed. Reg. 9,312, 9,314 (Dep’t Commerce Feb. 25, 1999) (notice of prelim. determination of sales at [LTFV]). However, NISCO subsequently withdrew from participation in the investigation. *See HRC from Russia*, 64 Fed. Reg. at 38,628. Commerce used total AFA to derive the Russia-wide rate because certain respondents did not respond to Commerce’s request for information and Commerce could not verify, inter alia, NISCO’s questionnaire response due to its withdrawal. *See id.*, 64 Fed. Reg. at 38,630.

<sup>4</sup> NLMK and NOVEX failed to timely challenge the all-others rate when the suspension agreement was terminated and the *ADD Order* issued, *see Novolipetsk Steel Pub. Joint Stock Co. v. United States*, 44 CIT \_\_, Slip Op. 20–58 (May 1, 2020), and now seeks a new rate after having made the entry at issue in this proceeding.

<sup>5</sup> On October 28, 2019, Defendant submitted indices to the public and confidential administrative records underlying Commerce’s final determination. These indices are located on the docket at ECF Nos. 21–1 and 21–2, respectively. All further references in this opinion to administrative record documents are identified by the numbers assigned by Commerce in those indices and preceded by “PD” and “CD” to denote public or confidential documents.

review and preliminarily determined that Plaintiffs' sale did not constitute a bona fide sale. [*HRC*] from [*Russia*], 84 Fed. Reg. 4,776 (Dep't Commerce Feb. 19, 2019) (prelim. results of [ADD] admin. review; 2016–2017) (“*Prelim. Results*”) and accompanying Decisions Memo. for the [*Prelim. Results*] at 7–8, A-821809, PD 108, bar code 3792089–01 (Feb. 11, 2019).<sup>6</sup> For its final determination, Commerce continued to find that Plaintiffs did not make a bona fide sale. Final Decision Memo at 17–18. As such, Commerce continued to assign to NLMK's entries the “all-others” rate of 184.56 percent. *See id.*; *see also Final Results*, 84 Fed. Reg. at 38,949. NLMK and NOVEX's appeal to this court ensued. *See generally* Compl.; Summons, Sept. 9, 2019, ECF No. 1. On September 21, 2020, the court heard oral argument. *See Oral Arg.*, Sept. 21, 2020, ECF No. 49.

## JURISDICTION AND STANDARD OF REVIEW

The court has jurisdiction pursuant to section 516A(a)(2)(B)(iii) of the Tariff Act of 1930, as amended, 19 U.S.C. § 1516a(a)(2)(B)(iii) (2018)<sup>7</sup> and 28 U.S.C. § 1581(c) (2018), which grant the court authority to review actions contesting the final determination in an administrative review of an ADD order. The court will uphold Commerce's determination unless it is “unsupported by substantial evidence on the record, or otherwise not in accordance with law.” 19 U.S.C. § 1516a(b)(1)(B)(i).

## DISCUSSION

### I. Commerce's Decision to Analyze Bona Fide Sales

#### A. Commerce's Authority Under 19 U.S.C. § 1675

Plaintiffs argue that 19 U.S.C. § 1675 does not allow Commerce's bona fide sales analysis in an administrative review. *See* Pls.' Br. at 5–10. Namely, Plaintiffs submit that Congress's amendment of § 1675(a) to require a bona fide sales analysis of U.S. sales in a new shipper review under § 1675(a)(2)(B)(iv) demonstrates that Commerce does not have statutory authority under § 1675(a)(2)(A) to analyze the bona fides of a U.S. sale in an administrative review. *See id.*; *see also* Trade Facilitation and Trade Enforcement Act of 2015 (“TFTEA”), Pub. L. No. 114–125, § 433, 130 Stat. 122 (2016). Defendant and Defendant-Intervenor counter that the court should defer to Commerce's interpretation of its authority in light of Congressional

<sup>6</sup> Commerce later published a correction notice not relevant to this dispute. *See* [*HRC*] from [*Russia*], 84 Fed. Reg. 16,643 (Dep't Commerce Apr. 22, 2019) (correction to the prelim. results of the 2016–2017 admin. review).

<sup>7</sup> Further citations to the Tariff Act of 1930, as amended, are to the relevant provisions of Title 19 of the U.S. Code, 2018 edition.

silence on the issue and that Commerce’s practice of applying a bona fide sales analysis in an administrative review is consistent with its statutory mandate. *See* Def.’s Memo. Opp’n Pls.’ Mot. J. Agency R. Confidential Version at 10–15, Apr. 17, 2020, ECF No. 30 (“Def.’s Br.”); Def.-Intervenor [Nucor’s] Resp. Br. Confidential Revised Version at 12–23, Apr. 17, 2020, ECF No. 33 (“Nucor’s Br.”). For the following reasons, the court holds that Commerce’s bona fide sales analysis in an administrative review is in accordance with law.

Section 1675(a)(2)(A) provides that, when conducting an administrative review of an ADD order, Commerce shall determine “the normal value and export price (or constructed export price) of each entry of the subject merchandise, and (ii) the dumping margin for each such entry.” 19 U.S.C. § 1675(a)(2)(A). This directive reflects Commerce’s authorization under 19 U.S.C. § 1673(1) to impose antidumping duties, in an amount equal to the amount by which normal value exceeds the export price (or constructed price), on “a class or kind of foreign merchandise” that it determines “is being, or is likely to be, sold in the United States at less than its fair value[.]”<sup>8</sup>

Section 1675(a)(2)(A) is capacious enough to accommodate Commerce’s authority to examine which sales it will consider for purposes of establishing a dumping margin in an administrative review in some circumstances. Section 1675(a)(2)(A) dictates how Commerce determines antidumping duties in an administrative review of an ADD order stemming from an investigation pursuant to 19 U.S.C. § 1673. Under § 1675(a)(2)(A), Commerce must calculate the normal value, export price, and dumping margin of each entry of subject merchandise. *See id.* at § 1675(a)(2)(A). The statute prescribes methodologies for determining normal value and export price. *See, e.g.*, 19 U.S.C. §§ 1677a, 1677b. Export price is defined as the “price at which the subject merchandise is first sold (or agreed to be sold),” § 1677a, but the statute does not provide for what constitutes a sale. Commerce thus has discretion to provide a reasonable interpretation for what constitutes a sale for purposes of conducting an administrative review under § 1675(a)(2)(A).

Given 19 U.S.C. §§ 1675(a)(2)(A) and 1677a’s silence with respect to the issue of what constitutes a sale, it is reasonable for Commerce to

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<sup>8</sup> After determining that merchandise is being (or is likely to be) entered and sold in the United States at LTFV, and if the U.S. International Trade Commission determines that imports of the merchandise cause (or threaten to cause) material injury to a domestic industry, Commerce issues an ADD order requiring that antidumping duties be assessed on the merchandise at an amount by which the normal value of the merchandise exceeds its export price (or constructed export price). 19 U.S.C. § 1673. Provided that it receives timely requests, Commerce is statutorily required to conduct periodic administrative reviews of an ADD order to determine the amount of antidumping duties owed on each entry of subject merchandise during the relevant period of review (“POR”). *See* 19 U.S.C. § 1675(a)(1)–(2).

disregard sales that are not bona fide in an effort to calculate a dumping margin that suitably approximates an exporter or producer's selling practices. *See* 19 U.S.C. §§ 1675, 1677a. Doing so accords with Commerce's statutory purpose under § 1673 of determining whether goods are being sold at less than fair value. *See* 19 U.S.C. § 1675(a)(2)(A); 19 U.S.C. § 1673(1). *See, e.g., Ceramica Regiomontana, S.A. v. United States*, 10 CIT 399, 404–05, 636 F. Supp. 961, 966 (1986), *aff'd*, 810 F.2d 1137, 1139 (Fed. Cir. 1987) (“*Ceramica*”) (citing, *inter alia*, *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843, (1984) (“*Chevron*”).

The court cannot discern from Congress's amendments to § 1675(a)(2)(B) alone an intent to preclude Commerce's authority to analyze the bona fides of a U.S. sale in an administrative review.<sup>9</sup> Congress's amendments to § 1675(a)(2)(B) are not worded restrictively, but rather, impose an affirmative obligation on Commerce to ensure that U.S. sales used to calculate an individual margin for a new shipper are bona fide. The legislative history indicates that Congress was driven by concerns that exporters and producers were abusing the ability to obtain a new shipper rate on an expedited basis in order to circumvent antidumping and countervailing duties. *See* H.R. REP. NO. 114–114, pt. 1, at 89 (2015). Congress's statutory solution to circumvention in the context of a new shipper review does not on its own amount to a preclusion of Commerce's authority to conduct a bona fides sales analysis in an administrative review. Indeed, Congress, in amending § 1675, did not make any changes to the provisions governing administrative reviews that would imply such an intent. That Congress is presumed to be aware of Commerce's practice when it amended 19 U.S.C. § 1675 lends force to the notion that Congress's amendments do not speak to Commerce's practice within the context of an administrative review.<sup>10</sup> *See Lorillard v. Pons*, 434 U.S. 575, 580 (1978). Accordingly, and as prior rulings from

<sup>9</sup> Exporters or producers not previously assigned a dumping margin may, under certain conditions, request a new shipper review. Namely, if Commerce receives a request from an exporter or producer of the subject merchandise establishing that it did not export (and was not affiliated with an exporter or producer that did export) subject merchandise into the United States during the period of investigation giving rise to the ADD order, Commerce is statutorily required to calculate an individual weighted-average dumping margin for that exporter or producer. *See* 19 U.S.C. § 1675(a)(2)(B)(i). On February 24, 2016, Congress enacted section 443 of the TFTEA, and modified 19 U.S.C. § 1675(a)(2)(B) to require that Commerce only use bona fide sales as the basis for calculating an individual dumping margin in a new shipper review.

<sup>10</sup> As such, the court is not persuaded by Plaintiffs' reliance on *Thomas v. Nicholson* and *Saha Thai Steel Pipe Pub. Co. Ltd. v. United States*. *See* Pls.' Br. at 8 (citing 423 F.3d 1279 (Fed. Cir. 2005); 43 CIT \_\_\_, 422 F. Supp. 3d 1363 (2019)). Those cases do not deal with instances where Congress acted to codify a pre-existing agency practice in one part of the statute, and do not touch on the issue of whether Congress, by its silence, intended to revoke that practice in another part of the statute.

this Court have recognized, it is reasonable for Commerce to interpret the statute as authorizing it to disregard transactions it reasonably concludes are not bona fide sales. *See, e.g., Windmill Int'l Pte v. United States*, 26 CIT 221, 230–32, 193 F. Supp. 2d 1303, 1312–14 (2002).

### **B. Commerce Reasonably Exercised Its Discretion**

Plaintiffs challenge Commerce's decision to conduct a bona fides analysis because NLMK has a long history of exporting HRC to the United States, and the importer of record, NOVEX, is its affiliated trading company. *See* Pls.' Br. at 10–14. Defendant counters that Commerce's decision to conduct a bona fides analysis is not subject to review. *See* Def.'s Br. at 16–17. Nonetheless, Defendant and Nucor both submit that Commerce's decision is reasonable in light of the facts and circumstances of this proceeding. *See id.* at 16–18; *see also* Nucor's Br. at 19–23. For the following reasons, the court holds that Commerce reasonably exercised its discretion.

Commerce has an administrative practice under certain circumstances of analyzing the bona fides of U.S. sales in administrative reviews. *Cf.* Final Decision Memo at 7; *see also Certain Oil Country Tubular Goods From Turkey*, 83 Fed. Reg. 64,107 (Dep't Commerce Dec. 13, 2018) (final results of [ADD] admin. review; 2016–2017) (“*OCTG from Turkey*”) and accompanying Issues and Decisions Memo. for [*OCTG from Turkey*] at 10–11, A-489–816, (Dec. 7, 2018) available at <https://enforcement.trade.gov/frn/summary/turkey/2018-26973-1.pdf> (last visited Nov. 21, 2020) (“*OCTG from Turkey IDM*”). As explained by Commerce, “[w]hile bona fide sales analyses always arise in the context of new shipper reviews, if a producer's or exporter's transactions involve prices, quantities, or overall circumstances that are questionable, Commerce will evaluate the bona fides of the sale in the context of an administrative review.” Final Decision Memo at 8; *see also* *OCTG from Turkey IDM* at 10. Contrary to Defendant's submission, Def.'s Br. at 16–18, the court may review Commerce's decision to conduct a bona fide sales analysis to determine whether it has reasonably explained any deviation from an agency practice. *See Atchison, Topeka & Santa Fe Ry. Co. v. Wichita Bd. of Trade*, 412 U.S. 800, 808 (1973). Further, although Commerce has authority to determine what constitutes a sale when calculating a dumping margin under 19 U.S.C. § 1675, the means by which it chooses to do so must be reasonable. *See Chevron*, 467 U.S. at 843–44.

Here, Commerce's decision to examine the bona fides of NLMK's sale is reasonable. It is reasonably discernible from Commerce's reference to the principle that “single sale[s] must be ‘carefully scruti-

nized” that Commerce is importing what was previously an agency practice of examining single sale transactions during a new shipper review into its methodology for conducting an administrative review. *See* Final Decision Memo at 16 (citations omitted). Further, Commerce’s practice is reasonable in an administrative review; a single sale transaction may warrant further scrutiny because there are fewer transactions from which to draw inferences about the exporter or producer’s selling practices. *See id.* at 13; Prelim. Bona Fide Sales Analysis Memo. at 14, PD 111, CD 197, bar codes 3793192–01, 3793189–01 (Feb. 11, 2019) (“Bona Fides Sales Memo”). Thus, given its authority to disregard transactions that do not constitute bona fide sales, Commerce’s practice of examining a single sale transaction is reasonable in an administrative review.

As such, Plaintiffs’ arguments regarding NLMK’s history of exporting into the United States are inapposite. *See* Pls.’ Br. at 10–14. Under 19 U.S.C. § 1675(a)(2)(A), Commerce seeks to calculate a dumping margin that accurately approximates the exporter or producer’s selling practices, and where the entry under review is based on a single transaction it is reasonable for Commerce to take a closer look to make sure the price was based on commercial considerations. Doing so will enable Commerce to calculate a dumping margin that better approximates a respondent’s selling practices, which is consistent with Commerce’s statutory purpose of determining whether merchandise is being sold at LTFV.

## II. Whether NLMK’s Entry is a Bona Fide Sale

Plaintiffs argue that Commerce’s determination is unsupported by substantial evidence because the record does not support Commerce’s conclusion that its sale is commercial unreasonable. *See* Pls.’ Br. at 14–46. Defendant and Nucor counter that Commerce’s determination is reasonable based on the record and that Plaintiffs’ challenge amounts to a request for the court to reweigh the evidence. *See* Def.’s Br. at 23–40; Nucor’s Br. at 23–41. For the following reasons, the court sustains Commerce’s determination that NLMK’s entry is not a bona fide sale.

Commerce employs a totality-of-the-circumstances approach to determine whether U.S. sales are bona fide in an administrative review. Similar to its practice in new shipper reviews, now codified in § 1675(a)(2)(B)(iv), Commerce explains that

[It] consider[s] the following factors when determining if a sale is bona fide: (1) timing of the sale; (2) price and quantity; (3) expenses arising from the transaction; (4) whether the goods were resold at a profit; and (5) whether the transaction was

made at arm's length. Thus, [Commerce] consider[s] a number of factors in [its] bona fide analysis, "all of which may speak to the commercial realities surrounding an alleged sale of subject merchandise."

Final Decision Memo at 11 (citations omitted). According to Commerce, "the weight given to each factor investigated will depend on the circumstances surrounding the sale[.]" and that it "is highly likely to examine objective, verifiable factors to ensure that a sale is not being made to circumvent an AD Order." *Id.* (citations omitted). Commerce's determinations must be supported by substantial evidence. The evidence must be sufficient that a reasonable mind might accept the evidence as adequate to support its conclusion while considering contradictory evidence. *See Consol. Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938); *see also Suramerica de Aleaciones Laminadas, C.A. v. United States*, 44 F.3d 978, 985 (Fed. Cir. 1994).

Here, Commerce offers several reasons for its determination that NLMK's U.S. sale is not bona fide. First, with respect to the pricing and quantity of the sale, upon comparison to NLMK's third-country sales, Commerce observes that the price of NLMK's sale is significantly higher, and the quantity of the sale is significantly lower, than other export transactions that NLMK made during the same period.<sup>11</sup> *See* Final Decision Memo at 12–14. Second, Commerce cites email correspondences between NLMK and its unaffiliated customer discussing the need to enter the merchandise before the end of the period of review ("POR") in order to revoke the ADD order on HRC from Russia as evidence that the timing of the sale did not arise out of ordinary commercial considerations. *See id.* at 14 (citing Bona Fides Sales Memo at 7, 8–11). Third, although Commerce notes that NLMK had previously conducted business with its customer, Commerce

<sup>11</sup> Commerce maintains its finding that the price per unit of NLMK's U.S. sale was significantly higher than NLMK and NOVEX's other export sales made during the same period. Final Decision Memo at 12 (citing Bona Fides Sales Memo at 5–6). Specifically, Commerce explained

Of NOVEX's [ ] third country sales, and NLMK's sole shipment of subject merchandise for [ ] metric tons (MT) with a per-unit value of USD 683.4 per MT had the third highest unit price of the [ ] third country sales – or a unit price higher than [ ] percent of NOVEX's export sales. The [ ] sales with the highest unit prices had a per unit value of USD [ ] per MT. The [ ] highest unit price of the third country sales was made at a substantially lower price of USD [ ] per MT. Additionally, an average of the unit prices of NOVEX's third country sales indicated that the three sales with the highest unit prices were made at prices significantly higher than the average-ranging from USD [ ] per MT above the average price of USD [ ] per MT. Given this information, we find that the per unit price of NLMK's sole U.S. sale is significantly higher than NLMK's/NOVEX's other export sales made during the same period. Thus, we find that the price of NLMK's POR sale is not representative of a normal business practice and, does not indicate that the sale is bona fide.

Bona Fides Sales Memo at 6 (citations omitted).

points to email correspondences with NLMK dictating the terms of the sale as evidence that the transaction was not negotiated at arms-length, which Commerce defines as being based on independent business interests. *See id.* at 14–15 (citing Bona Fides Sales Memo at 8–13). Finally, with respect to other relevant factors, Commerce notes NLMK/NOVEX’s contradictory statements about the merchandise when urging the customer to make the purchase, *see id.* at 15 (citing Bona Fides Sales Memo at 9–11),<sup>12</sup> the failure of NLMK’s customer to adhere to the payment terms, the refusal of NLMK’s sales agent to provide certain financial statements, *see id.* at 16, and the fact that only a single sale was made during the POR as evidence that NLMK’s sale is atypical. *See id.*

Commerce’s determination that NLMK’s U.S. sale is not bona fide is supported by substantial evidence. First, it is reasonable that Commerce infers, from email exchanges documenting instances where the seller directed the terms of the sale for its customer, that NLMK’s transaction was not negotiated at arms-length.<sup>13</sup> Commerce observes that an arms-length transaction is one that is negotiated based on independent interests, Final Decision Memo at 14 (citations omitted), and it is reasonable to infer from evidence that demonstrates a customer is setting its terms based on the producer’s preferences that the customer is not negotiating based on its own

<sup>12</sup> Commerce explained

Next, email correspondence indicates that NLMK/NOVEX made contradictory statements to justify the shipment of certain hot-rolled coils.[.] [ ] stated in emails that [ ] hot-rolled coils produced to these specifications had been found in inventory and were left over from a previous order for [ ] and NLMK also asserted on the record that “[

] However, previously in a separate submission, NLMK explained that it had not sold hot-rolled steel to [ ] since the demise of the suspension agreement in 2014. We also note that record evidence from the sales trace for the sole U.S. sale during the POR indicates that these [ ] hot-rolled coils were produced just prior to shipment in 2017. As such, record evidence indicates that NLMK and NOVEX made contradictory statements to justify the shipment of certain hot-rolled coils prior to the end of the POR, which the final customer was [ ], even though it had requested a different product to be shipped to [ ], rather than [ ]).

Bona Fides Sales Memo at 10.

<sup>13</sup> Record evidence suggests that the customer entered into the transaction as a favor to NLMK. Commerce cites an email exchange demonstrating that the customer planned to purchase HRC produced to one of [ ] specifications [ ]

[ ] requested *See* Bona Fides Sales Memo at 8–11 (citing, inter alia, NLMK Third Suppl. Questionnaire Resp. at Ex. SA3–2, CD 188, bar code 3746640–02 (Aug. 21, 2018)). NLMK/NOVEX would [ ] in order to initiate the administrative review. *See id.*; *see also* Final Decision Memo at 14 & n.61.

independent interests.<sup>14</sup> Second, without detracting evidence explaining the significant difference in pricing and quantity between its U.S. sale and its third country transactions, and given record evidence demonstrating NLMK's motivations for making the U.S. sale, the pricing of NLMK's transaction reasonably suggests the price is artificially inflated to reduce NLMK's dumping margin. A higher price for NLMK's U.S. sale would lead to a lower dumping margin by narrowing, if not eliminating, the difference between the export price and normal value of the sale. Taken together with the rest of Commerce's findings, *see* Final Decision Memo at 15– 16, the court cannot say that it is unreasonable for Commerce to conclude, based on the totality of the circumstances, that NLMK's U.S. sale was not bona fide. That Plaintiffs disagree is insufficient to demonstrate Commerce's determination is unreasonable.<sup>15</sup> *See Downhole Pipe & Equipment, L.P. v. United States*, 776 F.3d 1369, 1376 (Fed. Cir. 2015); *see also Zhejiang DunAn Hetian Metal Co. v. United States*, 652 F.3d 1333, 1341 (Fed. Cir. 2011).

Plaintiffs' challenges with respect to Commerce's examination of the price of NLMK's sale arise from their position that Commerce's practice is merely to determine whether the "price . . . is in line with general price trends in the U.S. market." Pls.' Br. at 17 (citations omitted).<sup>16</sup> As such, Plaintiffs contest Commerce's reliance on NLMK's third country sales as a benchmark against which to evalu-

<sup>14</sup> Plaintiffs argue that a sale to an unaffiliated customer is, ipso facto, an arm's length transaction. Pls.' Br. at 37–38 (citing, inter alia, *AK Steel Corp. v. United States*, 226 F.3d 1361, 1367 (Fed. Cir. 2000) ("*AK Steel Corp.*"). The passage from *AK Steel Corp.* that Plaintiffs cite discusses Commerce's methodology for deriving the export price (or constructed export price) under 19 U.S.C. § 1677a, and Plaintiffs otherwise fail to point to any legal authority limiting Commerce's discretion to make a record-based determination of whether a transaction is made at arms-length during its bona fide sales analysis.

<sup>15</sup> Plaintiffs disagree with the inferences Commerce draws from the record evidence. For example, Plaintiffs submit that Commerce's conclusion that record evidence of a late payment of 41 days weighs in favor of its finding that the transaction at issue was not bona fide is unsupported by substantial evidence. *See* Pls.' Br. at 42–43. Instead of pointing to detracting evidence that would impugn the reasonableness of Commerce's conclusion, Plaintiffs cite their statement that "[o]n occasion, payment may lag with any customer in the ordinary course of business . . . [n]ot withstanding the payment terms, sometimes customers wait until the merchandise is delivered and examined before rendering payment." Pls.' Br. at 42 (citing Customer-Specific Suppl. Questionnaire Resp. at 9, PD 73, CD 143 bar codes 3735851–01, 3735845–01 (July 27, 2020)). Proffering a reasonable inference to be drawn from the record, however, does not demonstrate that Commerce's determination is unreasonable.

<sup>16</sup> Plaintiffs rely in part on a bona fide sales analysis memorandum from the 2014–2015 administrative review of Commerce's ADD order on polyethylene retail carrier bags from Malaysia as support for their assertion, *see* Pls.' Br. at 17, but it is unclear from the final results of that review whether Commerce limits its examination as Plaintiffs argue. *See Polyethylene Retail Carrier Bags From Malaysia*, 81 Fed. Reg. 75,378 (Dep't Commerce Oct. 31, 2016) (final results of the [ADD] admin. review; 2014–2015) ("*Polyethylene from Malaysia*") and accompanying Issues and Decisions Memo. for the [*Polyethylene from*

ate the price and quantity of their U.S. sale, maintaining that Commerce generally uses data from U.S. Customs and Border Protection (“CBP”) as well as U.S. International Trade Commission (“ITC”) Dataweb data containing broad monthly average prices (“CBP data” and “ITC data”, respectively).<sup>17</sup> See Pls.’ Br. at 17–20 (asserting that CBP and ITC data are the golden standard for purposes assessing the commercial reasonableness of NLMK’s sale).

However, Commerce explains, that when analyzing the bona fides of a transaction, “either as an alternative or in addition to the CBP data examination, Commerce may also compare a respondent’s selling price and quantity . . . to a respondent’s own sales, whether these were made to third country markets or to the United States before or after the POR.” See Final Decision Memo at 12–13 (citations omitted).<sup>18</sup> In this instance, Commerce uses NLMK’s third country sales

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*Malaysia*] at 6, A-557–813, (Oct. 24, 2016), available at <https://enforcement.trade.gov/frn/summary/malaysia/2016-26220-1.pdf> (last visited Nov. 21, 2016) (“Polyethylene from Malaysia IDM”) (“U.S. import price data on the record indicate that the price of [the] sale was within the range of AUVs for comparable goods[.]”). Moreover, in *Polyethylene from Malaysia*, unlike here, Commerce found that the U.S. sale was “not reflective of a commercially unreasonable quantity, which is typically seen where parties attempt to ‘test the waters’ or manipulate the dumping margin.” *Polyethylene from Malaysia* IDM at 6. Even if Commerce here deviates from a purported practice with respect to its examination of the price of NLMK’s sale, it is apparent to the court that the deviation is reasonable, given the differing factual circumstances and the fact that Commerce here weighs the evidence based on the totality of the circumstances.

<sup>17</sup> Plaintiffs also argue that Commerce rejected the ITC and CBP data for conclusory reasons. Pls.’ Br. at 18 (citing Final Decision Memo at 13). However, Commerce is not obliged to use these datasets given its apparent practice of using third country sales data either in addition to, or as an alternative, to such sources. See Final Decision Memo at 12–13. Commerce reasonably explains that it prefers to use NLMK’s third country sales as a benchmark in this instance because the raw data is transaction specific, unlike the ITC and CBP data. Final Decision Memo at 12–13. Moreover, Commerce explains that the volume of NLMK’s third country sales is substantial enough to avoid sample size concerns. See *id.* Plaintiffs fail to persuade that Commerce’s approach in this instance is unreasonable.

<sup>18</sup> Plaintiffs and Defendant dispute Commerce’s justification for not using the CBP data. See Def.’s Br. at 19 (arguing that Commerce properly disregarded the CBP data on entries of Russian HRC because it consisted of [ [ ]]); but see Pls.’ Br. at 18–20; Pls.’ Reply Br. Confidential Version at 12, May 22, 2020, ECF No. 37 (citing Final Decision Memo at 13 n. 53) (arguing that Commerce’s decision to disregard was based on an entry error). Even if it is the case, as Plaintiffs suggest, that Commerce could have expanded the scope of its query to include CBP data beyond [ [ ]], Pls.’ Br. at 18–19, it is not unreasonable for Commerce to conclude that comparing NLMK’s transaction to NLMK/NOVEX’s third country sales is an appropriate methodology for determining whether the transaction is bona fide. See Final Decision Memo at 13–14. Commerce explains that it prefers to use transaction specific data, *id.* at 13, meaning that the raw data provides Commerce with a range of entries that may be averaged. *Id.* Moreover, according to Commerce, because the sample size of third country sales is large, and because NLMK’s U.S. sales and third country sales are all export sales made through the same channel, Commerce finds the third country sales to be the most reliable benchmark for assessing whether NLMK’s U.S. sale is bona fide. *Id.* Plaintiffs insist that the “concept of a ‘transaction specific benchmark’ is methodologically unsound,” see, e.g., Pls.’ Br. at 20, 27, but fail to persuasively explain to the court how Commerce’s methodological choice is unreasonable in this instance.

as an alternative because the ITC and CBP data do not provide information on a transaction-specific basis. *See id.* Given that it is examining the bona fides of a single sale, it is not unreasonable, nor contrary to Commerce’s practice, to use NLMK’s third country sales as a benchmark. As explained by Commerce, doing so enables it to analyze the full range of shipments upon which it relies to construct a benchmark. *See id.* at 12–13.

Finally, Plaintiffs argue there is nothing commercially unreasonable about arranging a transaction in such a way as to enable NLMK to seek an administrative review and obtain a lower dumping margin, particularly in light of commercial realities surrounding the sale.<sup>19</sup> *See, e.g.,* Pls.’ Br. at 30, 39, 41–42. It may be commercially reasonable to seek a lower dumping margin, and it is unsurprising that a company would seek to do so. However, the court’s position is to review whether Commerce reasonably supports its determination based on the factors enumerated in its totality-of-the-circumstances analysis. As explained, Commerce adduces enough evidence to allow a reasonable mind to conclude that NLMK’s transaction was not representative of its selling practices in the United States. *See* Final Decision Memo at 12, 14. As such, Commerce’s determination is sustained.

### III. Commerce’s Decision to Rescind the Administrative Review

Plaintiffs argue that Commerce lacks statutory authority to rescind the administrative review of its entry. *See* Pls.’ Br. at 46–52. Defendant and Nucor counter that Commerce has authority to rescind an administrative review where there are no bona fide sales upon which to calculate a dumping margin. *See* Def.’s Br. at 40–41; Nucor’s Br. at 41–44. For the following reasons, Commerce’s decision to rescind the administrative review is sustained.

Upon request, 19 U.S.C. § 1675(a) directs Commerce to perform a periodic administrative review of an ADD order. As explained, Commerce has authority to determine an appropriate methodology when conducting an administrative review and may disregard U.S. sales if

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<sup>19</sup> Plaintiffs argue that Commerce erred by applying its bona fides sales analysis in a vacuum and failing to consider record evidence that “prices in the U.S. market during the period of review were high and expected to increase due to the pending imposition of Section 232 tariffs.” Pls.’ Br. at 30 (citing Customer-Specific Questionnaire Resp. at 11–12, PD 51, bar code 3716358–01 (June 8, 2018)). However, it is reasonably discernible from Commerce’s analysis of the email correspondences that it finds NLMK’s purpose for making the sale was unrelated to market conditions in the United States. *See, e.g.,* Bona Fide Sales Memo at 11 (concluding that the correspondence “indicates that the sole U.S. sale made during the POR was designed and placed in the United States just prior to the end of the POR in order to revoke the antidumping duty order and was thus not based on normal business considerations.”); *see also, e.g.,* Final Decision Memo at 14. The court declines to reweigh the evidence.

it finds that those sales are not bona fide. *See* §§ 1673(1), 1675(a), 1677a; *see also Ceramica*, 10 CIT at 404–05, 636 F. Supp. at 966 (citing *Chevron*, 467 U.S. at 843).

Here, Commerce explains that it is justified in rescinding the review because it lacks a bona fide U.S. sale upon which to determine NLMK’s dumping margin. *See* Final Decision Memo at 17–18. The wording of § 1675(a) does not speak to the issue of whether Commerce must conduct and conclude an administrative review where it does not have a bona fide sale upon which to calculate a dumping margin. Commerce’s determination is reasonable because, as it explains, “[c]alculating a rate based on a non-bona fide sale would create an inaccurate margin.” Final Decision Memo at 17. As such, Commerce’s determination to rescind the review is sustained.

Plaintiffs argue that Commerce’s decision to rescind the administrative review impermissibly applies AFA to a cooperative respondent. *See* Pls.’ Br. at 52–55. Plaintiffs argument fails because Commerce is simply not applying facts available. *See* Final Decision Memo at 18. Commerce uses facts available to address a gap in the record evidence when calculating a dumping margin for an exporter or producer. 19 U.S.C. § 1677e(a). Here, Commerce is rescinding the review, and declining to calculate a new dumping margin for NLMK. *See* Final Decision Memo at 17–18. The consequence is that the 184.56 percent rate continues to apply. Plaintiffs argue the rate is unreasonable as applied to them. Yet, the all-others rate went unchallenged upon termination of the Suspension Agreement. Parties had the opportunity to challenge the rate when Commerce issued the final results upon the lifting of the Suspension Agreement.<sup>20</sup> 19 U.S.C. § 1516a(a)(2)(A)(i)(II), (a)(2)(B)(i). Neither Plaintiffs nor any other participant to the proceedings did. The application of the rate in this case, as the all-others rate, is a function of the failure of Plaintiffs to make one or more bona fide sales.

## CONCLUSION

For the foregoing reasons, Commerce’s final determination is supported by substantial evidence and in accordance with the law and is therefore sustained. Judgment will enter accordingly.

<sup>20</sup> A party may challenge an ADD order based upon a final affirmative determination by filing in this Court both a summons, within 30 days of the order’s publication in the Federal Register, and, within 30 days later, a complaint. *See* 19 U.S.C. § 1516a(a)(2)(A)(i)(II), (a)(2)(B)(i). Here, Commerce made a final affirmative determination that HRC from Russia is being sold at LTFV, and following the termination of the Suspension Agreement, published the *ADD Order*. *See HRC from Russia*, 64 Fed. Reg. at 38,641; *ADD Order*, 79 Fed. Reg. at 77,456. Neither Plaintiffs nor any participant to the proceeding commenced an action within 30 days of the publication of the *ADD Order*.

Dated: November 30, 2020  
New York, New York

*/s/ Claire R. Kelly*  
CLAIRE R. KELLY, JUDGE

Slip Op. 20–175

CELİK HALAT VE TEL SANAYİ A.S., Plaintiff, v. UNITED STATES,  
Defendant, and INSTEEL WIRE PRODUCTS COMPANY et al., Defendant-  
Intervenors.

Before: Claire R. Kelly, Judge  
Court No. 20–03843

[Denying plaintiffs motion for a temporary restraining order and preliminary injunction.]

Dated: December 6, 2020

*Irene H. Chen*, Chen Law Group, LLC, of Rockville, MD, for plaintiff.

*Tara K. Hogan*, Assistant Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC, for defendant. Also on the brief was *Jeffrey Bossert Clark*, Acting Assistant Attorney General, *Jeanne E. Davidson*, Director, and *Reginald T. Blades, Jr.*, Assistant Director. Of counsel were *Reza Karamloo* and *Jesus Saenz*, Attorneys, Office of the Chief Counsel for Trade Enforcement & Compliance, U.S. Department of Commerce.

*Brooke M. Ringel*, *Paul C. Rosenthal*, *Kathleen W. Cannon*, *R. Alan Luberdia*, and *Joshua R. Morey*, Kelley Drye & Warren, LLP, of Washington, DC, for defendant-intervenors Insteel Wire Products Company et al.

### **OPINION AND ORDER**

#### **Kelly, Judge:**

Before the court is Plaintiff Celik Halat ve Tel Sanayi A.S.’s (“Celik” or “Plaintiff”) motion for a temporary restraining order (“TRO”) and preliminary injunction. *See* Pl.’s Mot. for [TRO] & Prelim. Injunction, Nov. 19, 2020, ECF No. 5 (“Pl.’s Mot.”). Defendant opposes Plaintiff’s motion. *See* Def.’s Resp. to Pl.’s Mots. for [TRO] & Prelim. Injunction, Dec. 4, 2020, ECF No. 17 (“Def.’s Resp.”). For the following reasons, Plaintiff’s motion is denied.

#### **BACKGROUND**

On May 6, 2020, the U.S. Department of Commerce (“Commerce”) initiated its antidumping duty (“ADD”) investigation of prestressed concrete steel wire (“PC Strand”) from the Republic of Turkey (“Turkey”). *See* Compl. at ¶ 3, Nov. 19, 2020, ECF No. 2 (“Compl.”); *see also* [PC Strand] from Argentina, Colombia, Egypt, Indonesia, Italy, Malaysia, the Netherlands, Saudi Arabia, South Africa, Spain, Taiwan,

*Tunisia, [Turkey], Ukraine, and the United Arab Emirates*, 85 Fed. Reg. 28,605, 28,610 (Dep't Commerce May 13, 2020) (initiation of less-than-fair value investigations). On June 18, 2020, Commerce selected Celik for individual examination. *See* Compl. at ¶ 4. The next day, Commerce issued to Celik an antidumping questionnaire and set forth a deadline of July 17, 2020 for Celik's Section A response; August 10, 2020 for its Sections B and Section C responses; and August 13, 2020 for its Section D responses. *See id.* at ¶ 5. Celik's questionnaire responses were to be uploaded electronically to Commerce's ACCESS website by 5:00 pm on the specified deadline for each section. *See id.*

Plaintiff states that it timely filed its Section A and Section D questionnaire responses, but, due to technical issues with Commerce's ACCESS website, untimely filed portions of their Section B and Section C responses. *See id.* at ¶¶ 7–17. Namely, with respect to its Section B response, Plaintiff untimely submitted a supplementary “Domestic Sales Table” at 5:21 pm, and with respect to its Section C response, Plaintiff untimely submitted Exhibits C8–11—which comprised a part of Celik's response—at 5:06 pm. *See id.* at ¶ 8. Since Plaintiff did not meet the 5:00 pm deadline on August 10, 2020, Commerce refused to accept Plaintiff's Sections B and C questionnaire responses. *See id.* at ¶¶ 18–22.<sup>1</sup> On September 30, 2020, Commerce issued a preliminary determination in which it found that Plaintiff did not cooperate with the investigation to the best of its ability, and thus Commerce used facts available with an adverse inference (“adverse facts available” or “AFA”)<sup>2</sup> to preliminarily assign Plaintiff a dumping margin of 53.65 percent. *See [PC Strand] from Argentina, Colombia, Egypt, Indonesia, Italy, Malaysia, the Netherlands, Saudi Arabia, South Africa, Spain, Taiwan, Tunisia, [Turkey]*,

<sup>1</sup> Plaintiff asserts that on August 19, 2020, Commerce notified Plaintiff by letter that it was rejecting Plaintiff's untimely filed Section B and Section C questionnaire responses, and Plaintiff subsequently submitted a request for Commerce to reconsider its refusal to accept the responses, stating that the technical issues it experienced constituted extraordinary circumstances. *See* Compl. at ¶¶ 18–19; *see also* 19 C.F.R. § 351.302 (2020) (allowing Commerce to consider late questionnaires if extraordinary circumstances led to the delay). Commerce denied this request, after which Plaintiff states that it requested, and attended a video conference with Commerce once again asking it to consider the questionnaire responses. *See* Compl. at ¶¶ 20–21. In addition, after the petitioner in the ADD and countervailing duty investigation wrote a letter to Commerce calling for the imposition of adverse facts available, Plaintiff states that it responded, and asked Commerce to accept its responses. *See id.* at ¶ 22.

<sup>2</sup> Parties and Commerce sometimes use the shorthand “AFA” or “adverse facts available” to refer to Commerce's reliance on facts otherwise available with an adverse inference to reach a final determination. AFA, however, encompasses a two-part inquiry established by statute. *See* 19 U.S.C. § 1677e(a)–(b). It first requires Commerce to identify information missing from the record, and second, to explain how a party failed to cooperate to the best of its ability as to warrant the use of an adverse inference when “selecting among the facts otherwise available.” *Id.*

*Ukraine, and the United Arab Emirates*, 85 Fed. Reg. 61,722 (Dep't Commerce Sept. 30, 2020) (prelim. affirmative determinations of sales at less than fair value & prelim. affirmative critical circumstances determinations, in part) ("*Prelim. Results*") and accompanying Decisions Memo. for the [*Prelim. Results*] at 7–9, A-489–842, (Sept. 23, 2020), available at <https://enforcement.trade.gov/frn/summary/turkey/2020-21546-2.pdf> (last visited Dec. 5, 2020); see also Section 776 of the Tariff Act of 1930, as amended, 19 U.S.C. § 1677e (2018).<sup>3</sup>

On November 19, 2020, Plaintiff Celik initiated this action pursuant to 28 U.S.C. § 1581(i) (2018)<sup>4</sup> by concurrently filing a summons and complaint. See Summons, Nov. 19, 2020, ECF No. 1; Compl. Plaintiff submits that Commerce's refusal to accept its Section B and Section C questionnaire responses were arbitrary, capricious, an abuse of discretion and not in accordance with law. See Compl. at ¶¶ 43–44, 48–49. In addition, since Commerce declined to accept the Sections B and Section C responses, Plaintiff claims that Commerce assigned it a "punitive" and inaccurate dumping margin of 53.65 percent that would cause Plaintiff irreparable harm, including the total and permanent loss of Plaintiff's U.S. market. See *id.* at ¶¶ 24–25, 46, 48–49.

Shortly thereafter, Celik moved for a TRO and a preliminary injunction requesting that the court enjoin Commerce from refusing to accept Plaintiff's untimely submitted Section B and Section C questionnaire responses. See Pl.'s Mot. Plaintiff also filed a motion to consolidate this case with Celik Halat ve Tel Sanayi A.S. v. United States, Ct. No. 20–03848, another action challenging Commerce's decision to reject Celik's untimely questionnaire responses in the ongoing countervailing duty investigation of PC Strand from Turkey. See Pl.'s Mot. to Consolidate Cases, Nov. 19, 2020, ECF No. 6; see also Compl., Nov. 19, 2020, ECF No. 2 (from Dkt. Ct. No. 20–03848).

On November 20, 2020, the court held a telephonic conference with counsel for both parties for purposes of establishing a briefing schedule for the motion for a TRO and a preliminary injunction. See Appearance Sheet, Nov. 20, 2020, ECF No. 10. During the telephone conference, Defendant indicated that the government would be filing a motion to dismiss the complaint for lack of subject matter jurisdiction. The court ordered a schedule providing for the Defendant to respond to Plaintiff's motion by December 4, 2020, and further pro-

<sup>3</sup> Further citations to the Tariff Act of 1930, as amended, are to the relevant provisions of Title 19 of the U.S. Code, 2018 edition.

<sup>4</sup> Further citations Title 28 of the U.S. Code are to the 2018 edition.

viding for briefing of the motion to dismiss. *See* Scheduling Order, Nov. 20, 2020, ECF No. 11. The court also stayed the motion to consolidate pending resolution of the motion to dismiss. *See id.* In accordance with the court's order, Defendant filed its response to the request for a TRO and a preliminary injunction on December 4, 2020. *See generally* Def.'s Resp.

Defendant opposes Plaintiff's motion, arguing that Plaintiff is unlikely to succeed on the merits because this Court lacks jurisdiction and there has been no final agency action. *See id.* at 7–12. Further, Defendant argues that Plaintiff has not shown that it will suffer irreparable harm absent the injunction, nor has it shown that the public interest and balance of harms weigh in its favor. *See id.* at 12–19

### STANDARD OF REVIEW

U.S. Court of International Trade (“USCIT”) Rule 65 permits the court to issue a preliminary injunction on notice to the adverse party. *See* USCIT R. 65(a). To obtain a preliminary injunction, Plaintiff must establish that (1) it is likely to succeed on the merits, (2) it is likely to suffer irreparable harm without a preliminary injunction, (3) the balance of the equities favors Plaintiff, and (4) the injunction is in the public interest. *See Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008); *Zenith Radio Corp. v. United States*, 710 F.2d 806, 809 (Fed. Cir. 1983) (“*Zenith Radio Corp.*”). In reviewing these factors, “no one factor, taken individually,” is dispositive. *Ugine & ALZ Belg. v. United States*, 452 F.3d 1289, 1292 (Fed. Cir. 2006) (citations omitted) (“*Ugine & ALZ Belg.*”); *FMC Corp. v. United States*, 3 F.3d 424, 427 (Fed. Cir. 1993). However, each factor need not be given equal weight. *See Ugine & ALZ Belg.*, 452 F.3d at 1293; *Nken v. Holder*, 556 U.S. 418, 434 (2009) (“*Nken*”). Likelihood of success on the merits and irreparable harm are generally considered the most significant factors in evaluating a motion for injunctive relief. *See Nken*, 556 U.S. at 434; *Amazon.com, Inc. v. Barnesandnoble.com, Inc.*, 239 F.3d 1343, 1350 (Fed. Cir. 2001).

### DISCUSSION

#### I. Likelihood of Success on the Merits

Plaintiff's likelihood of success on the merits depends upon whether: (a) the court has subject matter jurisdiction; (b) Plaintiff has challenged a final agency action ripe for review; and (c) Commerce abused its discretion in rejecting Plaintiff's questionnaire.

##### A. Subject Matter Jurisdiction

Defendant asserts that Plaintiff is unlikely to succeed on the merits because the court lacks subject matter jurisdiction over the com-

plaint, and has indicated that it intends to file a motion to dismiss.<sup>5</sup> The court concludes that it is likely that the court lacks subject matter jurisdiction over Plaintiff's claims.

The court cannot exercise jurisdiction under 28 U.S.C. § 1581(i) where another subsection "is or could have been available, unless the remedy provided under that other subsection would be manifestly inadequate." *Miller & Co. v. United States*, 824 F.2d 961, 963 (Fed. Cir. 1987). "While neither Congress nor the courts have provided a precise definition of the term 'manifestly inadequate,' given the clear Congressional preference expressed in [28 U.S.C. § 1581(i)] for review in accordance with [19 U.S.C. § 1516a], the Court must be careful not to interfere in ongoing proceedings absent a clear indication of the inadequacy of a [19 U.S.C. § 1581(c)] review." *Sahaviriya Steel Indus. Pub. Co. Ltd. v. United States*, 33 CIT 140, 151, 601 F. Supp. 2d 1355, 1365 (2009) (citations omitted) ("*Sahaviriya*"). Moreover, "[a] party may not expand a court's jurisdiction by creative pleading." *Sunpreme Inc. v. United States*, 892 F.3d 1186, 1193 (Fed. Cir. 2018) (quoting *Norsk Hydro Can., Inc. v. United States*, 472 F.3d 1347, 1355 (Fed. Cir. 2006)). Instead, the court must "look to the true nature of the action in the district court in determining jurisdiction of the appeal." *Id.* (citations omitted).

Recourse under 19 U.S.C. § 1581(c) is not manifestly inadequate when judicial review pursuant to subsection (c) provides the remedy Plaintiff seeks—namely, a remand order directing Commerce to reconsider or further explain its refusal to accept Plaintiff's submissions. That Plaintiff frames its request for relief in such a way as to urge disposition of this cause of action before publication of the final determination cannot serve as the basis for the court's exercise of jurisdiction in this instance.

As such, although styled as an action under 28 U.S.C. § 1581(i), it appears the "true nature" of Plaintiff's action arises under § 1581(c), see *Juancheng Kangtai Chem. Co. v. United States*, 932 F.3d 1321, 1326 (Fed. Cir. 2019), which, pursuant to 19 U.S.C. § 1516a, enables Plaintiff to seek judicial review of the final results of an ADD investigation. Indeed, what Plaintiff seeks by asking the court to require Commerce to accept its untimely submission is not a temporary relief, but essentially the ultimate relief in a case challenging Commerce's

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<sup>5</sup> Although Defendant has not yet filed its motion, the court must consider the "likelihood" that it has subject matter jurisdiction over this proceeding in order to analyze the likelihood that Plaintiff will succeed on the merits. The court discusses the "likelihood" that it has jurisdiction in this case, as opposed to conclusively determining whether or not it has jurisdiction, because the motion before the court is for a preliminary injunction and TRO, and not a motion to dismiss

final determination in an ADD investigation. *See, e.g., Cyber Power Systems (USA) Inc. v. United States*, 44 CIT \_\_, \_\_, Slip Op. 20–130 at 7–8 (Sept. 2, 2020) (“*Cyber Systems*”).

Plaintiff argues that the remedy under § 1581(c) is manifestly inadequate because the harm it alleges is a loss of its U.S. sales market owing to Commerce’s failure to accept its questionnaire response. *See* Pls.’ Mot. at 9–10. However, without more, harm attributable to a possible abuse of discretion within an investigation is insufficient to render the remedy afforded by 19 U.S.C. § 1581(c) “manifestly inadequate.” *See Sahaviriya*, 33 CIT at 155, 601 F. Supp. 2d at 1368–69 (citations omitted) (finding the harm attributable to a potentially unauthorized antidumping proceeding insufficient to show that relief pursuant to 28 U.S.C. § 1581(c) is manifestly inadequate). The harm alleged by Plaintiff is incidental to participation in an antidumping investigation and is likely insufficient to surmount well-established principles requiring that this court strictly enforce the statutory and administrative requirements for bringing a cause of action under § 1581(c). As such, it is unlikely that this court has subject matter jurisdiction over Plaintiff’s complaint.

### **B. Final Agency Action**

Defendant argues that Celik is unlikely to succeed on the merits because its claim is not ripe. *See* Def.’s Resp. at 9–12. “Ripeness is a justiciability doctrine designed ‘to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties.’” *Nat’l Park Hospitality Ass’n v. U.S. Dep’t of Interior*, 538 U.S. 803, 807–08 (2003).

Even if Plaintiff’s complaint were properly before the court pursuant to 28 U.S.C. § 1581(i), it is unlikely that there is a viable cause of action because Commerce has not yet issued its final determination. It is possible that Commerce may reconsider challenged aspects of its preliminary determination, thus, involving the court at this juncture risks undue entanglement with the administrative process on the basis of contingent future events. *See, e.g., Thomas v. Union Carbide Agric. Prods. Co.*, 473 U.S. 568, 580–81 (1985). As such, the court concludes that ripeness concerns would weigh against Plaintiff’s likelihood of succeeding on the merits.

### **C. Abuse of Discretion**

Under 19 C.F.R. § 351.302, Commerce may reject untimely filed factual submissions. *See* 19 C.F.R. § 351.302. Commerce has

discretion to set and enforce its own deadlines to ensure finality, and the court reviews Commerce's decision to reject Celik's submission for abuse of that discretion. See *Bosun Tools Co. v. United States*, 43 CIT \_\_, \_\_, 405 F. Supp. 3d 1359, 1365–66 (2019) (citing *Grobest & I-Mei Industrial (Vietnam) Co. v. United States*, 36 CIT 98, 122–23, 815 F. Supp. 2d 1342, 1365–66 (2012) (“*Grobest*”); *NTN Bearing Corp. v. United States*, 74 F.3d 1204, 1207 (Fed. Cir. 1995) (“*NTN Bearing Corp.*”). Commerce abuses its discretion when it rejects information that would not be burdensome to incorporate and which would increase the accuracy of the calculated dumping margins. See *Grobest*, 36 CIT at 122–23, 815 F. Supp. 2d at 1365–66; see also *NTN Bearing Corp.*, 74 F.3d at 1207–08 (holding that Commerce abused its discretion where its decision not to use a “straightforward mathematical adjustment” to correct for certain clerical errors led to “the imposition of many millions of dollars in duties not justified under the statute.”). Moreover, the court may review Commerce's decision to ensure that it is not “treating similar situations in dissimilar ways.” *Nakornthai Strip Mill Public Co. v. United States*, 32 CIT 1272, 1276, 587 F. Supp. 2d 1303, 1307 (2008) (citations omitted).

Plaintiff submits that Commerce abused its discretion in rejecting its questionnaire responses because Commerce has granted extensions for reasons less severe than the circumstances surrounding the alleged 21-minute delay that gives rise to this action. See Pl.'s Mot. at 18–20. Plaintiff's allegations raise serious concerns regarding Commerce's justification for rejecting Plaintiff's requests for reconsideration; however, these concerns are insufficient to establish that the Plaintiff is likely to succeed in light of the jurisdictional and ripeness concerns.

## II. Irreparable Harm

Plaintiff alleges that, without the requested relief, it will suffer irreparable financial and reputational harm and will lose its business in the United States. See Pl.'s Mot. at 12–14. Defendant contends that it is unclear that Plaintiff's requested relief would alleviate any of the alleged harms, and further submits that Plaintiff's allegations of financial harm are not actual and imminent, but rather, speculative. See Def.'s Resp. at 12–17. Plaintiff fails to demonstrate that imminent, irreparable harm would occur if its motion is denied.

A finding of irreparable harm requires that a Plaintiff demonstrate “a viable threat of serious harm which cannot be undone.” *Zenith Radio Corp.*, 710 F.2d at 809 (citations omitted). Generally, an allegation of financial loss alone, however substantial, which is compensable with monetary damages, is not irreparable harm if such

corrective relief will be available at a later date. *See Sampson v. Murray*, 415 U.S. 61, 90 (1974) (“*Sampson*”). As such, “[t]he possibility that adequate compensatory or other corrective relief will be available at a later date, in the ordinary course of litigation, weighs heavily against a claim of irreparable harm.” *Id.* Nevertheless, irreparable harm may take the form of “[p]rice erosion, loss of goodwill, damage to reputation, and loss of business opportunities.” *Celsis In Vitro, Inc. v. CellzDirect, Inc.*, 664 F.3d 922, 930 (Fed. Cir. 2012). Substantial loss of business is irreparable harm because, in addition to the obvious economic injury, loss of business renders a final judgment ineffective, depriving the movant of meaningful judicial review. *See Doran v. Salem Inn, Inc.*, 422 U.S. 922, 932 (1975).

Plaintiff offers an affidavit from its Chief Executive Officer, Serdar Seylam, as support for its claim that the failure to obtain the relief it seeks will cause it irreparable harm. *See* Pl.’s Mot. at Ex. J. The affidavit states that Celik will lose its U.S. customer base, which is a significant portion of its business—the loss of which will impact the employment of its work force, its shareholders, and its future prospects in the U.S. market. *See generally id.* Plaintiff claims that its customers have already communicated that they could not continue doing business with Plaintiff’s U.S. PC Strand business if the preliminary rates that Commerce assigned “are confirmed in the final determination.” *See* Pl.’s Mot. at Ex. J, ¶¶ 11–12. Plaintiff also states that its U.S. customer has already started looking for an alternate supplier of PC Strand.<sup>6</sup> *See* Pl.’s Mot. at Ex. J, ¶ 17. Plaintiff provides no information concerning other markets or customers.<sup>7</sup> Plaintiff further alleges that if this court does not grant its motion, it will suffer financial losses in the amount of \$96,000 per month. *See* Pl.’s Mot. at Ex. J, ¶ 15. However, Plaintiff makes these allegations without citing to any evidence of its assets and whether or not they are sufficient to cover the costs. Plaintiff merely states that “[t]he losses will adversely affect our shareholders, employees and their families.” *See* Pl.’s Mot. at Ex. J, ¶ 15. Plaintiff offers no evidence that speaks to the question of whether the alleged harm is unavoidable or irreparable. Moreover, although financial losses and loss of business opportunities can constitute irreparable harm, the losses generally must be more severe than shown here and be “imminent and unavoidable.”

<sup>6</sup> Defendant also avers that Plaintiff’s two months delay in seeking relief undermines its claim of imminent harm. *See* Def.’s Resp. at 13. Plaintiff does not explain its delay in its motion, nor is the basis for the delay obvious to the court.

<sup>7</sup> Plaintiff states that it is “at immediate risk of losing its entire U.S. export market, which is its primary market and represents nearly half of its total exports by value.” *See* Pl.’s Mot. at 13. However, Plaintiff does not offer any evidence to support this statement, nor does it offer any evidence concerning the portion of its business that is dependent on exports, generally speaking.

*Harmoni Int'l Spice, Inc. v. United States*, 41 CIT \_\_, \_\_, 211 F. Supp. 3d 1298, 1308–09 (2017) (“*Harmoni*”). Plaintiff’s largely unsubstantiated allegations about potential harm to its business do not rise to this level of severity.

Additionally, although it argues that it would be unable to afford the bonds necessary to proceed with the normal administrative and judicial routes to challenge Commerce’s determination, *see* Pl.’s Mot. at Ex. J, ¶ 13, Plaintiff offers no support for the position that it could not secure the capital to fund those bonds from other sources. *See Harmoni*, 41 CIT at \_\_, 211 F. Supp. 3d at 1308 (denying a preliminary injunction where Plaintiff offered no proof that it had exhausted other avenues to secure capital). Although the need to seek out new markets or resort to alternative sources of capital may cause an adverse economic impact, the standard for irreparable harm requires more than an adverse economic impact. *See Corus Grp. PLC v. Bush*, 26 CIT 937, 944, 217 F. Supp. 2d 1347, 1355 (2002), *aff’d in part sub nom. Corus Grp. PLC v. Int’l Trade Comm’n.*, 352 F.3d 1351 (Fed. Cir. 2003).

Finally, according to Plaintiff, it has already suffered harm to its reputation in the U.S. *See* Pl.’s Mot. at Ex. J, ¶ 16. Although Plaintiff states this harm will be irreparable absent a grant of its requested relief, *see id.*, it has done little more than make this broad-based allegation. Beyond Mr. Seylam’s affidavit, Plaintiff offers no evidence that Plaintiff’s reputation has been harmed to date, let alone that it will be irreparably harmed going forward.

### III. Balance of Harms

Plaintiff contends the balance of harms weighs in its favor as it will suffer the loss of its U.S. sales market if the injunction does not issue. *See* Pl.’s Mot. at 20–21. When considering a motion for a preliminary injunction, the court must “balance the competing claims of injury and must consider the effect” that granting or denying relief would have on each party. *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 24 (2008) (“*Winter*”). The loss of a significant market may be a significant harm, but the harm caused by piecemeal appellate review of Commerce’s procedural determinations is also significant.

Balancing the hardship also requires the court to balance the equities. *See Winter*, 555 U.S. at 20. Here, Plaintiff admits that it did not begin to attempt to upload its Sections B and C questionnaire responses until 4:10 pm, less than an hour before the deadline. *See* Compl. at ¶ 9. Moreover, Plaintiff said that when it first received an error message regarding the Domestic Sales Table from the Section B

questionnaire, it decided not to call the ACCESS help desk. *See* Compl. at ¶ 10. Plaintiff could have not only accounted for system errors in advance, but also could have attempted to rectify the error with the help of known resources, but it chose not to. Interrupting the administrative process and resorting to the judicial process is not a costless endeavor. There are potential costs to the government as well as the domestic industry should it be entitled to relief as a result of the investigation. For the reasons given, and in light of the would-be harm to the government and the domestic injury, the balance of equities cannot favor Plaintiff whose alleged harms were avoidable.

#### IV. Public Interest

Plaintiff requests that this court force Commerce to accept its responses to Sections B and C of the ADD questionnaire, thus asking the court to grant it the ultimate relief it seeks. Where a plaintiff requests the “permanent, ultimate relief,” the public interest may “discourage[] issuance of a preliminary injunction.” *See* *Cyber Systems*, 44 CIT at \_\_, Slip Op. 20–130 at 7–8. A preliminary injunction that asks for the permanent, ultimate relief disrupts the status quo and harms the public interest where a hearing on the merits later reveals that the facts of the case demand a contrary conclusion to that provisionally reached in granting the preliminary injunction. *See id.* The public interest is served by the review of Commerce’s procedural determinations upon the review of its final determination. *See PPG Indus., Inc. v. United States*, 2 CIT 110, 112–13, 525 F. Supp. 883, 885 (1981) (discussing the Customs Court Act of 1980).

#### CONCLUSION

For the foregoing reasons it is

**ORDERED** that Plaintiff’s motion for a TRO and a preliminary injunction are denied.

Dated: December 6, 2020

New York, New York

*/s/ Claire R. Kelly*  
CLAIRE R. KELLY, JUDGE

Slip Op. 20–176

CELIK HALAT VE TEL SANAYI A.S., Plaintiff, v. UNITED STATES, Defendant, and INSTEEL WIRE PRODUCTS COMPANY et al., Defendant-Intervenors.

Before: Claire R. Kelly, Judge  
Court No. 20–03848

[Denying plaintiff's motion for a temporary restraining order and preliminary injunction.]

Dated: December 6, 2020

*Irene H. Chen*, Chen Law Group, LLC, of Rockville, MD, for plaintiff.

*Tara K. Hogan*, Assistant Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC, for defendant. Also on the brief was *Jeffrey Bossert Clark*, Acting Assistant Attorney General, *Jeanne E. Davidson*, Director, and *Reginald T. Blades, Jr.*, Assistant Director. Of counsel were *Reza Karamloo* and *Jesus Saenz*, Attorneys, Office of the Chief Counsel for Trade Enforcement & Compliance, U.S. Department of Commerce.

*Brooke M. Ringel*, *Paul C. Rosenthal*, *Kathleen W. Cannon*, *R. Alan Luberd*, and *Joshua R. Morey*, Kelley Drye & Warren, LLP, of Washington, DC, for defendant-intervenors Insteel Wire Products Company et al.

## **OPINION AND ORDER**

### **Kelly, Judge:**

Before the court is Plaintiff Celik Halat ve Tel Sanayi A.S.'s ("Celik" or "Plaintiff") motion for a temporary restraining order ("TRO") and preliminary injunction. *See* Pl.'s Mot. for [TRO] & Prelim. Injunction Confidential Version, Nov. 19, 2020, ECF No. 15 ("Pl.'s Mot."). Defendant opposes Plaintiff's motion. *See* Def.'s Resp. to Pl.'s Mot. for [TRO] & Prelim. Injunction, Dec. 4, 2020, ECF No. 20 ("Def.'s Resp."). For the following reasons, Plaintiff's motion is denied.

### **BACKGROUND**

On May 6, 2020, the U.S. Department of Commerce ("Commerce") initiated its countervailing duty ("CVD") investigation of prestressed concrete steel wire ("PC Strand") from the Republic of Turkey ("Turkey"). *See* Compl. at ¶ 2, Nov. 19, 2020, ECF No. 2 ("Compl."); *see also* [PC Strand] from [Turkey], 85 Fed. Reg. 28,610, 28,612 (Dep't Commerce May 13, 2020) (initiation of [CVD] investigation). On June 25, 2020, Commerce selected Celik for individual examination. *See* Compl. at ¶ 3. That same day, Commerce issued a revised initial CVD questionnaire to the Turkish government and set a deadline of August 10, 2020 at 5:00 pm Eastern Daylight Time for filing the final business proprietary information ("BPI") and the public CVD questionnaire response. *See id.* at ¶¶ 3, 9.

Plaintiff states that on or about August 4, 2020, due in part to a medical situation of counsel, it filed a request for a one-week extension of the August 7, 2020 deadline to file its response to Section III of Commerce's CVD questionnaire, which Commerce declined. *See id.* at ¶ 7. On August 7, 2020, Plaintiff timely filed its BPI response. *See id.* at ¶ 8. However, on August 10, 2020, purportedly due to counsel's medical situation, Plaintiff overlooked the two-hour time difference

between Mountain Daylight Time and Eastern Daylight Time when timing its submission, and submitted its response at 4:27 pm MDT (6:27 pm EDT) instead of 4:27 pm EDT. *See id.* at ¶¶ 10, 12.<sup>1</sup>

On August 20, 2020, after learning that its CVD response was untimely submitted and rejected, Plaintiff requested reconsideration of Commerce's rejection. *See id.* at ¶¶ 11–14. Commerce declined and continued to reject Plaintiff's August 7, 2020 and August 10, 2020 filings of the BPI and public versions of its questionnaire responses. *See id.* at ¶¶ 15–16. In the concurrent antidumping duty (“ADD”) investigation, Celik's counsel requested a meeting with Commerce to discuss its denial of the questionnaire responses in both the ADD and the CVD proceedings. *See Pl.'s Mot.* at 3. On September 4, 2020, Celik's counsel met with Commerce to discuss its denial of the responses. *See id.* at 3–4.

For its preliminary determination, Commerce applied adverse facts available with an adverse inference (“AFA”) after finding that Celik significantly impeded its investigation, and assigned a CVD subsidy and cash deposit rate of 135.06 percent.<sup>2</sup> *See [PC Strand] from [Turkey]*, 85 Fed. Reg. 59,287, 59,288 (Dep't Commerce Sept. 21, 2020) (prelim. affirmative [CVD] determination, prelim. affirmative critical circumstances determination, in part) (“*Prelim. Results*”) and accompanying Decision Memo. for the [*Prelim. Results*] at 9, C-489–843, (Sept. 14, 2020) available at <https://enforcement.trade.gov/frn/summary/turkey/2020–20692–1.pdf> (last visited Dec. 5, 2020). Moreover, Commerce determined that critical circumstances existed with respect to Celik's imports of subject merchandise, and, pursuant to section 703 and 733 of the Tariff Act of 1930, as amended 19 U.S.C. §§ 1671b(e)(2) and 1673b(e)(2) (2018),<sup>3</sup> Commerce retroactively suspended liquidation of Celik's entries. *See Prelim Results*, 85 Fed. Reg. at 59,288.

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<sup>1</sup> It appears that there is a typographical error in Plaintiff's complaint, and the court presumes that Plaintiff intended to state that, in filing its submission at 4:27 pm MDT, it overlooked the time difference between MDT and EDT. What Plaintiff actually states is that “the filing was actually submitted at 6:27 PM MDT, not 4:27PM EDT[.]” Compl. at ¶ 12. If this were true, then Plaintiff's filing was not submitted until 8:27pm EDT.

<sup>2</sup> Parties and Commerce sometimes use the shorthand “AFA” or “adverse facts available” to refer to Commerce's reliance on facts otherwise available with an adverse inference to reach a final determination. AFA, however, encompasses a two-part inquiry established by statute. *See* 19 U.S.C. § 1677e(a)–(b). It first requires Commerce to identify information missing from the record, and second, to explain how a party failed to cooperate to the best of its ability as to warrant the use of an adverse inference when “selecting among the facts otherwise available.” *Id.*

<sup>3</sup> Further citations to the Tariff Act of 1930, as amended, are to the relevant provisions of Title 19 of the U.S. Code, 2018 edition.

On November 19, 2020, Plaintiff Celik initiated this action pursuant to 28 U.S.C. § 1581(i) (2018)<sup>4</sup> by concurrently filing a summons and complaint. *See* Summons, Nov. 19, 2020, ECF No. 1; Compl. Shortly thereafter, Celik moved for a TRO and a preliminary injunction to enjoin Commerce from continuing to reject its untimely submitted questionnaire responses in the ongoing CVD investigation of certain PC Strand from Turkey. *See generally* Pl.’s Mot.; *see also Prelim. Results*. Plaintiff also filed a motion to consolidate this case with Celik Halat ve Tel Sanayi A.S. v. United States, Ct. No. 20–03843, an action challenging Commerce’s decision to reject Celik’s untimely questionnaire responses in the ongoing ADD investigation of PC Strand from Turkey. *See* Pl.’s Mot. to Consolidate Cases, Nov. 19, 2020, ECF No. 6; *see also* Compl., Nov. 19, 2020, ECF No. 2 (from Dkt. No. 20–03843).

On November 20, 2020, the court held a telephonic conference with counsel for both parties for the purpose of establishing a briefing schedule for the motion for a TRO and a preliminary injunction. *See* Appearance Sheet, Nov. 20, 2020, ECF No. 10. During the telephone conference, Defendant indicated that the government would be filing a motion to dismiss the complaint for lack of subject matter jurisdiction. The court ordered a schedule providing for the Defendant to respond to Plaintiff’s motion by December 4, 2020, and further providing for briefing of the motion to dismiss. *See Scheduling Order*, Nov. 20, 2020, ECF No. 11. The court also stayed the motion to consolidate pending resolution of the motion to dismiss. *See id.* In accordance with the court’s order, Defendant filed its response to Plaintiff’s request for a TRO and a preliminary injunction on December 4, 2020. *See generally* Def.’s Resp.

Defendant opposes Plaintiff’s motion, arguing that Plaintiff is unlikely to succeed on the merits because this Court lacks jurisdiction and there has been no final agency action. *See id.* at 7–12. Further, Defendant argues that Plaintiff has not shown that it will suffer irreparable harm absent the injunction, nor has it shown that the public interest and balance of harms weigh in its favor. *See id.* at 12–19.

## STANDARD OF REVIEW

U.S. Court of International Trade (“USCIT”) Rule 65 permits the court to issue a preliminary injunction on notice to the adverse party. *See* USCIT R. 65(a). To obtain a preliminary injunction, Plaintiff must establish that (1) it is likely to succeed on the merits, (2) it is likely to

<sup>4</sup> Further citations Title 28 of the U.S. Code are to the 2018 edition.

suffer irreparable harm without a preliminary injunction, (3) the balance of the equities favors Plaintiff, and (4) the injunction is in the public interest. See *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7 (2008); *Zenith Radio Corp. v. United States*, 710 F.2d 806, 809 (Fed. Cir. 1983) (“*Zenith Radio Corp.*”). In reviewing these factors, “no one factor, taken individually,” is dispositive. *Ugine & ALZ Belg. v. United States*, 452 F.3d 1289, 1292 (Fed. Cir. 2006) (citations omitted) (“*Ugine & ALZ Belg.*”); *FMC Corp. v. United States*, 3 F.3d 424, 427 (Fed. Cir. 1993). However, each factor need not be given equal weight. See *Ugine & ALZ Belg.*, 452 F.3d at 1293; *Nken v. Holder*, 556 U.S. 418, 434 (2009) (“*Nken*”). Likelihood of success on the merits and irreparable harm are generally considered the most significant factors in evaluating a motion for injunctive relief. See *Nken*, 556 U.S. at 434; *Amazon.com, Inc. v. Barnesandnoble.com, Inc.*, 239 F.3d 1343, 1350 (Fed. Cir. 2001).

## DISCUSSION

### I. Likelihood of Success on the Merits

Plaintiff’s likelihood of success on the merits depends upon whether: (a) the court has subject matter jurisdiction; (b) Plaintiff has challenged a reviewable final agency action ripe for review; and (c) Commerce abused its discretion in rejecting Plaintiff’s questionnaire.

#### A. Subject Matter Jurisdiction

Defendant asserts that Plaintiff is unlikely to succeed on the merits because the court lacks subject matter jurisdiction over the complaint, and has indicated that it intends to file a motion to dismiss.<sup>5</sup> The court concludes that it is likely that the court lacks subject matter jurisdiction over Plaintiff’s claims.

The court cannot exercise jurisdiction under 28 U.S.C. § 1581(i) where another subsection “is or could have been available, unless the remedy provided under that other subsection would be manifestly inadequate.” *Miller & Co. v. United States*, 824 F.2d 961, 963 (Fed. Cir. 1987). “While neither Congress nor the courts have provided a precise definition of the term ‘manifestly inadequate,’ given the clear Congressional preference expressed in [28 U.S.C. § 1581(i)] for review

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<sup>5</sup> Although Defendant has not yet filed its motion, the court must consider the “likelihood” that it has subject matter jurisdiction over this proceeding in order to analyze the likelihood that Plaintiff will succeed on the merits. The court discusses the “likelihood” that it has jurisdiction in this case, as opposed to conclusively determining whether or not it has jurisdiction, because the motion before the court is for a preliminary injunction and TRO, and not a motion to dismiss.

in accordance with [19 U.S.C. § 1516a], the Court must be careful not to interfere in ongoing proceedings absent a clear indication of the inadequacy of a [19 U.S.C. § 1581(c)] review.” *Sahaviriya Steel Industries Public Co. Ltd. v. United States*, 33 CIT 140, 151, 601 F. Supp. 2d 1355, 1365 (2009) (citations omitted) (“*Sahaviriya*”). Moreover, “[a] party may not expand a court’s jurisdiction by creative pleading.” *Sunpreme Inc. v. United States*, 892 F.3d 1186, 1193 (Fed. Cir. 2018) (quoting *Norsk Hydro Can., Inc. v. United States*, 472 F.3d 1347, 1355 (Fed. Cir. 2006)). Instead, the court must “look to the true nature of the action in the district court in determining jurisdiction of the appeal.” *Id.* (citations omitted).

Recourse under 19 U.S.C. § 1581(c) is not manifestly inadequate when judicial review pursuant to subsection (c) provides the remedy Plaintiff seeks—namely, a remand order directing Commerce to reconsider or further explain its refusal to accept Plaintiff’s submissions. That Plaintiff frames its request for relief in such a way as to urge disposition of this cause of action before publication of the final determination cannot serve as the basis for the court’s exercise of jurisdiction in this instance.

As such, although styled as an action under 28 U.S.C. § 1581(i), it appears the “true nature” of Plaintiff’s claim arises under § 1581(c), see *Juancheng Kangtai Chem. Co. v. United States*, 932 F.3d 1321, 1326 (Fed. Cir. 2019), which, pursuant to 19 U.S.C. § 1516a, enables Plaintiff to seek judicial review of the final results of a CVD investigation. Indeed, what Plaintiff seeks by asking the court to require Commerce to accept its submissions is not a temporary relief, but essentially the ultimate relief in a case challenging Commerce’s final determination in a CVD investigation. See, e.g., *Cyber Power Systems (USA) Inc. v. United States*, 44 CIT \_\_, \_\_, Slip Op. 20–130 at 7–8 (Sept. 2, 2020) (“*Cyber Systems*”).

Plaintiff argues that the remedy under § 1581(c) is manifestly inadequate because the harm it alleges is a loss of its U.S. sales market owing to Commerce’s failure to accept its questionnaire response. See Pls.’ Mot. at 7–9. However, without more, harm attributable to a possible abuse of discretion within an investigation is insufficient to render the remedy afforded by 19 U.S.C. § 1581(c) “manifestly inadequate.” See *Sahaviriya*, 33 CIT at 155, 601 F. Supp. 2d at 1368–69 (citations omitted) (finding the harm attributable to a potentially unauthorized ADD proceeding insufficient to show that relief pursuant to 28 U.S.C. § 1581(c) is manifestly inadequate). The harm alleged by Plaintiff is incidental to participation in a CVD investigation, and is likely insufficient to surmount well-established principles requiring that this court strictly enforce the statutory and

administrative requirements for bringing a cause of action under § 1581(c). As such, it is unlikely that this court has subject matter jurisdiction over Plaintiff's complaint.

### **B. Final Agency Action**

Defendant argues that Celik is unlikely to succeed on the merits because its claim is not ripe. *See* Def.'s Resp. at 9–12. “Ripeness is a justiciability doctrine designed ‘to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties.’” *Nat’l Park Hospitality Ass’n v. U.S. Dep’t of Interior*, 538 U.S. 803, 807–08 (2003).

Even if Plaintiff's complaint were properly before the court under 28 U.S.C. § 1581(i), it is unlikely that there is a viable cause of action because Commerce has not yet issued its final determination. It is possible that Commerce may reconsider challenged aspects of its preliminary determination, thus, involving the court at this juncture risks undue entanglement with the administrative process on the basis of contingent future events. *See, e.g., Thomas v. Union Carbide Agric. Prods. Co.*, 473 U.S. 568, 580–81 (1985). As such, the court concludes that ripeness concerns weigh against Plaintiff's likelihood of succeeding on the merits.

### **C. Abuse of Discretion**

Under 19 C.F.R. § 351.302, Commerce may reject untimely filed factual submissions. *See* 19 C.F.R. § 351.302. Commerce has the discretion to set and enforce its own deadlines to ensure finality, and the court reviews Commerce's decision to reject Celik's submissions for abuse of that discretion. *See Bosun Tools Co. v. United States*, 43 CIT \_\_, \_\_, 405 F. Supp. 3d 1359, 1365–66 (2019) (citing *Grobest & I-Mei Industrial (Vietnam) Co. v. United States*, 36 CIT 98, 122–23, 815 F. Supp. 2d 1342, 1365–67 (2012) (“*Grobest*”); *NTN Bearing Corp. v. United States*, 74 F.3d 1204, 1207–08 (Fed. Cir. 1995) (“*NTN Bearing Corp.*”). Commerce abuses its discretion when it rejects information that would not be burdensome to incorporate and which would increase the accuracy of the calculated subsidy rate. *See Grobest*, 36 CIT at 122–23, 815 F. Supp. 2d at 1365–66; *see also NTN Bearing Corp.*, 74 F.3d at 1207–08 (holding that Commerce abused its discretion where its decision not to use a “straightforward mathematical adjustment” to correct for certain clerical errors led to “the imposition of many millions of dollars in duties not justified under the statute.”). Moreover, the court may review Commerce's decision to ensure that it

is not “treating similar situations in dissimilar ways.” *Nakornthai Strip Mill Public Co. v. United States*, 32 CIT 1272, 1276, 587 F. Supp. 2d 1303, 1307 (2008) (citations omitted).

Plaintiff submits that Commerce abused its discretion in rejecting its questionnaire responses because Commerce has granted extensions for reasons less severe than the circumstances surrounding the alleged 87-minute delay that gives rise to this action. *See* Pl.’s Mot. at 16–18. Plaintiff’s allegations raise serious concerns regarding Commerce’s justification for rejecting Plaintiff’s requests for reconsideration; however, these concerns are insufficient to establish that Plaintiff is likely to succeed in light of the jurisdictional and ripeness concerns.

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Plaintiff alleges that without the requested relief it will suffer irreparable financial and reputational harm and will lose its business in the United States. *See* Pl.’s Mot. at 10–12. Defendant contends that it is unclear that Plaintiff’s requested relief would alleviate any of the alleged harms, and further submits that Plaintiff’s allegations of financial harm are not actual and imminent, but rather, speculative. *See* Def.’s Resp. at 12–17. Plaintiff fails to demonstrate that imminent, irreparable harm would occur if its motion is denied.

A finding of irreparable harm requires that a Plaintiff demonstrate “a viable threat of serious harm which cannot be undone.” *Zenith Radio Corp.*, 710 F.2d at 809 (citations omitted). Generally, an allegation of financial loss alone, however substantial, which is compensable with monetary damages, is not irreparable harm if such corrective relief will be available at a later date. *See Sampson v. Murray*, 415 U.S. 61, 90 (1974) (“*Sampson*”). As such, “[t]he possibility that adequate compensatory or other corrective relief will be available at a later date, in the ordinary course of litigation, weighs heavily against a claim of irreparable harm.” *Id.* Nevertheless, irreparable harm may take the form of “[p]rice erosion, loss of goodwill, damage to reputation, and loss of business opportunities.” *Celsis In Vitro, Inc. v. CellzDirect, Inc.*, 664 F.3d 922, 930 (Fed. Cir. 2012). Substantial loss of business is irreparable harm because, in addition to the obvious economic injury, loss of business renders a final judgment ineffective, depriving the movant of meaningful judicial review. *See Doran v. Salem Inn, Inc.*, 422 U.S. 922, 932 (1975).

Plaintiff offers the affidavit from its Chief Executive Officer, Serdar Seylam, to support its claim that the failure to obtain the relief it seeks will cause it irreparable harm. *See* Pl.’s Mot. at Ex. H. The affidavit states that Celik will lose its U.S. customer base, which is a

significant portion of its business—the loss of which will affect the employment of its work force, its shareholders, and its future prospects in the U.S. market. *See generally id.* Plaintiff claims that its customers have already communicated that they could not continue doing business with Plaintiff’s U.S. PC Strand business if the preliminary rates that Commerce assigned “are confirmed in the final determination.” *See* Pl.’s Mot. at Ex. H, ¶¶ 11–12. Plaintiff also states that its U.S. customer has already started looking for an alternate supplier of PC Strand.<sup>6</sup> *See* Pl.’s Mot. at Ex. H, ¶ 17. Plaintiff provides no other information concerning other markets or customers.<sup>7</sup> Plaintiff further alleges that if this court does not grant its motion, it will suffer financial losses in the amount of \$96,000 per month. *See* Pl.’s Mot. at Ex. H, ¶ 15. However, Plaintiff makes these allegations without citing to any evidence of its assets and whether or not they are sufficient to cover the costs. Plaintiff merely states that “[t]he losses will adversely affect our shareholders, employees and their families.” *See* Pl.’s Mot. at Ex. H, ¶ 15. Plaintiff offers no evidence that speaks to the question of whether the alleged harm is unavoidable or irreparable. Moreover, although financial losses and loss of business opportunities can constitute irreparable harm, the losses generally must be more severe than shown here and be “imminent and unavoidable.” *Harmoni Int’l Spice, Inc. v. United States*, 41 CIT \_\_, \_\_, 211 F. Supp 3d 1298, 1308–09 (Ct. Int’l Trade 2017) (“*Harmoni*”). Plaintiff’s largely unsubstantiated allegations about potential harm to its business do not rise to this level of severity.

Additionally, although it argues that it would be unable to afford the bonds necessary to proceed with the normal administrative and judicial routes to challenge Commerce’s determination, *see* Pl.’s Mot. at Ex. H, ¶ 13, Plaintiff offers no support for the position that it could not secure the capital to fund those bonds from other sources. *See Harmoni*, 41 CIT at \_\_, 211 F. Supp. 3d at 1308 (denying a preliminary injunction where Plaintiff offered no proof that it had exhausted other avenues to secure capital). Although the need to seek out new markets or resort to alternative sources of capital might cause an adverse economic impact, the standard for irreparable harm requires more than an adverse economic impact. *See Corus Grp. PLC v. Bush*,

<sup>6</sup> Defendant also avers that Plaintiff’s two months delay in seeking relief undermines its claim of imminent harm. *See* Def.’s Resp. at 13. Plaintiff did not explain its delay in its motion, nor is the basis for the delay obvious to the court.

<sup>7</sup> Plaintiff claims that without the requested relief, it “is facing the loss of its entire U.S. market of PC Strand, which accounts for 70 percent of Celik Halat’s total exports in 2019.” Compl., ¶ 19. However, Plaintiff does not offer any evidence to support this statement, nor does it offer any evidence concerning the portion of its business that is dependent on exports, generally speaking.

26 CIT 937, 944 (2002), *aff'd in part sub nom. Corus Grp. PLC. v. Int'l Trade Comm'n.*, 352 F.3d 1351 (Fed. Cir. 2003).

Finally, according to Plaintiff, it has already suffered harm to its reputation in the U.S. *See* Pl.'s Mot. at Ex. H, ¶ 16. Although Plaintiff states this harm will be irreparable absent a grant of its requested relief, *see, id.*, it has done little more than make this broad-based allegation. Beyond Mr. Seylam's affidavit, Plaintiff offers no evidence that Plaintiff's reputation has been harmed to date, let alone that it will be irreparably harmed going forward.

### III. Balance of Harms

Plaintiff contends that the balance of harms weighs in its favor as it will suffer the loss of its U.S. sales market if the injunction does not issue. *See* Pl.'s Mot. at 18–19. When considering a motion for a preliminary injunction, the court must “balance the competing claims of injury and must consider the effect” that granting or denying relief would have on each party. *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 24 (2008) (“*Winter*”). The loss of a significant market may be a significant harm, but the harm caused by piecemeal appellate review of Commerce's procedural determinations is also significant. Interrupting the administrative process and resorting to the judicial process is not a costless endeavor. There are potential costs to the government as well as the domestic industry should it be entitled to relief as a result of the investigation.

Balancing the hardship also requires the court to balance the equities. *See Winter*, 555 U.S. at 20. Here, although Plaintiff's counsel took some precaution by setting multiple alarms to wake up for the submission, counsel failed to consider time zone differences. *See* Pl.'s Mot. at 39. For the reasons given, and in light of the would-be harm to the government and the domestic injury, the balance of equities cannot favor Plaintiff whose alleged harms were avoidable.

### IV. Public Interest

Plaintiff requests that this court force Commerce to accept its responses to Sections B and C of the CVD questionnaire, thus asking the court to grant it the ultimate relief it seeks. Where a plaintiff requests the “permanent, ultimate relief,” the public interest may “discourage[] issuance of a preliminary injunction.” *See Cyber Systems*, 44 CIT \_\_, Slip Op. 20–130 at 7–8. A preliminary injunction that asks for the permanent, ultimate relief disrupts the status quo and harms the public interest where a hearing on the merits later reveals that the facts of the case demand a contrary conclusion to that provisionally reached in granting the preliminary injunction. *See id.* The public interest is served by the review of Commerce's procedural

determinations upon the review of its final determination. *See PPG Indus., Inc. v. United States*, 2 CIT 110, 112–13, 525 F. Supp. 883, 885 (1981) (discussing the Customs Court Act of 1980).

### CONCLUSION

For the foregoing reasons it is

**ORDERED** that Plaintiff’s motion for a TRO and a preliminary injunction are denied.

Dated: December 6, 2020

New York, New York

*/s/ Claire R. Kelly*  
CLAIRE R. KELLY, JUDGE

Slip Op. 20–177

TRANSPACIFIC STEEL LLC, Plaintiff, and BORUSAN MANNESMANN BORU SANAYI VE TICARET A.Ş. et al., Plaintiff-Intervenors, v. UNITED STATES et al., Defendants.

Before: Claire R. Kelly, Gary S. Katzmman, and Jane A. Restani, Judges  
Court No. 19–00009

[ Denying, without prejudice, Plaintiff and Plaintiff-Intervenor’s motion to enforce the judgment. ]

Dated: December 9, 2020

*Matthew M. Nolan, Nancy A. Noonan, Diana Dimitriuc Quaia, Jason Rotstein, Russell A. Semmel, Leah Scarpelli, and Aman Kakar*, Arent Fox LLP, of Washington, DC, for plaintiff Transpacific Steel LLC.

*Julie C. Mendoza, Donald B. Cameron, R. Will Planert, Brady W. Mills, Mary S. Hodgins, Edward J. Thomas*, Morris, Manning, & Martin, LLP, of Washington, DC, for plaintiff-intervenor Borusan Mannesmann Boru Sanayi ve Ticaret A.S. et al.

*Lewis E. Leibowitz*, The Law Office of Lewis E. Leibowitz, of Washington, DC, for plaintiff-intervenor The Jordan International Company.

*Tara K. Hogan*, Assistant Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC. Also on the brief were *Stephen C. Tosini* and *Meen Geu Oh*, Senior Trial Counsel, *Jeffrey Bossert Clark*, Acting Assistant Attorney General, *Jeanne E. Davidson*, Director, and *Aimee Lee*, Assistant Director.

### OPINION AND ORDER

#### Kelly, Judge:

Plaintiff Transpacific Steel LLC (“Transpacific”), as well as Plaintiff-Intervenors Borusan Mannesmann Boru Sanayi ve Ticaret A.û. (“BMB”), Borusan Mannesmann Pipe U.S. Inc. (“BMP”), and The Jordan International Company (“Jordan”) (collectively, “Plaintiffs”) move, for the second time, to enforce the court’s judgment pending appeal to the U.S. Court of Appeals for the Federal Circuit (“Court of

Appeals”). See [Pls.] Renewed Mot. to Enforce Judgment, Nov. 4, 2020, ECF No. 78; see also Pl. [Transpacific] & Pl.-Intervenors [BMB] et al.’s Resp. Defs.’ Mot. for a Stay of Enforcement of Judgment Pending Appeal, Aug. 19, 2020, ECF No. 71 (“Pls.’ Resp. Br.”); [Pls.] Mot. to Order Defs.’ to Provide Status Report & Timeline on Refund of Unlawfully Collected Section 232 Tariffs, Aug. 21, 2020, ECF No. 74 (“Pls.’ Mot. for Status Report & Timeline”); *Transpacific Steel LLC v. United States*, 44 CIT \_\_, Slip Op. 20–98 (July 14, 2020) (“*Transpacific II*”); Notice of Appeal, Aug. 13, 2020, ECF No. 67 (“Notice of Appeal”); Judgment, July 14, 2020, ECF No. 66 (“Judgment”). For the following reasons, the court denies Plaintiffs’ motion to enforce the judgment pending appeal of *Transpacific II* to the Court of Appeals without prejudice.

### BACKGROUND

The court presumes familiarity with the facts of this case, as set out in *Transpacific II*, 44 CIT at \_\_, Slip Op. 20–98 at 3–5, as well as *Transpacific Steel LLC v. United States*, 44 CIT \_\_, \_\_, Slip Op. 20–136 at 2–4 (Sept. 14, 2020) (“*Transpacific III*”), and now recounts the facts relevant to the disposition of Plaintiffs’ motion. On January 21, 2020, Plaintiffs jointly moved for judgment on the agency record to challenge the lawfulness of Proclamation 9772, which imposed additional duties on certain steel imports from Turkey. See Pl. [Transpacific] & Pl.-Intervenors [BMB] et al.’s 56.1 Mot. J. Agency R., Jan. 21, 2020, ECF No. 51; see also *Proclamation 9772 of August 10, 2018*, 83 Fed. Reg. 40,429 (Aug. 15, 2018) (“*Proclamation 9772*”). On July 14, 2020, the court granted Plaintiffs’ motion, holding that, in issuing Proclamation 9772, the President exceeded his statutory authority and violated Plaintiffs’ Fifth Amendment guarantees. See *Transpacific II*, 44 CIT at \_\_, Slip Op. 20–98 at 6–22. The court thus granted Plaintiffs’ requested relief and instructed U.S. Customs and Border Protection to issue Plaintiff and Plaintiff-Intervenors a refund of the difference between any tariffs collected on imports of steel articles pursuant to Proclamation 9772 and the 25 percent ad valorem tariff that would otherwise apply. See generally Judgment; see also [Pl.’s] Am. Compl. at Prayer for Relief, Apr. 2, 2019, ECF No. 19; [Pl.-Intervenors BMB & BMP’s] Compl. at Prayer for Relief, Dec. 9, 2019, ECF No. 35–1; [Pl.-Intervenor Jordan’s] Consent Mot. Intervene, Attached Compl. at Prayer for Relief, Dec. 13, 2019, ECF No. 45.

On August 13, 2020, Defendants filed a notice of appeal of *Transpacific II* to the Court of Appeals. See generally Notice of Appeal. Shortly thereafter, Defendants moved to stay enforcement of the

court's judgment pending appeal. *See generally* [Defs.'] Mot to Stay, Aug. 13, 2020, ECF No. 68 ("Defs.' Mot"). On August 19, 2020, Plaintiffs submitted their response in opposition to Defendants' motion, and the following day, filed a motion to enforce the judgment, requesting that the court, upon denial of Defendants' motion, order Defendants to provide a status report and timeline for the government's refund of unlawfully collected additional tariffs.<sup>1</sup> *See generally* Pls.' Resp. Br.; Pls.' Mot. for Status Report & Timeline. Although the court sua sponte ordered the suspension of liquidation for any unliquidated entries, the court denied the Defendants' motion to stay. *See Transpacific III*, 44 CIT at \_\_\_, Slip Op. 20–136 at 3. The court also denied the Plaintiffs' motion to enforce the judgment explaining that "the court's judgment does not provide a deadline for compliance, and Plaintiffs do not provide any reason to doubt that Defendants will promptly comply with the court's judgment should they fail to obtain a stay of enforcement from the Court of Appeals." *Id.* at 9.

On September 25, 2020, Defendants moved for an emergency stay of the injunction pending appeal at the Court of Appeals. *See* Def.-App. [United States'] Mot. to Stay, [Ct. Appeals] Docket No. 20–2157 (Fed. Cir. Sept. 25, 2020), ECF No. 18. Briefing on the motion for an emergency stay concluded on October 8, 2020, *see* Def.-App. [United States'] Reply Supp. Mot. to Stay, [Ct. Appeals] Docket No. 20–2157 (Fed. Cir. Sept. Oct. 8, 2020), ECF No. 24, and the opening brief in the appeal was filed on October 30, 2020. *See* Br. of Def.-App. [United States], [Ct. Appeals] Docket No. 20–2157 (Fed. Cir. Sept. Oct. 30, 2020), ECF No. 27.

## JURISDICTION AND STANDARD OF REVIEW

The court has jurisdiction under 28 U.S.C. § 1581(i)(2) and (4) (2018). The court has inherent authority to enforce its own judgments. *See B.F. Goodrich Co. v. United States*, 18 CIT 35, 36, 843 F. Supp. 713, 714 (1994). This authority includes the "power to determine the effect of its judgments and issue injunctions to protect against attempts to attack or evade those judgments." *United States v. Hanover Ins. Co.*, 82 F.3d 1052, 1054 (Fed. Cir. 1996).

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<sup>1</sup> Specifically, Plaintiffs request the court to instruct the government to:

[E]xplain the refund process in detail and refund collected Section 232 tariffs together with such costs and interest as provided by law expeditiously and provide the Court with the steps it is taking to effectuate the Court's judgment via a status report and timeline for refunds to be filed within one week of the Court's decision on Defendants' motion for a stay. . . [and] to provide the Court with a status report every two weeks after the filing of the first status report along with a final status report once all unlawfully collected tariffs are refunded.

Pls.' Mot. for Status Report & Timeline at 3.

## DISCUSSION

The court grants motions to enforce a judgment “when a prevailing plaintiff demonstrates that a defendant has not complied with a judgment entered against it, even if the noncompliance was due to misinterpretation of the judgment.” *GPX Int’l Tire Corp. v. United States*, 39 CIT \_\_, \_\_, 70 F. Supp. 3d 1266, 1272 (2015) (quoting *Heartland Hosp. v. Thompson*, 328 F. Supp. 2d 8, 11 (D.C. Cir. 2004)).

As a threshold matter Defendants urge the court to “stay its hand,” i.e., refrain from considering the Plaintiffs’ motion in light of the pending appeal. See Defs.’ Resp. to Renewed Mot. to Enforce at 3–4, Nov. 23, 2020, ECF No. 79 (“Defs.’ Resp. to Renewed Mot.”). Defendants’ suggestion misinterprets the effect of an appeal on the court’s continuing jurisdiction over its judgment, as well as the court’s prior order. An appeal divests the court of jurisdiction over “those aspects of the case involved in the appeal,” see *Griggs v. Provident Consumer Discount Co.*, 459 U.S. 56, 58 (1982), but not necessarily over all matters. See, e.g., *Invenenergy Renewables LLC v. United States*, 44 CIT \_\_, \_\_, Slip Op. 20–144 at 12–45 (Oct. 15, 2020) (finding that U.S. Court of International Trade (“USCIT”) Rule 62.1 did not allow the court to reconsider a renewed motion that was already before the Court of Appeals, but that it did allow the court to modify a preliminary injunction, partially grant a motion to complete the administrative record and deny a motion to stay the proceedings). The status of the court’s judgment is distinct from the issues on appeal. USCIT Rule 62(a) provides for a 30-day automatic stay of a judgment. See USCIT R. 62(a). Consequently, after 30 days there is an enforceable judgment of this Court. Defendants must promptly comply with that judgment. See *Transpacific III*, 44 CIT at \_\_, Slip Op. 20–136 at 8–9. If this court were to “stay its hand” as Defendants suggest, Defendants would obtain another automatic stay in a case where the law does not provide for one simply by asking for a stay from the Court of Appeals.

Further, the court’s order discussed the Defendants’ prompt compliance with the judgment should it fail to obtain a stay. See *Transpacific III*, 44 CIT at \_\_, Slip Op. 20–136 at 9. Defendants have failed, at least for now, to obtain a stay. The court expects that Defendants will comply with the judgment promptly, i.e., within a reasonable period of time under the circumstances.

Nonetheless, Plaintiffs have not demonstrated that the Defendants at this time have not, under the circumstances, promptly complied with the judgment. The court in its prior opinion noted that the Defendants might seek to stay the judgment at the Court of Appeals.

*See Transpacific III*, 44 CIT at \_\_, Slip Op. 20–136 at 9. Pursuing a legal remedy to forestall the immediate consequences of a judgment, alone cannot suffice to demonstrate non-compliance. If it did, then the mere request for a stay would paradoxically create grounds for enforcement. Moreover, prompt compliance allows for some reasonable amount of time to obtain a stay from the Court of Appeals while taking other steps to effectuate the judgment. Waiting some period, here, about two months after briefing the stay before the Court of Appeals, while taking steps to enforce the judgment is reasonable. Defendants, in their response to Plaintiffs’ motion, have provided a status report of sorts outlining steps that have been taken to comply with the judgment. Defendants explain that while awaiting a decision from the Court of Appeals the government has sought to ascertain the amount of any refunds owed in the event that the Court of Appeals denies the government’s request to stay enforcement of the judgment. *See* Defs.’ Resp. to Renewed Mot. at 4–5. Waiting two months while pursuing steps in compliance with this Court’s judgment seems reasonable in this case.

Waiting three months, by which time the merits of the appeal will likely be fully briefed before the Court of Appeals, would not seem reasonable in this case. *See* Fed. R. App. P. 31(a). Defendants have sought a stay from the Court of Appeals. They have not obtained one. Unless a stay is granted, there is no stay of judgment and Defendants are obligated to effectuate this Court’s judgment. *See Nken v. Holder*, 556 U.S. 418, 427 (Fed. Cir. 2009) (citations omitted) (explaining that a stay disrupts the ordinary judicial process). Accordingly, Plaintiffs’ motion to enforce the judgment is denied, without prejudice.

### CONCLUSION

For the foregoing reasons, it is

**ORDERED** that Plaintiffs’ motion to enforce the judgment is denied without prejudice.

Dated: December 9, 2020

New York, New York

*/s/ Claire R. Kelly*

CLAIRE R. KELLY, JUDGE

*/s/ Gary S. Katzmann*

GARY S. KATZMANN, JUDGE

*/s/ Jane A. Restani*

JANE A. RESTANI, JUDGE



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