

U.S. Customs and Border Protection



DEPARTMENT OF THE TREASURY

19 CFR PART 12

DEC. 20-16

RIN 1515-AE58

IMPORT RESTRICTIONS IMPOSED ON ARCHAEOLOGICAL MATERIAL FROM CHILE

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

ACTION: Final rule.

SUMMARY: This final rule amends the U.S. Customs and Border Protection (CBP) regulations to reflect the imposition of import restrictions on certain archaeological material from the Republic of Chile (Chile). These restrictions are being imposed pursuant to an agreement between the United States and Chile that has been entered into under the authority of the Convention on Cultural Property Implementation Act. The final rule amends the CBP regulations by adding Chile to the list of countries which have a bilateral agreement with the United States that imposes cultural property import restrictions. The final rule also contains the Designated List that describes the types of archaeological material to which the restrictions apply.

DATES: Effective on October 7, 2020.

FOR FURTHER INFORMATION CONTACT: For legal aspects, Lisa L. Burley, Chief, Cargo Security, Carriers and Restricted Merchandise Branch, Regulations and Rulings, Office of Trade, (202) 325-0300, ot-otrrculturalproperty@cbp.dhs.gov. For operational aspects, Genevieve S. Dozier, Management and Program Analyst, Commercial Targeting and Analysis Center, Trade Policy and Programs, Office of Trade, (202) 945-2942, CTAC@cbp.dhs.gov.

SUPPLEMENTARY INFORMATION:

Background

The Convention on Cultural Property Implementation Act, Public Law 97–446, 19 U.S.C. 2601 *et seq.* (hereinafter, “the Cultural Property Implementation Act”) implements the 1970 United Nations Educational, Scientific and Cultural Organization (UNESCO) Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property (hereinafter, “the Convention” (823 U.N.T.S. 231 (1972))). Pursuant to the Cultural Property Implementation Act, the United States entered into a bilateral agreement with Chile to impose import restrictions on certain Chilean archaeological material. This rule announces that the United States is now imposing import restrictions on certain archaeological material from Chile.

Determinations

Under 19 U.S.C. 2602(a)(1), the United States must make certain determinations before entering into an agreement to impose import restrictions under 19 U.S.C. 2602(a)(2). On June 12, 2019, the Assistant Secretary for Educational and Cultural Affairs, United States Department of State, after consultation with and recommendation by the Cultural Property Advisory Committee, made the determinations required under the statute with respect to certain archaeological material originating in Chile that is described in the Designated List set forth below in this document.

These determinations include the following: (1) That the cultural patrimony of Chile is in jeopardy from the pillage of archaeological material representing Chile’s cultural heritage dating from approximately 31,000 B.C. to 250 years before the signing of the Agreement; (2) that the Chilean government has taken measures consistent with the Convention to protect its cultural patrimony (19 U.S.C. 2602(a)(1)(B)); (3) that import restrictions imposed by the United States would be of substantial benefit in deterring a serious situation of pillage and remedies less drastic are not available (19 U.S.C. 2602(a)(1)(C)); and (4) that the application of import restrictions as set forth in this final rule is consistent with the general interests of the international community in the interchange of cultural property among nations for scientific, cultural, and educational purposes (19 U.S.C. 2602(a)(1)(D)). The Assistant Secretary also found that the material described in the determinations meets the statutory definition of “archaeological or ethnological material of the State Party” (19 U.S.C. 2601(2)).

The Agreement

On May 7, 2020, the United States and Chile signed a bilateral agreement, “Memorandum of Understanding between the Government of the United States of America and the Government of Chile Concerning the Imposition of Import Restrictions on Categories of Archaeological Material of Chile” (“the Agreement”), pursuant to the provisions of 19 U.S.C. 2602(a)(2). The Agreement enters into force on September 30, 2020, and enables the promulgation of import restrictions on categories of archaeological material representing Chile’s cultural heritage ranging in date from the Paleoindian period (approximately 31,000–8000 B.C.) to the Huri Moai phase in Chile (A.D. 1680–1868). A list of the categories of archaeological material subject to the import restrictions is set forth later in this document.

Restrictions and Amendment to the Regulations

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

Import restrictions listed at 19 CFR 12.104g(a) are effective for no more than five years beginning on the date on which the Agreement enters into force with respect to the United States. This period may be extended for additional periods of not more than five years if it is determined that the factors which justified the Agreement still pertain and no cause for suspension of the Agreement exists. The import restrictions will expire on September 30, 2025, unless extended.

Designated List of Archaeological Material of Chile

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

The Designated List includes archaeological material in stone, metal, ceramic, and organic tissue ranging in date from approximately 31,000 B.C. to 1868 A.D.

Archaeological Material

Approximate chronology of well-known archaeological sites, traditions, and cultures: Archaeological material covered by the Agreement is associated with the diverse cultural groups that resided in Chile's five cultural zones on the mainland: the Arid North, the Semi-arid North, Central Chile, Southern Chile, and the Far South; and on Rapa Nui (formerly Easter Island) in Polynesia.

The Arid North, the Semi-Arid North, Central Chile, and Southern Chile

Prehistoric archaeological material from the Arid North, the Semi-arid North, Central Chile, and Southern Chile dates from the earliest human presence, currently dated to approximately 31,000 B.C., to the end of the Arauco war in A.D. 1772.

(a) *Paleoindian period:* Groups of terminal Pleistocene terrestrial hunter-gatherers: Monteverde and Pilauco (c. 31,000–8000 B.C.); Santa Julia (10,000 B.C.); Quebrada de Mani-12 (11,000–9000 B.C.); Tagua Tagua 1 and 2 (13,500–10,800 B.C.); and Austral hunters (before 10,000 B.C.).

(b) *Early Archaic period:* Groups of land and sea Holocene hunter-gatherers: San Pedro Viejo de Pichasca Tradition (8000 B.C.); Alero Marifilo 1 (10,000–2000 B.C.); Huentelauquén Complex (11,500–8000 B.C.); Piuquenes Cavern (10,076–9373 B.C.); Alero El Manzano (10,140–8564 B.C.).

(c) *Middle Archaic period:* Chinchorro (8500–2000 B.C.); Talcahuense coastal hunter-gatherers (4500–2000 B.C.); Papudo and Morrillos Complex (7000–3000 B.C.); Cuchipuy site (7291–6643 B.C.); El Manzano 3, La Batea 1 and Tagua Tagua 2 sites (7000–3000 B.C.).

(d) *Late Archaic period:* Caleta Huelén-42 (4780–3780 B.C.); Caramucho-3 (4030 B.C.); Alero Punta Colorada (3,000–1 B.C.); and Guanaqueros Complex (3000 B.C.).

(e) *Early Pottery period:* Alto Ramírez and Faldas del Morro Phases (500 B.C.–A.D. 200); El Molle Culture (300 B.C.–A.D. 800); Caleta Huelén-7, 10, 20 and 43 (450 B.C.–A.D. 820); Guatacondo-1 (900 B.C.–A.D. 200); Ramaditas (900 B.C.–A.D. 200); Pitren Complex (A.D. 350–1000); Llolleo Complex (A.D. 200–1200); and Bato Groups (A.D. 200–1200).

(f) *Middle Pottery period:* Tiwanaku-influenced cultures (A.D. 600–1000); Caserones-1 (350 B.C.–A.D. 900); and San Pedro de Atacama Culture (500 B.C.–A.D. 1470).

(g) *Late Intermediate Pottery period*: Arica Culture (A.D. 1000–1450); Pica-Tarapacá Complex (A.D. 900–1450); Camiña (A.D. 1200–1400); Diaguaita Culture (A.D. 1200–1536); and Aconcagua Cultural Complex (A.D. 900–1470).

(h) *Late Pottery period*: Inka-influenced cultures (A.D. 1200–1450); El Vergel Complex (A.D. 1000–1550); and Valdivia Ceramics (A.D. 1400–1800).

The Far South

Archaeological material in the Far South is associated with hunter-gatherers living in the region from the beginning of the Holocene through the 19th century A.D.

(a) *Early Holocene*: Hunter-gatherers sites of El Chueco 1, Baño Nuevo 1, Fell, and Pali Aike sites (10,000–8000 B.C.).

(b) *Middle Holocene*: Hunter-gatherers from the Fell III cultural tradition (8000–5000 B.C.); early Austral canoe nomads Englefield tradition (6500–5000 B.C.); Northern canoe nomads (6000–5000 B.C.).

(c) *Late Holocene*: Austral hunter-gatherers and canoe nomads (5,000 B.C.–A.D. 19th century).

Rapa Nui

Archaeological material from Rapa Nui dates from the earliest settlers around A.D. 400 to 1868.

(a) *Ahu Moroki phase*: Rapa Nui Culture (A.D. 400–1100).

(b) *Ahu Moai phase*: Rapa Nui Culture (A.D. 1100–1680).

(c) *Huri Moai phase*: Rapa Nui Culture (A.D. 1680–1868).

Categories of Archaeological Material

I. Stone

II. Ceramic

III. Metal

IV. Human remains

V. Textiles

VI. Wood

VII. Bone, shell and other organic matter

I. Stone

Stone tools marked the arrival of the first people to each region of Chile and continued to be used throughout history. Examples of archaeological stone material covered in the Agreement include the following objects.

A. *Chipped stone tools*—Projectile points and tools for scraping, cutting, or perforating are made primarily from quartz crystal, quartz, basalt, silicate, and obsidian. Stone tools from the Arid North may be attached to wooden handles. A *mata'a* is a multifunctional Rapa Nui obsidian biface with a stem about 10 cm long.

B. *Hoes, axes, and shovels*—Rough and unpolished medium-sized hoes, axes, and shovels first appeared in the Early Pottery period and continued to be used throughout the Arid North, the Semi-arid North, Central Chile, and Southern Chile. In Rapa Nui, basalt or obsidian chisels (*toki*) are carved or polished bifaces in rectangular, trapezoidal, cylindrical, or irregular shapes with a pointed end. Dimensions range from 5 cm to 25 cm.

C. *Bolas (boleadoras)*—Round, oval, or pear-shaped stone balls have an equatorial groove where a string was tied.

D. *Pestles and mortars*—A pestle is a hand-held stone used with a bottom mortar stone to grind grains. Late Archaic period conical hollowed pestles were used with flat grinding stones. Llolleo Culture long and rounded pestles were used with concave mortars with a defined grinding channel. Female figure Pre-Mapuche stone mortars have a cavity in the abdomen.

E. *Cup-marked stones*—Large granite stones with one to dozens of carved cylindrical or oval cavities about 20 cm deep are associated with several cultures including the Papudo and Morrillos Complex.

F. *Perforated stones and spindle whorls (torteras)*—Perforated stones are cylindrical, spherical, or ovoid stones perforated through the center. Spindle whorls are smaller stones of similar shape used to spin yarn. Diaguita culture polished stone spindle whorls are shaped like double axes.

G. *Stone pipes*—Carved and polished stone pipes are for consuming hallucinogenic drugs. El Molle, Llolleo, and Pitrén culture pipes are T-shaped with small cylindrical bowls and two lateral tubular extensions, one with a closed end and one with an open end. Bowls sometimes have mamiform decorations. Mapuche culture pipes and their predecessors (*kitras*) have cylindrical bodies with a small bowl in the center and short stem or are anthropomorphic with the bowl in the torso and stem at the foot. Pipes may also have zoomorphic shapes.

H. *Fishing tools*—Weights for fishing lines, hooks, harpoon heads, and shellfish hooks from northern and central coastal archaeological sites are made from stone. Austral canoe nomad fishing line weights are made from coarse-grained pebbles with notches or grooves. Rapa Nui hooks are 3–10 cm long and made from black basalt, sometimes mixed with bone. They are elongated and curved with a semi-flat section and a pointed edge; the shaft is longer than the stem.

I. *Geometric stones*—Early Archaic period geometric stones associated with Huentalauquén and San Pedro Viejo de Pichasca Complexes are igneous stone or granite carved and polished into circles, triangles, rectangles, and polygons. The stones are sometimes covered with red, orange, gray, or black pigment. Rapa Nui geometric stones are manufactured mainly from basalt.

J. *Toqui mano*—Llolleo and Mapuche style toqui manos are cylindrical polished stone objects with a flat and beveled distal end, similar in shape to an axe head. Some have vertical incisions along the edge of the blade.

K. *Beads*—Necklaces and bracelets are often made of stone beads. Beads from the Arid and Semi-arid North are made from malachite, white quartz, silicate, and obsidian beginning in the Early Pottery period. Llolleo culture discoidal basalt beads (0.3 to 0.7 cm in diameter) are often mixed with malachite and greenish apatite tubular beads (about 0.5 cm long and 0.4 cm in diameter).

L. *Labrets (tembetás)*—Tembetás are stone ornaments worn in a perforation of the lower lip. They may be discoidal with wings, cylindrical with wings, or conical with wings. Some are fusiform in shape, including straight or curved bottle-shapes. Diaguita culture tembetás are button-shaped with small wings. Tembetás are also associated with the Llolleo culture and Bato groups.

M. *Moai*—Moai are Rapa Nui anthropomorphic figures carved in basalt, lapilli tuff, trachyte, or red scoria. Dimensions range from 30 cm to several meters in height. Some have high or low relief petroglyphs or incisions on the back and front of the figure.

N. *Rock art*—Rock art includes petroglyphs (engravings) and pictographs (paintings) that may have been removed from large boulders or outcrops. Rock art from the Arid North and Semi-arid North depicts humans, camelids, felines, snakes, lizards, spiders, sea mammals, fish, turtles, other animal figures, and geometric motifs. Cave art in the Far South includes geometric figures, handprints, and camelids painted in red, black, and ochre pigments.

O. *Other polished stone objects*—Late Pottery period cultures, including those with Inka influence, made anthropomorphic and zoomorphic figures (llamas, condors, snakes, etc.). Diaguita and Aconcagua style stone panpipes (*antaras*) are musical instruments consisting of multiple tubes. Mapuche and pre-Mapuche pendants from Central Chile are shaped like axe heads with a drilled hole to suspend the ornament. Mapuche scepters (*clavas*) are polished stone objects with a handle and head in the shape of a bird.

II. Ceramic

The earliest-known pottery in Chile dates to about 3,000 years ago. Potters in the Arid North, Semi-arid North, Central Chile, and Southern Chile created vessels, body ornaments, pipes, and other utilitarian and ceremonial items. Cultures in the Far South and Rapa Nui did not manufacture ceramics. Examples of archaeological ceramics covered in the Agreement include the following objects.

Ceramics of the Arid North

A. *Early undecorated pottery*—includes Faldas de Morro style large jars with restricted necks (on average 26 cm tall and 18 cm in diameter); small, shallow undecorated bowls about 4 cm tall; and large, deep undecorated bowls about 10 cm tall. Alto Ramirez style globular jars are undecorated.

B. *San Pedro de Atacama style*—polished black, dark brown, or red pottery may be decorated with modeled faces or geometric patterns of incised lines. Forms include bowls about 10 cm tall; anthropomorphic bottles about 18 cm tall; and tall, narrow jars with straight walls and flat bases about 12 cm tall.

C. *Tiwanaku-influenced pottery*—includes Cabuza-style lightly polished red ware decorated with black, or sometimes white, painted bands of lines, triangles, and wavy lines. Forms include jars with one handle, bowls, and *keros* (beakers). Imported fine polychrome Tiwanaku ceramics include jars, bowls, and *keros* with geometric, zoomorphic, or anthropomorphic painted or modeled decorations.

D. *Maytas-Chiribaya style pottery*—includes bowls, jars with one handle, and *cántaros* (very large jars with small necks) decorated with elaborate geometric designs in white, black, and red paint on red slip, often arranged into bands.

E. *Arica culture ceramics*—include San Miguel style large globular jars with narrow necks, *keros*, and smaller jars with one handle with white slip and black and red painted geometric figures, zigzag lines, and spirals. Pocomá-Gentilar style polished unslipped jars, *cántaros*, and cups have black, white, and red painted geometric figures, crosses, anthropomorphic designs, and zoomorphic designs on orange or white surfaces.

F. *Inka-influenced ceramics*—include locally produced Inka style jars that are monochrome polished red or orange or have painted black and red geometric designs. Imported Saxamar or Inka Pacajes pottery includes polished red ware plates and shallow bowls with fine lines, dots, or small llamas painted on the interior. Imported Inka polychrome pottery includes plates and jars with black, red, white, and cream painted geometric decorations.

Ceramics of the Semi-Arid North

G. *Early pottery*—includes El Molle style ceramics such as polished red, brown, and black cups, bottles, and jars with modeled decorations on the handles including animals and cultivated plants. Some cups are shaped like anthropomorphic kneeling figures. Some vessels are decorated with finely incised zones created by parallel lines, steps, and zigzags or with white, red and black paint. Some vessels have a metallic appearance created by applying pulverized hematite to the surface. Other Early ceramics include rough or polished red, black, or gray undecorated vessels. Styles include Loa, Quillagua, and Caleta Huelén.

H. *Pica-Tarapacá Complex ceramics*—include upright bottles, sometimes in anthropomorphic or zoomorphic shapes; bottles shaped like reclining anthropomorphic or zoomorphic figures; and asymmetrical or boot-shaped jars. Pottery is smoothed or polished red or black.

I. *Late Intermediate Pottery period*—Altiplano black-on-red ceramics are decorated with black paint over red slip creating lines, wavy lines, and steps on the outside of jars and bottles and inside of bowls. Styles include Isluga Black-on-Red and Chilpe Black-on-Red.

J. *Diaguita style pottery*—includes bowls with straight walls and round bases, often with modeled faces; bell-shaped bowls; anthropomorphic jars; boot-shaped jars with excised decoration; boot-shaped anthropomorphic or zoomorphic jars; and duck-shaped vessels. Red, white, and black painted designs on the exterior of finely burnished vessels include bell-shapes, rhombuses, crosses, felines, dots, and crosshatching, often organized into four equal segments.

K. *Diaguita pottery with Inka influence*—mixes Diaguita and Inka forms and designs. For example, Diaguita style straight-walled bowls are decorated on the interior with Inka motifs; Inka style bird-shaped plates have Diaguita decoration, sometimes divided into four sections; Inka style aríbalos have white slip and Diaguita decoration; and duck-shaped vessels painted with Inka designs. Some pottery closely imitates Cusco forms and designs, including flat or bird-shaped plates and aríbalos decorated with checkered patterns, hourglasses, double crosses, zoomorphic designs, and abstract plant motifs. Imported Inka polychrome pottery includes plates and jars with black, red, white, and cream painted geometric decorations.

Ceramics of Central Chile

L. *Early pottery*—includes smoothed or polished black or dark brown Bato and Llolleo style bridge-handle vessels, long-neck jars, and vessels shaped like squashes. Anthropomorphic jars are mono-

chrome polished vessels with a thick strap handle connecting the neck to a molded human head with coffee bean eyes and prominent eyebrows and noses in a T-shape. Small, fine jars are decorated with wavy lines of hematite paint alternating with red areas. T-shaped ceramic pipes, ear plugs, and discoidal lip ornaments with wings (*tembetás*) were also made from ceramic.

M. *Aconcagua style pottery*—includes semispherical bowls and globular cups decorated with black painted lines on orange clay forming geometric decorations, zigzags, straight lines, triangles with *pestañas*, and *trinacrio* motifs.

Ceramics of Southern Chile

N. *Pitrén style pottery*—includes a wide variety of forms ranging from simple globular bottles to strap-handle jars in the form of animals, plants, or humans. *Ketru metawe* are asymmetrical or duck-shaped jars. Most vessels are monochrome brown or red. Some have modeled decorations, incision, or negative paint. Ceramic pipes are T-shaped and 3–5 cm long.

O. *Late red-on-white pottery, including pre-Hispanic El Vergel and Colonial period Valdivia styles*—includes large open vessels used as funerary urns and *ketru metawe*. Vessels may be monochrome red or decorated with red, and sometimes black, paint over white slip creating geometric designs. Other forms include jars, bottles, plates, bowls, cups, mugs with handles, and urns. Common designs include triangles filled with parallel lines, horizontal bands of chevrons, bands of nested zigzags, vertical bands of crosshatching and diamonds, and hourglasses.

P. *Mapuche style pottery*—includes jars with one handle (*metawe*), plates, bottles, pots (*challa*), bowls, large bowls, and mugs. Pottery is typically coarse and may be monochrome black, brown, or red-slipped. Asymmetrical jars are frequently painted with red or black geometric designs on white slip. Painted designs may be in two horizontal bands of opposing triangles. Some jars are duck-shaped. Later forms include dogs, horses, and pigs.

III. Metal

Cultures in the Arid North, the Semi-arid North, Central Chile, and Southern Chile developed metallurgy and manufactured artifacts in copper, silver, and gold. There is no record of metallurgy among cultures in the Far South or Rapa Nui. Most metal artifacts from Chile were used for ritual and personal adornment. Examples of archaeological metal objects covered in the Agreement include the following objects.

A. *Personal ornaments*—Several cultures made metal earrings and rings from copper (El Molle, San Pedro de Atacama, Llolleo, Aconcagua, Pitrén, El Vergel), gold (Arica, Tiwanaku, Inka, San Pedro de Atacama), or silver (Arica, Inka, San Pedro de Atacama). Notable types include Diaguita earrings that may have quadrangular or spiral shaped bodies and/or stone or metal appendices. San Pedro de Atacama rings may be made from smooth laminar sheets or wires. Some rings have appendices or heads. Other San Pedro de Atacama ornaments include metal plaques, small bells, gold and silver disks, imitation feathers, diadems, headbands, ear plugs, and bracelets. Diaguita and El Vergel bracelets are made from copper. Arica and Aconcagua cultures made copper hooks. Arica and San Pedro de Atacama cultures made ornamental clothing pins (*tupus*). Mapuche *tupus* were made from copper and silver.

B. *Domestic and ceremonial tools*—Functional metal axes are associated with Diaguita and San Pedro de Atacama cultures. Inka and Inka-influenced Diaguita *tumis* are ceremonial axes with a long handle and a semicircular or rectilinear blade. San Pedro, Diaguita, and Inka copper chisels are long copper tools with quadrangular cross-sections that are beveled on one end. San Pedro de Atacama mace heads are ellipsoidal. Inka copper or bronze mace heads are star-shaped. Metal tools from the Arid North may be attached to wooden handles. San Pedro de Atacama and Inka tweezers are made from copper or copper alloy. San Pedro de Atacama culture also made circular or ovoid punches. Knuckles (*manoplas*) are fist-sized semicircular tools with a pointed protrusion that may have been used to tighten bowstrings or as “brass knuckles.”

C. *Vessels*—Gold or silver San Pedro de Atacama style cups with embossed decorations include gold *keros* with Tiwanaku designs and portrait vessels. Inka and Diaguita cultures made copper plates.

D. *Psychotropic paraphernalia*—San Pedro de Atacama culture snuff tubes are wrapped with tape-like strips of gold and/or silver with ends made of gold. The distal end may have a Tiwanaku design such as a camelid head. The Diaguita culture used copper snuff spoons.

E. *Figurines*—Small Inka style figurines depict male, female, and animal figures in solid gold or silver. Diaguita figurines were made from copper.

IV. *Human Remains*

Preservation of human remains, including through mummification, is common in the Arid North due to the dry desert climate. In contrast, very few human remains preserve in the Far South or Rapa

Nui, with the exception of manufactured items that incorporate human skeletal elements. Examples of archaeological human remains covered in the Agreement include the following objects.

A. *Naturally mummified human remains*—Early Archaic period mummified human remains from the Arid North are in extended positions on mats. Late Archaic period mummified human remains are in flexed positions. Early Pottery period mummified human bodies in flexed positions wear wool clothing and are placed on mats. Middle to late Pottery period mummy bundles contain flexed mummified human remains wrapped in layers of basketry and textiles.

B. *Artificially mummified human remains*—Chinchorro culture mummified human remains have wood and plant fibers replacing removed bones and organs. Red or black clay covers the faces and extended bodies. Their wigs are made of human hair.

C. *Tools and jewelry*—Rapa Nui culture needles, pendants, beads, punches and hooks are made from human skeletal remains.

D. *Incised skulls*—Rapa Nui culture incised skulls have incised designs in the frontal or parietal bone. Incised designs may be filled with yellow or red pigment.

V. *Textiles*

Most archaeological textiles are from the Arid North and Semi-arid North where dry conditions lead to excellent preservation. The earliest preserved textiles are from the Early Pottery period in the Arid North. Clothing and items for domestic use are made from camelid wool and cotton. Examples of archaeological textiles covered in the Agreement include the following objects.

A. *Tunics, shirts, shawls, and girdles*—Early Pottery period clothing from the Arid North includes shawls and shirts woven on looms from thick woolen fibers. The tunic (*unku*) is a sleeveless male garment that sometimes reaches to the knees. Early Pottery period tunics are often decorated with polychrome vertical lines in natural colors and/or embroidery on the edges of collars and sleeves. Alto Ramirez culture tunics and girdles made from polychrome and figurative tapestries stand out. Middle Pottery period Cabuza and Tiwanaku textiles include wool tunics, shirts, girdles, and other garments made predominantly of green, blue, and red fibers with complex geometric designs made with techniques of weft-faced weave, floating warp, and embroidered finishes. In the Late Pottery period, cotton fibers are introduced along with new decorative techniques such as tie-dye, tapestry, and feather applications. Atacama tradition plain or striped tunics are warp-faced with embroidered edges. Tapestry tunics and bags have red, blue, and white designs including networks of

rhombuses, triangles, or squares accompanied by a zoomorphic figure with three fingers resembling a lizard.

B. *Hats*—Tiwanaku-influenced four-corner hats are monochrome or polychrome with geometric and figurative designs. Varied Middle to Late Pottery period turbans, caps, helmets, and hoods are made from wool, basketry, and leather. Some have attached metal, feather, or wood ornaments. For example, Atacama style crown-type hats were made of braided plant fibers covered by leather strips.

C. *Mats and skirts*—Mats are made from a series of reeds or branches joined by plant fibers to form a flexible plane in one direction. Chinchorro culture plant fiber skirts (*faldellines*) are made from fibers twisted like strings and tied to a main cord.

D. *Bags*—Ceremonial bags (*chuspas*) are trapezoidal, square, or rectangular and hang by a string. They are decorated on both sides with thin lines of dyed yarn with woven designs. Belt-bags are long rectangular girdles folded lengthwise to create a bag. They are decorated on one side. Bags and belt-bags have geometric, anthropomorphic, and zoometric designs made from yarn dyed dark red, orange, terracotta, purple, ochre, green, and blue. Small square or rectangular domestic-use bags are decorated with thin lines of natural colors. Atacama style bags are made from cut-pile weave similar to velvet and have checkerboard designs. Middle Pottery period Arica culture textiles use fewer decorative techniques and colors, but have increased diversity of anthropomorphic and zoomorphic designs.

E. *Panels*—Panels (*inkuñas*) are small rectangular textiles about 45 x 50 cm in size. Panels often have weft finishings creating dangling cords that serve as handles. Panels may hold burial bundles, household items, coca leaves, or agricultural products.

F. *Khipus*—Inka khipus are recording devices made of cotton and wool knotted cords hanging from a central cord.

VI. Wood

Archaeological wooden objects are rare. Few were produced in the Arid North due to a scarcity of raw material. Wood was available in Central Chile, Southern Chile, and the Far South, but environmental conditions in those areas do not favor wood preservation. Examples of archaeological wooden objects covered in the Agreement include the following objects.

A. *Snuff tablets*—Snuff tablets are shallow rectangular trays that may be decorated with geometric or zoo-anthropomorphic figures associated with cultures of Northern Chile, San Pedro de Atacama Complex, the Diaguita Culture, and other cultures influenced by the Inka.

B. *Keros*—Keros are vase-shaped beakers with elaborate carved geometric or zoomorphic designs associated with the Arica Culture, San Pedro de Atacama Complex, Diaguita Culture, and others influenced by Inka culture.

C. *Domestic tools*—Combs, boxes, spindle shafts, and spindle whorls are made from wood. Mapuche Culture rafts, plates, spoons, spindle whorls, and other items are made from oak, bay laurel, rali, alerce, and coihue.

D. *Navigation items*—Oars from the Arid North and Semi-arid North are made from wood, and rafts are made from wood and inflated sea lion skins. Dugout canoes (*wampos*) from Central Chile and Southern Chile are carved from a single tree trunk.

VIII. *Bone, Ivory, Shell, and Other Organic Material*

Preservation of bone, shell, and other organic material is best in the Arid and Semi-arid North. Very little bone or shell has been recovered in the Far South or Rapa Nui. Various artefacts were made for domestic, recreational, decorative, and ritual use. Examples of archaeological objects covered in the Agreement include the following objects.

A. *Hooks and harpoons*—Middle and Late Archaic period hooks from the Arid North are made from mollusk shells and cactus thorns. Harpoons are made from bone. Rapa Nui culture spear tips and fishhooks are made from bone and shell.

B. *Bone and shell tools*—Bone tools from the Arid North include awls, punches, pressure flakers, darts, shovels, hoes, and two-headed anthropomorphic bone spindle whorls. Most tools are made from camelid bones. Hoes are made from whale bones. Cutting tools are made from sharpened marine mollusks. Bone awls, spears, and tubes date to the Paleoindian period in Southern Chile. Austral canoe nomad awls, beads, chisels, pressure flakers, smoothers, and harpoon and spear points with serrated edges are made from terrestrial mammals, marine mammals, and birds. Some harpoons have geometric engravings and occasional animal motifs. Rapa Nui culture needles are made from bird bones.

C. *Body ornaments*—Earrings from the Arid North are made from shell. Necklaces and other jewelry are made from bone beads. Austral canoe nomad pendants are made from sea lion canine teeth and engraved albatross bone. Rapa Nui culture ornaments include bone pendants, bone necklaces, tooth beads, small black or white shell beads, medium brown shell beads, and bone ear plugs. Inka shell ornaments are made from *Spondylus princeps*, or *mullu*.

D. *Spatulas and snuff tubes*—Snuff tubes are small bones that have been hollowed out, polished, and decorated on the exterior. Spatulas have rounded tips for inhaling snuff and are decorated with carved zoomorphic designs.

E. *Combs*—Middle and Late Pottery period combs are made from cactus thorns joined by interlaced fibers.

F. *Gourd containers*—Gourd containers have pyro-engraved geometric, anthropomorphic, and zoomorphic designs.

G. *Basketry and rope*—Early Pottery period basketry includes miniatures and large baskets or plates. Middle and Late Pottery period baskets are medium size. Ropes are made from vegetable fiber.

H. *Musical instruments*—Panpipes are made of reeds lashed together with cords or carved from a single piece of wood. Rattles are made from gourds and wood with seeds or pebbles inside. *Chajchas* or *cahschas* are camelid hoofs held together with a fabric strap.

I. *Moai eyes*—The eyes of moai are made from coral and may have either red scoria or black obsidian pupils.

Additional Resources

National Cultural Heritage Service, Chile, digital collections: <https://www.patrimoniocultural.gob.cl/portal/Contenido/Colecciones-digitales/>.

Heritage Assets Documentation Center, Chile, Regional Heritage Thesaurus: <http://www.tesauroregional.cl/linea-de-tiempo>.

Inapplicability of Notice and Delayed Effective Date

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

Regulatory Flexibility Act

Because no notice of proposed rulemaking is required, the provisions of the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) do not apply.

Executive Orders 12866 and 13771

CBP has determined that this document is not a regulation or rule subject to the provisions of Executive Order 12866 or Executive Order 13771 because it pertains to a foreign affairs function of the United States, as described above, and therefore is specifically exempted by section 3(d)(2) of Executive Order 12866 and section 4(a) of Executive Order 13771.

Signing Authority

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

List of Subjects in 19 CFR Part 12

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

Amendment to CBP Regulations

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

PART 12—SPECIAL CLASSES OF MERCHANDISE

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

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

* * * * *

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

* * * * *

■ 2. In § 12.104g, the table in paragraph (a) is amended by adding an entry for Chile in alphabetical order to read as follows:

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

(a) * * *

State party	Cultural property	Decision No.
*	* * * * *	*
Chile	Archaeological material representing Chile’s cultural heritage from the Paleindian period (c. 31,000 B.C.) to the Huri Moai phase in Chile (A.D. 1680–1868)	CBP Dec. 20–16.
*	* * * * *	*

* * * * *

Dated: October 7, 2020.

MARK A. MORGAN,
*Chief Operating Officer and Senior Official
Performing the Duties of the Commissioner,
U.S. Customs and Border Protection.*

Approved:

TIMOTHY E. SKUD,
*Deputy Assistant
Secretary of the Treasury.*

[Published in the Federal Register, October 9, 2020 (85 FR 64020)]



**PROPOSED REVOCATION OF A RULING LETTER AND
REVOCATION OF TREATMENT RELATING TO THE
TARIFF CLASSIFICATION OF A PLANT DISTILLATION
REFINING MODULE**

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

ACTION: Notice of proposed revocation of a ruling letter, and revocation of treatment relating to the tariff classification of a plant distillation refining module.

SUMMARY: Pursuant to section 625(c), 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. 103–182, 107 Stat. 2057), this notice advises interested parties that U.S. Customs and Border Protection (CBP) intends to revoke a ruling letter concerning tariff classification of a plant distillation refining module under the Harmonized Tariff Schedule of the United States (HTSUS). Similarly, CBP intends to revoke any treatment previously accorded by CBP to substantially identical transactions. Comments on the correctness of the proposed actions are invited.

DATE: Comments must be received on or before November 27, 2020.

ADDRESS: Written comments are to be addressed to U.S. Customs and Border Protection, Office of Trade, Regulations and Rulings, Attention: Trade and Commercial Regulations Branch, 90 K St., NE, 10th Floor, Washington, DC 20229–1177. Submitted comments may be inspected at the address stated above during

regular business hours. Arrangements to inspect submitted comments should be made in advance by calling Ms. Cammy Canedo at (202) 325-0439.

FOR FURTHER INFORMATION CONTACT: Tom P. Beris, Electronics, Machinery, Automotive, and International Nomenclature Branch, Regulations and Rulings, Office of Trade, at (202) 325-0292.

SUPPLEMENTARY INFORMATION:

BACKGROUND

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

Pursuant to 19 U.S.C. § 1625(c)(1), this notice advises interested parties that CBP is proposing to revoke a ruling letter pertaining to the tariff classification of a plant distillation refining module. Although in this notice, CBP is specifically referring to New York Ruling Letter (NY) N300353, dated September 27, 2018 (Attachment A), this notice also covers any rulings on this merchandise which may exist, but have not been specifically identified. CBP has undertaken reasonable efforts to search existing databases for rulings in addition to the one identified. No further rulings have been found. Any party who has received an interpretive ruling or decision (i.e., a ruling letter, internal advice memorandum or decision, or protest review decision) on the merchandise subject to this notice should advise CBP during the comment period.

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

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

In NY N300353, CBP classified a plant distillation refining module in heading 8419, HTSUS, specifically in subheading 8419.89.95, HTSUS, which provides for “Machinery, plant or laboratory equipment, whether or not electrically heated (excluding furnaces, ovens and other equipment of heading 8514), for the treatment of materials by a process involving a change of temperature such as heating, cooking, roasting, distilling, rectifying, sterilizing, pasteurizing, steaming, drying, evaporating, vaporizing, condensing or cooling, other than machinery or plant of a kind used for domestic purposes; Other machinery, plant or equipment: Other: Other.” CBP has reviewed NY N300353 and has determined the ruling letter to be in error. It is now CBP’s position that the plant distillation refining module is properly classified, by application of General Rules of Interpretation (GRI) 1 (Note 4 to Section XVI) under heading 8419, HTSUS and GRIs 6, 1 and 3 (c) under subheading 8419.60.50, HTSUS, which provides for other machinery for liquefying air or other gases.

Pursuant to 19 U.S.C. § 1625(c)(1), CBP is proposing to revoke NY N300353 and to revoke or modify any other ruling not specifically identified to reflect the analysis contained in the proposed Headquarters Ruling Letter (HQ) H302168, set forth as Attachment B to this notice. Additionally, pursuant to 19 U.S.C. § 1625(c)(2), CBP is proposing to revoke any treatment previously accorded by CBP to substantially identical transactions.

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

Dated:

GREGORY CONNOR
for

CRAIG T. CLARK,
Director

Commercial and Trade Facilitation Division

Attachments

ATTACHMENT A

N300353

September 27, 2018

CLA-2-84:OT:RR:NC:N1:102

CATEGORY: Classification

TARIFF NO.: 8419.89.9585

Ms. NICHOL BRADLEY
FLUOR CORPORATION
6700 LAS COLINAS BLVD
IRVING, TX 75039

RE: The tariff classification of a distillation refining module

DEAR Ms. BRADLEY:

In your letter dated August 30, 2018 you requested a tariff classification ruling. Technical information was submitted with your request.

The Distillation Refining Module, module 1101JB, interfaces with various other modules and consists of interconnected components that include reboilers, condensers, pumps, drums and interconnecting pipes. It is noted that the distillation module does not include the distillation columns and does not complete a distillation process. The function of the multi-tiered module is to complete a transfer of heat process that vaporizes liquid and a cooling process that liquefies gas.

The reboilers are configured as shell and tube heat exchangers that use steam or gas to vaporize liquid. The vapor is then returned to the boilers and liquid drawn from the boilers is collected by a drum and subsequently pumped to another module.

The condensers, which are also said to be configured as a shell and tube heat exchangers, cool vapor and liquefy gas. The condensed liquid produced by the condensers is sent to a drum and later pumped to another module.

The classification of merchandise under the Harmonized Tariff Schedule of the United States (HTSUS) is governed by the General Rules of Interpretation ("GRIs"). General Rule of Interpretation 1 states in part that for legal purposes, classification shall be determined according to the terms of the headings and any relevant section or chapter notes and, unless otherwise required, according to the remaining GRIs taken in order.

In your letter, you suggest that the heat exchangers impart the essential character of the module and therefore, the Distillation Refining Module should be classified in subheading 8419.50.5000, HTSUS, which provides for Machinery, plant or laboratory equipment, whether or not electrically heated (excluding furnaces, ovens and other equipment of heading 8514), for the treatment of materials by a process involving a change of temperature such as heating, cooking, roasting, distilling, rectifying, sterilizing, pasteurizing, steaming, drying, evaporating, vaporizing, condensing or cooling, other than machinery or plant of a kind used for domestic purposes; instantaneous or storage water heaters...heat exchange units: other. While we agree with the suggested heading, we differ at the subheading level.

Note 4 to Section XVI states that where a machine (including a combination of machines) consists of individual components (whether separate or interconnected by piping, by transmission devices, by electric cables or by other devices) intended to contribute together to a clearly defined function

covered by one of the headings in chapter 84 or chapter 85, then the whole falls to be classified in the heading appropriate to that function.

Based on the information presented, the clearly defined function of the Distillation Refining Module is the transfer of heat that vaporizes liquid and a cooling process that liquefies gas. This functionality, which is completed by the reboilers and condensers, is beyond the scope of the suggested subheading.

Therefore, in accordance with GRI 1 and Note 4 to Section XVI, the applicable subheading for the Distillation Refining Module, module 1101JB, will be subheading 8419.89.9585, HTSUS, which provides for Machinery, plant or laboratory equipment, whether or not electrically heated (excluding furnaces, ovens and other equipment of heading 8514), for the treatment of materials by a process involving a change of temperature such as heating... vaporizing, condensing or cooling, other than machinery or plant of a kind used for domestic purposes; instantaneous or storage water heaters, nonelectric; Other machinery, plant or equipment: Other: Other: For other materials. The general rate of duty 4.2 percent ad valorem.

In your submission, you request a ruling for country of origin. Additional information is needed. Such information includes providing the country or origin for each component and providing a detailed explanation of the manufacturing processes that occur in the various countries mentioned.

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

This ruling is being issued under the provisions of Part 177 of the Customs Regulations (19 C.F.R. 177).

A copy of the ruling or the control number indicated above should be provided with the entry documents filed at the time this merchandise is imported. If you have any questions regarding the ruling, contact National Import Specialist Sandra Martinez at Sandra.martinez@cbp.dhs.gov.

Sincerely,

STEVEN A. MACK

Director

National Commodity Specialist Division

ATTACHMENT B

HQ H302168

CLA-2 OT:RR:CTF:EMAIN HQ H302168 TPB

CATEGORY: Classification

TARIFF NO.: 8419.60.50

JOSEPH ACAYAN

GIVENS & JOHNSTON PLLC

950 ECHO LANE, SUITE 360

HOUSTON, TX 77024-2788

Re: Revocation of NY N300353; Classification of a distillation refining module

DEAR MR. ACAYAN:

The following is our decision regarding your request for reconsideration of New York Ruling Letter (NY) N300353, dated September 27, 2018, on behalf of your client, Fluor Enterprises, Inc. (Fluor; Importer), regarding the tariff classification of a certain plant module under the Harmonized Tariff Schedule of the United States (HTSUS).

In that ruling letter, the product at issue, "Module 1101JB," is described as interfacing with various other modules and consists of interconnected components that include reboilers, condensers, pumps, drums and interconnecting pipes. The module was classified under subheading 8419.89.9585, Harmonized Tariff Schedule of the United States (HTSUS), which provides for "machinery, plant or laboratory equipment, whether or not electrically heated (excluding furnaces, ovens and other equipment of heading 8514), for the treatment of materials by a process involving a change of temperature such as heating, cooking, roasting, distilling, rectifying, sterilizing, pasteurizing, steaming, drying, evaporating, vaporizing, condensing or cooling, other than machinery or plant of a kind used for domestic purposes; Other machinery, plant or equipment: Other: Other." In your request for reconsideration, you argue that the proper classification of the module is under subheading 8419.50.50, HTSUS, which provides for other heat exchange units.

Upon review of NY N300353, we find that the classification of Module 1101JB was incorrect. For the reasons set forth below, NY N300353, is revoked.

FACTS:

The article at issue in NY N300353 is Module 1101JB, which is described in the ruling as follows:

The Distillation Refining Module, module 1101JB, interfaces with various other modules and consists of interconnected components that include reboilers, condensers, pumps, drums and interconnecting pipes. It is noted that the distillation module does not include the distillation columns and does not complete a distillation process. The function of the multi-tiered module is to complete a transfer of heat process that vaporizes liquid and a cooling process that liquefies gas.

The reboilers are configured as shell and tube heat exchangers that use steam or gas to vaporize liquid. The vapor is then returned to the boilers and liquid drawn from the boilers is collected by a drum and subsequently pumped to another module.

The condensers, which are also said to be configured as a shell and tube heat exchangers, cool vapor and liquefy gas. The condensed liquid produced by the condensers is sent to a drum and later pumped to another module.

As implied above, the subject module is one of several separately imported modules that comprise the South Louisiana Methanol Plant (the Plant). The Plant includes a 93-tray distillation column (the “column”) that is used to separate a mixed stream of liquid methanol and water. The column produces a stream of 99%+ pure methanol gas out of the top and a stream of 99%+ pure water out of the bottom. You note that the subject distillation module does not include the distillation columns and does not complete a distillation process. While the reboilers and the condensers are both included in Module 1101JB and are imported together, they are two separate systems supporting the column, which performs two distinctly different, albeit complementary, functions.

In your submission, you note that the reboilers provide the heat necessary for the distillation column to function by boiling and recycling a portion of the column’s bottom liquid fraction back into the column, while the condensers dissipate heat from the column to help regulate the temperature in the column by condensing and recycling a portion of the column’s top gaseous fraction back into the column.

NY N300353 states that the function of the multi-tiered module is to complete a transfer of heat process that vaporizes liquid and a cooling process that liquefies gas. The reboilers are configured as shell and tube heat exchangers that use steam or gas to vaporize liquid. The vapor is then returned to the boilers and liquid drawn from the boilers is collected by a drum and subsequently pumped to another module. The condensers, which are also said to be configured as a shell and tube heat exchangers, cool vapor and liquefy gas. The condensed liquid produced by the condensers is sent to a drum and later pumped to another module.

ISSUE:

What is the classification of the distillation refining module?

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 HTSUS provisions under consideration are as follows:

8419		Machinery, plant or laboratory equipment, whether or not electrically heated (excluding furnaces, ovens and other equipment of heading 8514), for the treatment of materials by a process involving a change of temperature such as heating, cooking, roasting, distilling, rectifying, sterilizing, pasteurizing, steaming, drying, evaporating, vaporizing, condensing or cooling, other than machinery or plant of a kind used for domestic purposes; instantaneous or storage water heaters, non-electric; parts thereof:
8419.50	-	Heat exchange units
8419.60	-	Machinery for liquefying air or other gases
	-	Other machinery, plant and equipment
8419.89	--	Other

You note that while the reboilers and the condensers are both included in Module 1101JB and are imported together they are two separate systems supporting the column that perform two distinctly different, albeit complementary, functions. As such, they should be classified separately. However, from the schematics provided with your request, the Module 1101JB comprises a complete system where the component reboilers and condensers are interconnected. As such, Note 4 to Section XVI is applicable. That Note states:

Where a machine (including a combination of machines) consists of individual components (whether separate or interconnected by piping, by transmission devices, by electric cables or by other devices) intended to contribute together to a clearly defined function covered by one of the headings in Chapter 84 or Chapter 85, then the whole falls to be classified in the heading appropriate to that function.

The components, reboilers and condensers, contribute together to perform a function covered by heading 8419, i.e., the treatment of materials by a process involving a change of temperature. As such, there is no difference of opinion between Importer and CBP as to the heading for these modules are classified under.

With regard to the subheading, GRI 6 instructs that for legal purposes, the classification of goods in the subheadings of a heading shall be determined according to the terms of those subheadings and any related Subheading Notes and, *mutatis mutandis*, to GRIs 1 – 5, on the understanding that only subheadings at the same level are comparable. For the purposes of this Rule the relative Section and Chapter Notes also apply, unless the context otherwise requires.

In your submission, you argue that the reboilers and the condensers are all shell and tube heat exchangers and based on their function, should be classified under subheading 8419.50 as heat exchangers.

We agree that the reboilers are shell and tube heat exchangers, and if these were the sole components of the module, they would be classified under subheading 8419.50, HTSUS. However, the module is comprised of additional components, which include condensers. As you indicate, the gaseous fraction of the methane feed enters the condensers shell, where it is cooled to the point of condensing. Subheading 8419.60, HTSUS, specifically provides for machinery for liquefying air or other gases, and therefore covers the instant condensers regardless of whether they accomplish their function by virtue of heat transfer.

Taking the above into consideration, the instant Module 1101JB performs the functions of vaporizing liquid *and* liquefying gas through a combination of reboilers and condensers. Looking again at Note 4 to Section XVI, it states that where a machine (including a combination of machines) consists of individual components (whether separate or interconnected by piping, by transmission devices, by electric cables or by other devices) intended to contribute together to a clearly defined function covered by one of the headings in Chapter 84 or Chapter 85, then the whole falls to be classified in the heading appropriate to that function. Application of this Note at the subheading level does not resolve the classification issue, since neither subheading 8419.50 or 8419.60 describes a clearly defined function performed by the module; each subheading describes only a part of the module's operation. Subheading 8419.89 is a residual subheading, which provides for other machinery or plant equipment not described in any of the previous subheadings. But in this case, the functions of the module have been described in two preceding subheadings of heading 8419, HTSUS. As such, GRI 1 (*via* GRI 6) instructs us to proceed to the subsequent GRIs.

In this case, we have a product comprised of components described in two different subheadings, i.e., subheading 8419.50 and 8419.60, making it a composite good. These types of goods are classified by application of GRI 3. Further, because both the reboilers and the condensers provide necessary functions to the module, neither component imparts the essential character of the module. Therefore, by application of GRI 3 (c), the module will be classified under the subheading which occurs last in numerical order among those which equally merit consideration. In this case, subheading 8419.60, which provides for machinery for liquefying air or other gases.

HOLDING:

As explained above, by application of GRI 1 (Note 4 to Section XVI) Module 1101JB is classified under heading 8419, HTSUS, which provides for machinery, plant or laboratory equipment, whether or not electrically heated (excluding furnaces, ovens and other equipment of heading 8514), for the treatment of materials by a process involving a change of temperature. Further, by application of GRIs 6 and 3 (c), the module is classified in subheading 8419.60.50, HTSUS, which provides for other machinery for liquefying air or other gases. The general rate of duty is free.

Pursuant to U.S. Note 20 to Subchapter III, Chapter 99, HTSUS, products of China classified under subheading 8419.60.50, HTSUS, unless specifically excluded, are subject to an additional 25-percent ad valorem rate of duty. At the time of importation, you must report the Chapter 99 subheading, i.e., 9903.88.01, in addition to subheading 8419.60.50, HTSUS, listed above.

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

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

EFFECT ON OTHER RULINGS:

New York Ruling Letter N300353, dated September 27, 2018, is hereby REVOKED.

Sincerely,
CRAIG T. CLARK,
Director
Commercial and Trade Facilitation Division


19 CFR PART 177**REVOCATION OF TWO RULING LETTERS AND
REVOCATION OF TREATMENT RELATING TO THE
TARIFF CLASSIFICATION OF WALKING POLES**

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

ACTION: Notice of revocation of two ruling letters and revocation of treatment relating to the tariff classification of walking poles.

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 two ruling letters concerning the tariff classification of walking poles 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. 34, on September 2, 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 December 27, 2020.

FOR FURTHER INFORMATION CONTACT: Suzanne Kingsbury, Electronics, Machinery, Automotive and International Nomenclature Branch, Regulations and Rulings, Office of Trade, at (202) 325–0113 or via email at suzanne.kingsbury@cbp.dhs.gov.

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. 34, on September 2, 2020, proposing to revoke two ruling letters pertaining to the tariff classification of walking poles. 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 NY N01680, dated September 24, 2007, and NY N010380, dated May 8, 2007, CBP classified two styles of walking poles in heading 9506, HTSUS, specifically in subheading 9506.99.60, HTSUS, which provides for "[A]rticles and equipment for general physical exercise, gymnastics, athletics, other sports (including table-tennis) or outdoor games, not specified or included elsewhere in this chapter; swimming pools and wading pools; parts and accessories thereof: Other: Other: Other." CBP has reviewed NY N016801 and NY N010380 and has determined the ruling letters to be in error. It is now CBP's position that walking poles are properly classified in heading 6602, HTSUS, specifically in subheading 6602.00.00, HTSUS, which provides for "[W]alking-sticks, seat-sticks, whips, riding crops and the like."

Pursuant to 19 U.S.C. § 1625(c)(1), CBP is revoking NY N01680 and NY N010380 and revoking or modifying any other ruling not specifi-

cally identified to reflect the analysis contained in Headquarters Ruling Letter (“HQ”) H262581, 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:

GREGORY CONNOR
for

CRAIG T. CLARK,
Director

Commercial and Trade Facilitation Division

Attachment

HQ H262581

October 5, 2020

CLA-2 OT:RR:CTF:EMAIN H262581 SKK

CATEGORY: Classification

TARIFF NO.: 6602.00.00

MS. TRACY FERLAND
EXCEL SPORTS
133 ELM STREET
WINOOSKI, VT 05404

RE: Revocation of NY N016801 and NY N010380; tariff classification of walking poles or walking sticks

DEAR MS. FERLAND:

This ruling is in reference to New York Ruling Letter (NY) N016801, issued to Excel Sports on September 24, 2007, in which U.S. Customs and Border Protection (CBP) classified walking poles under heading 9506, Harmonized Tariff Schedule of the United States (HTSUS), specifically subheading 9506.99.60, HTSUS, which provides for “[A]rticles and equipment for general physical exercise, gymnastics, athletics, other sports (including table-tennis) or outdoor games, not specified or included elsewhere in this chapter; swimming pools and wading pools; parts and accessories thereof: Other: Other: Other.” Since the issuance of that ruling, we have determined that NY N016801 is in error.

CBP has also reviewed NY N010380, dated May 8, 2007, which involves the classification of substantially similar Nordic walking poles in subheading 9506.99.60, HTSUS. As with NY N016801, we have determined that the tariff classification of the subject merchandise at issue in this ruling is incorrect.

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, a notice proposing to revoke NY N016801 and NY N010380 was published on September 2, 2020, in Volume 54, Number 34 of the Customs Bulletin. No comments were received in response to the proposed action.

FACTS:

The articles at issue in NY N016801 are described as “walking poles.” They are constructed of carbon fiber and fiberglass shafts and feature handgrips with straps. The end of the poles are fitted with steel or rubber tips and have baskets to prevent the poles from sinking into soft ground or snow.

The articles at issue in NY N010380 are identified as “Nordic walking poles or sticks.” They are constructed of carbon or metal alloy materials and are described as a general fitness tool for use in hiking, speed walking or roller skating.

LAW AND ANALYSIS:

Classification under the HTSUS is in accordance with the General Rules of Interpretation (GRIs). GRI 1 provides that the classification of goods will 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 will then be applied in order.

The following HTS headings are under consideration:

- 6602 Walking-sticks, seat-sticks, whips, riding-crops and the like:
- 9506 Articles and equipment for general physical exercise, gymnastics, athletics, other sports (including table-tennis) or outdoor games, not specified or included elsewhere in this chapter; swimming pools and wading pools; parts and accessories thereof:

Note 1(c) to Chapter 66 provides, in pertinent part, that this Chapter does not cover “goods of chapter 95 (for example, toy umbrellas, toy sun umbrellas).”

Note 1(h) to Chapter 95 provides, in pertinent part, that this Chapter does not cover “walking-sticks” and directs classification their classification to heading 66.02.

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

The ENs to heading 6602 state, in pertinent part:

With the **exception** of the goods mentioned in the exclusions below, this heading covers walking-sticks, canes, whips (including whip-leads), riding-crops and similar articles irrespective of the materials of which they are made.

(A) **Walking-sticks, seat-sticks and similar articles.**

In addition to ordinary walking-sticks, this group also includes seat-sticks (with handles designed to open out to form a seat), walking-sticks specially designed for disabled persons and senior citizens, boy scouts’ poles, shepherds’ crooks.

The group also includes unfinished walking-sticks of cane or wood which have been turned, bent or otherwise worked; but it **excludes** cane or wood suitable for the manufacture of walking-sticks which has been simply roughly trimmed or rounded (**heading 14.01** or **Chapter 44**). The heading also **excludes** blanks identifiable as unfinished handles (**heading 66.03**).

The handle and shaft (stick) portions of walking-sticks, etc., may be made of various materials and may incorporate precious metal or metal clad with precious metal, precious or semi-precious stones (natural, synthetic or reconstructed). They may also be wholly or partly covered with leather or other materials.

* * * * *

This heading **excludes**:

* * * * *

(d) Articles of **Chapter 95** (e.g., golf clubs, hockey sticks, ski sticks, alpine ice-axes).

As Chapter 95 Note 1(h) excludes “walking-sticks” of heading 6602, HTSUS, the initial determination is whether the subject walking poles are *prima facie* classifiable under heading 6602, HTSUS.

Heading 6602, HTSUS, is an *eo nomine* provision. As such, the heading provides for all forms of its named exemplars, *i.e.*, “walking-sticks.” Although the term “walking-sticks” is not defined in the HTSUS or in the ENs, the term may be construed for tariff classification purposes according to its common commercial meaning. *See Millennium Lumber Distrib. Ltd., v. United States*, 558 F.3d 1326, 1329 (Fed. Cir. 2009). To ascertain the common commercial meaning of a tariff term, CBP “may rely on its own understanding of the term as well as lexicographic and scientific authorities.” *See Lon-Ron Mft. Co. v. United States*, 334 F.3d 1304, 1309 (Fed. Cir. 2003).

The term “walking stick” is defined by the *Merriam-Webster* online dictionary as “1 : a straight rod or stick (as of wood or aluminum) that is used to provide stability in walking or hiking.” *See* <https://www.merriam-webster.com/dictionary/walking%20stick>. Additionally, various websites use the term “walking stick” interchangeably with the terms “walking pole,” “walking staff,” “hiking stick,” and “trekking pole.” Although these articles may differ in design features (*i.e.*, type of grip, telescoping shaft, rubber or steel pole point, sold singly or in pairs), their shared characteristic is that they provide stability when walking or hiking. *See* <https://www.verywellfit.com/before-you-buy-fitness-walking-or-trekking-poles-3432912> (site last visited May 2020), noting:

Walking With One Pole or Hiking Staff A single walking stick, pole, or staff can give you stability, especially on loose terrain or when crossing streams. It also can relieve stress on the joints. A staff can also give you a measure of security as attackers may be more likely to go annoy somebody who doesn’t have a stick. You can find a variety of designs for single walking sticks, including those made of natural wood, as well as lightweight aluminum sticks that telescope or fold for ease of packing when you aren’t using them.

* * *

Hiking Poles and Trekking Poles Two sticks are better than one on the trail. Using a pair of hiking poles or trekking poles gives you balance and takes more stress off the lower body joints.

* * *

Fitness Walking and Nordic Walking Poles A pair of fitness walking poles allow you to burn more calories while feeling no greater exertion when walking on streets, sidewalks, and paths. These poles come with instruction manuals and often with videos for the proper technique. Nordic walking grips are designed for that technique, with a half-glove to allow the proper release of the pole on the backswing. They come with a removable rubber tip for switching between hard and soft surfaces.

See also https://en.wikipedia.org/wiki/Walking_stick (site last visited May 2020), noting:

Hikers use walking sticks, also known as trekking poles, pilgrim’s staffs, hiking poles, or hiking sticks, for a wide variety of purposes: to clear spider webs or to part thick bushes or grass obscuring their trail; as a support when going uphill or as a brake when going downhill; as a balance point when crossing streams, swamps, or other rough terrain; to feel for obstacles in the path; to test mud and puddles for depth; to enhance the cadence of striding, and as a defence against wild animals.

Based on the foregoing, the common commercial meaning of the term “walking sticks” includes “walking poles.” Accordingly, we find that the walking poles at issue in NY N016801 and NY N010380 fall within the common commercial meaning of “walking sticks” and are therefore *eo nomine* provided for in 6602, HTSUS. This conclusion is consistent with NY N189015 (pair of fitness walking poles), dated November 7, 2011, NY N222656 (metal alloy trekking/hiking poles), dated July 18, 2012, and NY N197699 (wooden hiking stick), dated January 6, 2012, in which CBP classified the subject articles under subheading 6602.00.00, HTSUS.

HOLDING:

By application of GRIs 1 and 6, the walking poles at issue in NYs N016801 and N010380 are classified under heading 6602, HTS, specifically under subheading 6602.00.00, HTSUS, which provides for “[W]alking-sticks, seat-sticks, whips, riding crops and the like.” The applicable rate of duty is 4% *ad valorem*.

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

EFFECT ON OTHER RULINGS:

NY N016801, dated September 24, 2007, and NY N010380, dated May 8, 2007, are hereby REVOKED.

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

Sincerely,

GREGORY CONNOR
for

CRAIG T. CLARK,
Director

Commercial and Trade Facilitation Division



**PROPOSED REVOCATION OF SIX RULING LETTERS,
MODIFICATION OF ONE RULING LETTER, AND
PROPOSED REVOCATION OF TREATMENT RELATING TO
THE TARIFF CLASSIFICATION OF “PIGGY” BANKS**

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

ACTION: Notice of proposed revocation of NY I87269, NY D84404, NY 816190, NY N005466, NY C85171, and NY L86796, modification of NY L82296, and proposed revocation of treatment relating to the tariff classification of “piggy” banks.

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 Implementa-

tion Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that U.S. Customs and Border Protection (CBP) intends to revoke six ruling letters and modify one ruling letter concerning tariff classification of “piggy” banks under the Harmonized Tariff Schedule of the United States (HTSUS). Similarly, CBP intends to revoke any treatment previously accorded by CBP to substantially identical transactions. Comments on the correctness of the proposed actions are invited.

DATE: Comments must be received on or before November 27, 2020.

ADDRESS: Written comments are to be addressed to U.S. Customs and Border Protection, Office of Trade, Regulations and Rulings, Attention: Trade and Commercial Regulations Branch, 90 K St., NE, 10th Floor, Washington, DC 20229–1177. Submitted comments may be inspected at the address stated above during regular business hours. Arrangements to inspect submitted comments should be made in advance by calling Mrs. Cammy Canedo at (202) 325–0439.

FOR FURTHER INFORMATION CONTACT: Marina Mekheil, Chemicals, Petroleum, Metals and Miscellaneous Classification Branch, Regulations and Rulings, Office of Trade, at (202) 325–0974.

SUPPLEMENTARY INFORMATION:

BACKGROUND

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

Pursuant to 19 U.S.C. § 1625(c)(1), this notice advises interested parties that CBP is proposing to revoke 6 ruling letters and modify one ruling letter pertaining to the tariff classification of “piggy” banks. Although in this notice, CBP is specifically referring to New York Ruling Letters (“NY”) I87269, dated October 11, 2002 (Attach-

ment A), NY D84404, dated December 2, 1998 (Attachment B), NY 816190, dated October 31, 1995 (Attachment C), NY N005466, dated January 26 2007 (Attachment D), NY C85171, dated April 2, 1998 (Attachment E), NY L86796, dated August 5, 2005 (Attachment F), and NY L82296, dated February 22, 2005 (Attachment G), this notice also covers any rulings on this merchandise which may exist, but have not been specifically identified. CBP has undertaken reasonable efforts to search existing databases for rulings in addition to the seven identified. No further rulings have been found. Any party who has received an interpretive ruling or decision (i.e., a ruling letter, internal advice memorandum or decision, or protest review decision) on the merchandise subject to this notice should advise CBP during the comment period.

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

In NY I87269, NY 816190, NY N005466, NY L86796, and NY L82296, CBP classified "piggy" banks in heading 9503, HTSUS, specifically in subheading 9503.49.00, HTSUS, which provides for "Other toys: Other."¹ In NY D84404 and NY C85171, CBP classified "piggy" banks in heading 9503, HTSUS, specifically in subheading 9503.90.00, HTSUS, which provides for "Other toys: Other."²

CBP has reviewed NY I87269, NY D84404, NY 816190, NY N005466, NY C85171, NY L86796, and NY L82296 and has determined the ruling letters to be in error. It is now CBP's position that "piggy" banks are properly classified, in heading 3924, HTSUS, specifically in subheading 3924.90.56, HTSUS, which provides for "Tableware, kitchenware, other household articles and hygienic or toilet articles, of plastics: Other: Other."

Pursuant to 19 U.S.C. § 1625(c)(1), CBP is proposing to revoke NY I87269, NY D84404, NY 816190, NY N005466, NY C85171, and NY L86796, and modify NY L82296 and to revoke or modify any other ruling not specifically identified to reflect the analysis contained in the proposed Headquarters Ruling Letter ("HQ") H268403, set forth as Attachment H to this notice. Additionally, pursuant to 19 U.S.C. §

¹ 9503.00.00 in the 2020 edition of the HTSUS.

² *Id.*

1625(c)(2), CBP is proposing to revoke any treatment previously accorded by CBP to substantially identical transactions.

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

Dated: September 15, 2020

for
CRAIG T. CLARK,
Director
Commercial and Trade Facilitation Division

NY I87269

October 11, 2002

CLA-2-95:RR:NC:2:224 I87269

CATEGORY: Classification

TARIFF NO.: 9503.49.0000

MS. DARLENE D. JONES
SCHENKER STINNES LOGISTICS
1300 DIAMOND SPRINGS ROAD
SUITE 300
VIRGINIA BEACH, VA 23455

RE: The tariff classification of a toy piggy bank from China.

DEAR MR. JONES:

In your letter dated October 7, 2002, you requested a tariff classification ruling, on behalf of The Little Tikes Company, your client.

You are requesting the tariff classification on a plastic toy piggy bank. The toy piggy bank is available in two colors: pink and blue. The product will be marketed for children as a toy item. The proper classification will be in Chapter 95 of the HTSUSA as other toys representing animals. You have not requested that the sample be returned to your office.

The applicable subheading for the toy piggy bank, no style number shown, will be 9503.49.0000, Harmonized Tariff Schedule of the United States (HTS), which provides for toys representing animals or non-human creatures (for example, robots and monsters) and parts and accessories thereof. The rate of duty will be free.

This ruling is being issued under the provisions of Part 177 of the Customs Regulations (19 C.F.R. 177).

A copy of the ruling or the control number indicated above should be provided with the entry documents filed at the time this merchandise is imported. If you have any questions regarding the ruling, contact National Import Specialist Tom McKenna at 646-733-3025.

Sincerely,

ROBERT B. SWIERUPSKI
Director,
National Commodity
Specialist Division

PD D84404

December 2, 1998

CLA-2-95:S:T:1:3:D14 D84404

CATEGORY: Classification

TARIFF NO: 9503.90.0045

MR. ALBERT Z. LENCOVSKI
 ETNA WORLDWIDE CORPORATION
 53 WEST 23RD STREET
 NEW YORK, NY 10010

RE: The tariff classification of Six (6) Toy Money Banks from China

DEAR LENCOVSKI:

In your letter dated November 2, 1998, you requested a tariff classification ruling. Samples of the subject articles were submitted with your inquiry.

The first article is item number 2052, Pepsi-Cola Bank. It is in the shape of a soda vending machine and is predominantly blue in color. It is made of plastic and measures approximately 7 1/4" x 4 3/4" x 2" in height, width and depth, respectively. It has a coin slot in its top and a four-coin sorter in its back. The coin-sorter is made of clear plastic which allows the user to view the sorting of the respective coins. It sorts the inserted coins into pennies, nickels, dimes and quarters and opens to allow access to the sorted coins.

The second article is item number 2116, Jackpot Coin Sorter. It is in the shape of a Las Vegas slot machine. It is made of plastic and is predominantly gold and black in color. It has a handle that actuates a single cylinder and causes the cylinder to revolve. It measures approximately 6 1/4" x 5 1/2" x 4" in height, width and depth, respectively. It has a coin slot in its top and a four-coin sorter in its back. The coin-sorter is made of clear plastic which allows the user to view the sorting of the respective coins. It sorts the inserted coins into pennies, nickels, dimes and quarters and opens to allow access to the sorted coins. It also has a drawer in its front designed to hold bills.

The third article is item number 2308, Pay Phone Coin Sorter. It is in the shape of a pay telephone, with the pay slot acting as the coin slot. It is made of plastic and measures approximately 8" x 3 1/2" x 4" in height, width and depth, respectively. It has a simulated dial pad, coin return lever, coin return slot, "locked" coin box and cradle. It has a removable receiver that is attached to the telephone by a black textile cord. It has four (4) removable trays that holds the sorted pennies, nickels, dimes and quarters.

The fourth article is item 9699, Piano Bank. It is made of clear plastic and is in the shape of an upright piano. It measures approximately 6" x 5 1/2" x 2 3/4" in height, width and depth, respectively. It has a coin slot in its top and a four-coin sorter in its back. The coin-sorter is made of clear plastic which allows the user to view the sorting of the respective coins. It sorts the inserted coins into pennies, nickels, dimes and quarters and opens to allow access to the sorted coins.

The fifth article is item number 2711, Spin Coin Bank. It is cylindrical in shape and is made of clear plastic. It measures approximately 3 1/2" in diameter at its center and approximately 3" at its top and bottom. The base is removable which allows access to the coins. It has a coin slot in its lid which receives pennies, nickels, dimes and quarters. The lid also has two (2) opposing metal springs attached to its bottom that puts a "spin" on the coins as they go through the slot. The coins spin on a "silver" stand half way down the cylinder and then falls to the bottom when the spinning stops.

The sixth article is item number 8125, The Vault Coin Bank. It is in the shape of a vault and measures approximately 7" x 6 ½" x 3 ½" in height, width and depth, respectively. It is made of plastic and is predominantly grey in color. It has a "working" combination lock and handle on the front which locks and unlocks the door. It has a coin slot in its top and a four-coin sorter inside. It also has a place for bills on the rear of the door.

The applicable tariff provision for these toy money banks will be 9503.90.0045, Harmonized Tariff Schedule of the United States (HTS), which provides for Other toys and models. The rate of duty will be free.

This ruling is being issued under the provisions of Part 177 of the Customs Regulations (19 C.F.R. 177).

A copy of the ruling or the control number should be provided with the entry documents filed at the time this merchandise is imported.

Sincerely,

IRENE JANKOV

Port Director

Los Angeles-Long Beach Seaport

NY 816190

October 31, 1995

CLA-2-95:R:N7:224 816190

CATEGORY: Classification

TARIFF NO.: 9503.49.0020

CINDY HAZLETT
APPLAUSE, INC.
6101 VARIEL AVE.
WOODLAND HILLS, CA 91367

RE: The tariff classification of a Mickey Mouse bank from China.

DEAR MS. HAZLETT:

In your letter dated October 20, 1995, you requested a tariff classification ruling.

You are requesting the tariff classification of an item, referred to in your ruling request as the Mickey Bank. The item, shown in your letter as style number 33693, is a plastic representation of the Mickey Mouse character. The item which is approximately 9-1/2 inches tall is a functional bank, however the play value as well as the comical value of the Mickey Mouse character would make this item a toy for tariff classification purposes. Sample is being returned to you, as requested.

The applicable subheading for the Mickey Mouse bank will be 9503.49.0020, Harmonized Tariff Schedule of the United States (HTS), which provides for "Other toys;...and accessories thereof (con.): Other...Toys not having a spring mechanism: Other". The rate of duty will be free.

This ruling is being issued under the provisions of Section 177 of the Customs Regulations (19 C.F.R. 177).

A copy of the ruling or the control number indicated above should be provided with the entry documents filed at the time this merchandise is imported. If you have any questions regarding the ruling, contact National Import Specialist Thomas A. McKenna at 212-466-5475.

Sincerely,

ROGER J. SILVESTRI

Director

National Commodity

Specialist Division

N005466

January 26, 2007

CLA-2-95:RR:E:NC:2:224

CATEGORY: Classification

TARIFF NO.: 9503.49.0000

MS. WENDY SUDSINSUNTHORN
SUMMIT PRODUCTS, LLC
7299 GADSDEN HWY
TRUSSVILLE, AL 35173

RE: The tariff classification of Zillions Counting Pig Toy Bank from China

DEAR MS. SUDSINSUNTHOM:

In your letter date January 15 2007, you requested a tariff classification ruling.

You are requesting the tariff classification on a product that is described as a Zillions Counting Pig Toy Bank. There is no designated item number indicated for the product. The article is a large, translucent pig bank with a digital reader that indicates the amount of money in the bank. This toy encourages a child to save money and tells them the amount in the bank deposited. The toys will be classifiable in Chapter 95 of the Harmonized Tariff Schedule of the United States as toys representing animals.

The applicable subheading for the Zillions Counting Pig Toy Bank will be 9503.49.0000, Harmonized Tariff Schedule of the United States (HTSUS), which provides for toys representing animals or non-human creatures... and parts and accessories thereof. The rate of duty will be Free.

Duty rates are provided for your convenience and are subject to change. The text of the most recent HTSUS and the accompanying duty rates are provided on World Wide Web at <http://www.usitc.gov/tata/hts/>.

This ruling is being issued under the provisions of Part 177 of the Customs Regulations (19 C.F.R. 177).

Pursuant to title 19 United States Code, Section 3005 The Harmonized Tariff Schedule of the United States is in the process of being amended to reflect changes recommended by the World Customs Organization. The amendments are expected to affect the classification of your merchandise. On January 4, 2007, Presidential Proclamation 8097 containing these changes was published in the Federal Register. See 72 FR 453, Volume 72, No. 2. The proclaimed changes are effective for goods entered or withdrawn from warehouse for consumption on or after February 3, 2007. Once those changes are in effect, it is anticipated that your merchandise will be classified in 9503.00.0000 HTSUS.

A copy of the ruling or the control number indicated above should be provided with the entry documents filed at the time this merchandise is imported. If you have any questions regarding the ruling, contact National Import Specialist Tom McKenna at 646-733-3025.

Sincerely,

ROBERT B. SWIERUPSKI
Director,
National Commodity
Specialist Division

PD C85171

April 2, 1998

CLA-2-95:S:T:1:3:D14-C85171

CATEGORY: Classification

TARIFF NO: 9503.90.0045

MR. GORDON ANDERSON
C. H. ROBINSON INTERNATIONAL INC.
8100 MITCHELL ROAD
EDEN PRAIRIE, MN 55344

RE: The tariff classification of miniature Toy Banks from China

DEAR MR. ANDERSON:

In your letter dated March 6, 1998, you requested a tariff classification ruling on behalf of your client McGlynn Bakery Inc./Decopac. Samples of the subject articles were submitted with your inquiry. Such samples will be returned to you as requested.

The first article is a PVC bank measuring approximately 4" in height. It is depicted in the shape of the head of the Looney Tune cartoon character "Marvin the Martian." It has a black face, large white eyes, and is shown wearing a green trojan helmet. The article has a small coin slot in its top and a retrieval plug in the base. The base is red in color and contains the legend "BIRTHDAY GREETINGS EARTHLING!!!" Inside of the article is an electronic musical mechanism which plays a Happy Birthday melody when coins are dropped through the coin slot. This mechanism consumes a large part of the cavity of the article.

The second article is a PVC bank measuring approximately 4" in height. It is depicted in the shape of a football permanently mounted to a football tee. The football is brown and white in color and contain a small coin slot in its top. The football tee is orange in color and has a retrieval plug in its base. The utility of these items is limited due to the small size of the respective coin slots and storage capacities.

The applicable tariff provision for these miniature toy banks will be 9503.90.0045, Harmonized Tariff Schedule of the United States (HTS), which provides for Other toys and models. The rate of duty will be free.

This ruling is being issued under the provisions of Part 177 of the Customs Regulations (19 C.F.R. 177).

A copy of the ruling or the control number should be provided with the entry documents filed at the time this merchandise is imported.

Sincerely,

IRENE JANKOV
Port Director

Los Angeles-Long Beach Seaport

NY L86796

August 5, 2005

CLA-2-95:RR:NC:2:224 L86796

CATEGORY: Classification

TARIFF NO.: 9503.49.0000

MR. TROY D. CRAGO
ATICO INTERNATIONAL USA, INC.
501 SOUTH ANDREWS AVENUE
FT. LAUDERDALE, FL 3301

RE: The tariff classification of an animal toy bank from China

DEAR MR. CRAGO:

In your letter dated July 25, 2005, you requested a tariff classification ruling.

You are requesting the tariff classification on an item that is described as an animal bank that is composed of a plastic body covered with plush on the outside surface. The product is designated as item number C078JA01245. The bank is a whimsical depiction of an elephant, and although it is a functional bank, the primary purpose of the article is to amuse a child or an adult. The proper classification will be in Chapter 95 of the HTS, as a toy representing an animal. The sample will be returned, as requested by your office.

The applicable subheading for the toy elephant bank, item #C078JA01245, will be 9503.49.0000, Harmonized Tariff Schedule of the United States (HTS), which provides for toys representing animals or non-human creatures...and parts and accessories thereof: other. The rate of duty will be free.

This ruling is being issued under the provisions of Part 177 of the Customs Regulations (19 C.F.R. 177).

A copy of the ruling or the control number indicated above should be provided with the entry documents filed at the time this merchandise is imported. If you have any questions regarding the ruling, contact National Import Specialist Tom McKenna at 646-733-3025.

Sincerely,

ROBERT B. SWIERUPSKI
Director,
National Commodity
Specialist Division

NY L82296

February 22, 2005

CLA-2-95:RR:NC:2:224 L82296

CATEGORY: Classification

TARIFF NO.: 9503.49.0000; 7326.20.0070

MR. RALPH SAUNDERS
DERINGER LOGISTICS CONSULTING GROUP
1 LINCOLN BOULEVARD, SUITE 225
ROUSES POINT, NY 12979

RE: The tariff classification of 5 assorted items from China

DEAR MR. SAUNDERS:

In your letter dated January 21, 2005, you requested a tariff classification ruling, on behalf of Car Freshner Corp., your client.

You are requesting the tariff classification on five articles as follows: an unscented piggy bank made of polyvinyl chloride resin, an unscented polyvinyl chloride resin pine tree attached to a metal key ring, a bio-hazard auto air freshener (diffuser), a Hula Garfield air freshener, and a Western gear steer skull air freshener. The samples will be returned, as requested.

You stated in your letter that the piggy bank should be classified in 3924.90.5500 HTS. However, we are of the opinion that the item is too small to function as a bank. Rather, we believe that the piggy bank would be most suitable for use as a toy.

The Garfield air freshener functions as a source of amusement while it freshens the air. Therefore, it would also be classified as a toy representing an animal in Chapter 95 of the HTS.

The applicable subheading for the toy piggy bank and the Hula Garfield toy will be 9503.49.0000, Harmonized Tariff Schedule of the United States (HTS), which provides for toys representing animals or non-human creatures...and parts and accessories thereof: other. The rate of duty will be free.

The applicable subheading for the pine tree key ring will be 7326.20.0070, Harmonized Tariff Schedule of the United States (HTS), which provides for articles of iron or steel wire. The rate of duty will be 3.9% ad valorem.

This ruling is being issued under the provisions of Part 177 of the Customs Regulations (19 C.F.R. 177).

A copy of the ruling or the control number indicated above should be provided with the entry documents filed at the time this merchandise is imported. If you have any questions regarding the ruling, contact National Import Specialist Tom McKenna at 646-733-3025.

We are returning your request for a classification ruling regarding the bio-hazard auto air freshener (diffuser) and the Western gear steer skull air freshener because we need additional information in order to issue a ruling.

Samples of these products were submitted with your ruling request. The samples are being returned to you.

Please submit marketing material for these products: the bio-hazard auto air freshener and the Western gear steer skull air freshener.

Please submit a value breakdown for the bio-hazard auto air freshener and the steer skull air freshener.

Are these two products refillable, and what is the source of the fragrance?

Please provide a fragrance breakdown.

As regards the bio-hazard auto air freshener, is there any other function of the plug-in?

When this information is available, you may wish to consider resubmission of your request. If you decide to resubmit your request, please submit the samples and a copy of your original letter, along with any additional information requested in this notice.

Please mail your request to the U.S. Customs and Border Protection, Customs Information Exchange, 10th Floor, One Penn Plaza, New York, NY 10119, attn: Binding Rulings Section. If you have any questions regarding the above, contact National Import Specialist Stephanie Joseph at 646-733-3268.

Sincerely,

ROBERT B. SWIERUPSKI

Director,

*National Commodity
Specialist Division*

HQ H268403
OT:RR:CTF:CPMMA H268403MMM
CATEGORY: Classification
TARIFF NO.: 3924.90.56

MR. RALPH SAUNDERS
DERINGER LOGISTICS CONSULTING GROUP
1 LINCOLN BOULEVARD, SUITE 225
ROUSES POINT, NY 12979

RE: Revocation of NY L82296, NY I87269, NY D84404, NY 816190, NY N005466, NY C85171, and NY L86796; Classification of “piggy” Banks

DEAR MR. SAUNDERS,

This is reference to the New York Ruling Letter (NY) L82296, issued to you by U.S. Customs and Border Protection (CBP) on February 22, 2005 concerning classification of an animal “piggy” bank under the Harmonized Tariff Schedule of the United States (HTSUS). We have reviewed your ruling, and determined that it is incorrect, and for the reasons set forth below, are modifying your ruling.

We have also reviewed NY I87269, dated October 11, 2002, NY D84404, dated December 2, 1998, NY 816190, dated October 31, 1995, NY N005466, dated January 26, 2007, NY C85171, dated April 2, 1998, and NY L86796, dated August 5, 2005, and determined they are also incorrect, and for the reasons set forth below, we are revoking those rulings.

FACTS:

In your ruling NY L82296 (representation of a pig), and in rulings NY I87269 (representation of a pig), NY D84404 (representation of a soda vending machine), and NY 816190 (representation of Mickey Mouse character), CBP classified the subject plastic “piggy” banks into heading 9503, HTSUS, as toys.

In NY N005466, CBP stated as follows in reference to the subject merchandise:

Described as a Zillions Counting Pig Toy Bank. There is no designated item number indicated for the product. The article is a large, translucent pig bank with a digital reader that indicates the amount of money in the bank. This “piggy” bank encourages a child to save money and tells them the amount in the bank deposited.

In NY C85171, CBP stated as follows:

The first article is a PVC bank measuring approximately 4” in height. It is depicted in the shape of the head of the Looney Tune cartoon character “Marvin the Martian.” It has a black face, large white eyes, and is shown wearing a green trojan helmet. The article has a small coin slot in its top and a retrieval plug in the base. The base is red in color and contains the legend “BIRTHDAY GREETINGS EARTHLING!!!.” Inside of the article is an electronic musical mechanism which plays a Happy Birthday melody when coins are dropped through the coin slot. This mechanism consumes a large part of the cavity of the article.

The second article is a PVC bank measuring approximately 4” in height. It is depicted in the shape of a football permanently mounted to a football tee. The football is brown and white in color and contain a small coin slot

in its top. The football tee is orange in color and has a retrieval plug in its base. The utility of these items is limited due to the small size of the respective coin slots and storage capacities.

In NY L86796, CBP stated as follows:

An animal bank that is composed of a plastic body covered with plush on the outside surface. The product is designated as item number C078JA01245. The bank is a whimsical depiction of an elephant, and although it is a functional bank, the primary purpose of the article is to amuse a child or an adult.

CBP also classified the merchandise in NY N005466, NY C85171, and NY L86796 in heading 9503, HTSUS, as toys.

ISSUE:

Whether the subject “piggy” banks are classified in heading 9503, HTSUS, as other toys.

LAW AND ANALYSIS:

Merchandise imported into the United States is classified under the HTSUS. Tariff classification is governed by the principles set forth in the General Rules of Interpretation (GRIs) and, in the absence of special language or context which requires otherwise, by the Additional U.S. Rules of Interpretation. The GRIs and the Additional U.S. Rules of Interpretation are part of the HTSUS and are to be considered statutory provisions of law for all purposes.

GRI 1 requires that classification be determined first 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 heading and legal notes do not otherwise require, the remaining GRIs 2 through 6 may then be applied in order. GRI 2(a) provides, in relevant part, that “[a]ny reference in a heading to an article shall be taken to include a reference to that article incomplete or unfinished, provided that, as entered, the incomplete or unfinished articles has the essential character of the complete or finished article.”

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

The 2019 HTSUS provision under consideration are as follows:

3924: Tableware, kitchenware, other household articles and hygienic or toilet articles, of plastics:

6307: Other made up articles

8543: Electrical machines and apparatus, having individual functions, not specified or included elsewhere in this chapter; parts thereof:

9503: Dolls, other toys

Note 2 to Chapter 39, states in relevant part:

2. This chapter does not cover:

(s) Articles of section XVI (machines and mechanical or electrical appliances)

(y) Articles of Chapter 95 (for examples, toys, games, sports equipment)

The ENs to Heading 9503 state in relevant part:

(D) **Other toys.**

This group covers toys intended essentially for the amusement of persons (children or adults). However, toys which, on account of their design, shape or constituent material, are identifiable as intended exclusively for animals, e.g., pets, do not fall in this heading, but are classified in their own appropriate heading. This group includes:

All toys not included in (A) to (C). Many of the toys are mechanically or electrically operated.

These include:

(xxii) Toy money boxes

* * * *

Classification within Chapter 39 is subject to Chapter 39, Legal Note 2(y), which excludes from Chapter 39 goods that are classifiable in Chapter 95, HTSUS. Therefore, if the subject articles are described in Chapter 95, they are precluded from classification in any of the provisions of Chapters 39, even if they are described therein. We must therefore first address whether the subject articles are described in heading 9503, HTSUS.

Although the term “toy” is not defined in the HTSUS, EN 95.03 provides that heading 9503, HTSUS, covers toys intended essentially for the amusement of persons. *U. S. v. Topps Chewing Gum*, 58 CCPA 157, C.A.D. 1022 (1971) (hereafter *Topps*), is illustrative in determining whether an article is intended for the amusement of the user. *Topps* held that an article may be considered a toy if it provides the same kind of amusement as a plaything. In *Topps*, various decorative buttons with humorous quotes which created evident and inherent amusement were classified as toys of heading 9503.

Where merchandise might have another purpose in addition to providing amusement, the primary purpose of the item must be its amusement value for it to be classified as a toy. In *Ideal Toy Corp. v. United States*, 78 Cust. Ct. 28, 33 (1977), the Customs Court held that “when amusement and utility become locked in controversy, the question becomes one of determining whether the amusement is incidental to the utilitarian purpose, or the utility purpose is incidental to the amusement.”

Additionally, heading 9503, HTSUS, is a “principal use” provision within the meaning of Additional U.S. Rule of Interpretation (AUSRI) 1(a), HTSUS.¹ For articles governed by principal use, Additional U.S. Rule of Interpretation 1(a), HTSUS, provides that, in the absence of special language or context which otherwise requires, such use “is to be determined in accordance with the use in the United States at, or immediately prior to, the date of importation, of goods of that class or kind to which the imported goods belong, and the controlling use is the principal use.” In other words, the article’s principal use at the time of importation determines whether it is classifiable within a particular class or kind.

In determining whether the principal use of a product is for amusement, and thereby classified as a toy, Customs considers a variety of factors, including: (1) the general physical characteristics of the merchandise; (2) the ex-

¹ *Minnetonka Brands v. United States*, 110 F. Supp. 2d 1020, 1026 (CIT 2000).

pectation of the ultimate purchasers; (3) the channels, class or kind of trade in which the merchandise moves; (4) the environment of the sale (i.e., accompanying accessories and the manner in which the merchandise is advertised and displayed); (5) usage, if any, in the same manner as merchandise which defines the class.² Not all of these factors will necessarily be relevant in every situation. In the instant case, the factors for which information is available is primarily the physical characteristics.

While EN 95.03(D)(xxii) provides specifically for toy money boxes, any toy classifiable in heading 9503, HTSUS, particularly one with a dual purpose of utility and amusement, must meet the criteria discussed above. For example, in *Nadel & Sons Toy Corp. v. United States*, 4 CIT 20 (1982), the Court of International Trade discussed the application of these precedents to a plastic money bank in the figure of Uncle Sam. The figure was standing on a decorated platform which served as a receptacle of coins. One of Uncle Sam's arms was extended and its hand was designed to accommodate a coin. When a button was pressed, the arm dropped the coin into a satchel that opened. The Court found that the purpose of the Uncle Sam bank was to save and store coins. The Court stated that "the coins are received into the article in a manner that amuses is incidental and not controlling," and that there was little "amusement value" in such a pastime, which would be soon abandoned.

In the instant case, the physical features of the subject banks are not characteristic of a toy. These banks serve a utilitarian purpose, and if they provide any amusement, it is incidental to the utilitarian purpose. Similar to the toy bank in *Nadel*, the purpose of the banks is to save and store coins, with very little amusement value.

Additionally, although the subject banks in NY C85171 and NY 816190 have amusing appearances, as they are representations of recognizable licensed animated characters ("Mickey Mouse" and "Marvin the Martian"), they do "not promote pretend and role play, stimulate imagination, combat a child's ennui, promote mimetic activity or provide the opportunity for children to develop manipulative skill or muscular dexterity" and are also not characteristic of a toy.³ Thus the subject merchandise in NY L82296, NY I87269, NY D84404, NY 816190, and the Football bank in NY C85171 are by application of GRI 1 not toys and are classified in heading 3924, HTSUS as household articles of plastic.

The Zillions Counting Toy pig (NY N005466), the Marvin the Martian bank (NY C85171), and the plush animal bank (NY L86796) are by application of GRI 3(b), composite goods classified in heading 3924. According to GRI 3(b), composite goods consisting of different materials or made up of different components shall be classified as if they consisted of the material or component which gives them their essential character. Although the GRIs do not provide a definition of "essential character," EN (VIII) of GRI 3(b) provides guidance. According to this EN, the essential character may be determined by the nature of the material or component, its bulk, quantity, weight or value, or by the role of a constituent material in relation to the use of the goods.

² *United States v. Carborundum Co.*, 63 C.C.P.A. 98, 102, 536 F.2d 373, 377 (1976).

³ Headquarters Ruling H275175, dated September 5, 2017 (citing *Springs Creative Prods. Group v. United States*, 35 I.T.R.D. (BNA) 1955, Slip Op. 13-107 (Ct. Int'l Trade Aug. 16, 2013)).

It is well-established that a determination as to “essential character” is driven by the particular facts of the case at hand.⁴ Essential character has traditionally been understood as “that which is indispensable to the structure, core or condition of the article, *i.e.*, what it is” and as “the most outstanding and distinctive characteristic of the article.”⁵

The plastic components provide the essential character to the subject merchandise. The electronic components in NY N005466 and NY C85171 and the textile components in NY L86796 are merely used to provide minimal amusement. However, the plastic components are the most distinctive characteristic of the banks, as they are the bulk of the article as well as the component in which the coins are stored. The subject merchandise in NY N005466, NY C85171 and NY L86796 are also properly classified in heading 3924, HTSUS as household articles of plastic by application of GRI 3(b).

HOLDING:

By application of GRI 1 and GRI 3(b), the subject merchandise, is classified in heading 3924, HTSUS. The “piggy” banks are specifically described in subheading 3924.90.56, HTSUSA (Annotated), which provides for: “Tableware, kitchenware, other household articles and hygienic or toilet articles, of plastics: Other: Other.” The 2019 column one general rate of duty for subheading 3924.90.56, HTSUSA, is 3.4% ad valorem.

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

EFFECT ON OTHER RULINGS

New York Ruling Letter L82296, dated February 22, 2005 is hereby MODIFIED in accordance with the above analysis.

New York Ruling Letters I87269, dated October 11, 2002, D84404, dated December 2, 1998, 816190, dated October 31, 1995, N005466, dated January 26, 2007, C85171, April 2, 1998, and L86796, dated August 5, 2005 are hereby REVOKED in accordance with the above analysis.

Sincerely,

CRAIG CLARK,

Director

Commercial and Trade Facilitation Division

CC: Darlene D. Jones
Schenker Stinner Logistics
1300 Diamond Springs Road
Suite 300
Virginia Beach, VA 23455

CC: Albert Z. Lencovski
Etna Worldwide Corporation
53 West 23rd Street
New York, NY 10010

⁴ See, e.g., *Alcan Food Packaging (Shelbyville) v. United States*, 771 F.3d 1364, 1366 (Fed. Cir. 2014) (“The ‘essential character’ of merchandise is a fact-intensive issue.”); see also EN VIII to GRI 3(b) (“The factor which determines essential character will vary as between different kinds of goods.”).

⁵ *Structural Indus. v. United States*, 360 F. Supp. 2d 1330, 1336 (Ct. Int’l Trade 2005).

- CC: Cindy Hazlett
Applause, Inc.
6101 Variel Ave.
Woodland Hills, CA 91367
- CC: Wendy Sudsinsunthorn
Summit Products, LLC
7299 Gadsden Hwy
Trussville, AL 35173
- CC: Gordon Anderson
C.H. Robinson International Inc.
8100 Mitchell Road
Eden Prairie, MN 55344
- CC: Troy D. Crago
Atico International USA, Inc.
501 South Andrews Avenue
Ft. Lauderdale, FL 3301



**PROPOSED MODIFICATION OF ONE RULING LETTER
AND REVOCATION OF TREATMENT RELATING TO THE
ELIGIBILITY OF CERTAIN INSTANT CHAI TEAS FOR
PREFERENTIAL TREATMENT UNDER NAFTA**

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

ACTION: Notice of proposed modification of one ruling letter and revocation of treatment relating to the eligibility of certain instant chai teas for preferential tariff treatment under the North American Free Trade Agreement (“NAFTA”).

SUMMARY: Pursuant to section 625(c), Tariff Act of 1930 (19 U.S.C. § 1625(c)), as amended by section 623 of title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that U.S. Customs and Border Protection (“CBP”) intends to modify one ruling letter concerning the eligibility of certain instant chai teas for preferential tariff treatment under NAFTA. Similarly, CBP intends to revoke any treatment previously accorded by CBP to substantially identical transactions. Comments on the correctness of the proposed actions are invited.

DATE: Comments must be received on or before November 27, 2020.

ADDRESS: Written comments are to be addressed to U.S. Customs and Border Protection, Office of Trade, Regulations and Rulings, Attention: Cammy Canedo, Regulations and Disclosure

Law Division, 90 K St., NE, 10th Floor, Washington, DC 20229–1177. Submitted comments may be inspected at the address stated above during regular business hours. Arrangements to inspect submitted comments should be made in advance by calling Ms. Cammy Canedo at (202) 325–0439.

FOR FURTHER INFORMATION CONTACT: Elif Eroglu, Valuation and Special Programs Branch, Regulations and Rulings, Office of Trade, at (202) 325–0277.

SUPPLEMENTARY INFORMATION:

Background

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

Pursuant to 19 U.S.C. § 1625(c)(1), this notice advises interested parties that CBP is proposing to modify one ruling letter pertaining to the eligibility of certain instant chai teas for preferential tariff treatment under NAFTA and the country of origin of the instant chai teas for marking purposes. Although in this notice, CBP is specifically referring to New York Ruling Letter (“NY”) N306886, dated November 18, 2019 (Attachment A), this notice also covers any rulings on this merchandise which may exist, but have not been specifically identified. CBP has undertaken reasonable efforts to search existing databases for rulings in addition to the one identified. No further rulings have been found. Any party who has received an interpretive ruling or decision (i.e., a ruling letter, internal advice memorandum or decision, or protest review decision) on the merchandise subject to this notice should advise CBP during the comment period.

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

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

In NY N306886, CBP determined that the instant chai teas classified under subheadings 2101.20.54, 2101.20.58, or 2101.20.90, HTSUS, were not eligible for preferential treatment under NAFTA and that the country of origin of the instant chai teas was either the United States or Kenya for marking purposes. CBP has reviewed NY N306886, and has determined this ruling letter to be partially in error. CBP disagrees with NY N306886 that the Chai Moments Matcha Latte is classified under subheading 2101.20.54, HTSUS, which is not a NAFTA eligible provision for goods of Mexico. It is now CBP's position that the Chai Moments Matcha Latte, classified under subheading 2101.20.58, HTSUS, is eligible for preferential tariff treatment under NAFTA, and its country of origin is Mexico for purposes of the marking requirements. Further, the country of origin of the remaining four instant chai teas, Chai Moments Ginger Chai, Chai Moments Plain Chai, Chai Moments Ginger Turmeric, and Chai Moments Unsweetened Masala is Kenya for marking purposes.

Pursuant to 19 U.S.C. §1625(c)(1), CBP is proposing to modify NY N306886, and to revoke or modify any other ruling not specifically identified to reflect the analysis contained in the proposed Headquarters Ruling Letter ("HQ") H312440, set forth as Attachment B to this notice. Additionally, pursuant to 19 U.S.C. §1625(c)(2), CBP is proposing to revoke any treatment previously accorded by CBP to substantially identical transactions.

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

Dated:

for
CRAIG T. CLARK,
Director
Commercial and Trade Facilitation Division

Attachments

N306886

November 18, 2019

CLA-2-21:OT:RR:NC:N2:232

CATEGORY: Classification

TARIFF NO.: 2101.20.5400; 2101.20.5800;

2101.20.9000

HAROLD C. AVERILL
PARKER & COMPANY
P.O. BOX 271
4694 JAIME ZAPATA AVE.
BROWNSVILLE, TX 78522

RE: The tariff classification and status under the North American Free Trade Agreement (NAFTA), of Instant Chai tea sticks from Mexico; Article 509. Correction to Ruling Number N305789

DEAR MR. AVERILL:

This replaces Ruling Number N305789, which inadvertently stated the incorrect country of origin for marking purposes for certain merchandise. A complete corrected ruling follows.

In your letter dated August 14, 2019, on behalf of your client, Rafi Industries, Inc., you requested a ruling on the classification and status of Instant Chai tea sticks from Mexico under the NAFTA.

The subject merchandise is described as Instant Chai Teas under the brand name "Tea India." There are four varieties of sweetened teas and one unsweetened tea under the product name "Chai Moments."

"Chai Moments Ginger Chai" sweetened tea is said to contain 55 to 60 percent Cane Sugar, 12 to 14 percent Whole Milk Powder, 11 to 13 percent Skim Milk Powder, 6 to 7 percent Black Tea Extract, 4 to 5 percent Chicory Root Inulin, 1 to 2 percent Ginger Flavor and 1 to 2 percent Ginger Spice Powder. The Cane Sugar, Whole Milk Powder, Skim Milk Powder and Ginger Flavor are products of the United States. The Black Tea Extract is a product of Kenya. The Chicory Root Inulin is a product of Belgium. The Ginger Spice Powder may be sourced from China, India or Nigeria. The total dry weight of sugar is said to be 59.86 percent.

"Chai Moments Matcha Latte" sweetened tea is said to contain 55 to 60 percent Cane Sugar, 17 to 19 percent Non-Dairy Creamer, 10 to 12 percent Malted Milk Powder, 4 to 6 percent Matcha Green Tea, 4 to 6 percent Skim Milk Powder, 3 to 5 percent Whole Milk Powder, 1 to 2 percent Green Tea Matcha Flavor and less than 1 percent of Pectin and Tara Gum. The Cane Sugar, Non-Dairy Creamer, Malted Milk Powder, Skim Milk Powder, Whole Milk Powder, and Green Tea Matcha Flavor are products of the United States. The Matcha Green Tea is a product of Japan. The Pectin may be sourced from Mexico, China or Spain. The Tara Gum is a product of Peru. The total dry weight of sugar is said to be 55.25 percent.

"Chai Moments Plain Chai" sweetened tea is said to contain 55 to 60 percent Cane Sugar, 14 to 16 percent Whole Milk Powder, 11 to 13 percent Skim Milk Powder, 6 to 8 percent Black Tea Extract and 9 to 11 percent Chicory Root Inulin. The Cane Sugar, Whole Milk Powder and Skim Milk Powder are products of the United States. The Black Tea Extract is a product of Kenya. The Chicory Root Inulin is a product of Belgium. The total dry weight of sugar is said to be 56.39 percent.

“Chai Moments Ginger Turmeric” sweetened tea is said to contain 55 to 65 percent Cane Sugar, 12 to 14 percent Whole Milk Powder, 11 to 13 percent Skim Milk Powder, 5 to 6 percent Black Tea Extract, 5 to 6 percent Chicory Root Inulin, 1 to 2 percent Ginger Flavor, and less than 1 percent of Ginger Spice Powder, Turmeric Spice Powder, Cinnamon Spice Powder and Pepper Spice Powder. The Cane Sugar, Whole Milk Powder, Skim Milk Powder and Ginger Flavor are products of the United States. The Black Tea Extract is a product of Kenya. The Chicory Root Inulin is a product of Belgium. The Ginger Spice Powder may be sourced from China, India or Nigeria. The Turmeric Spice Powder is a product of India. The Cinnamon Spice Powder is a product of Vietnam. The Pepper Spice Powder may be sourced from India, Indonesia, Malaysia or Vietnam. The total dry weight of sugar is said to be 59.45 percent.

“Chai Moments Unsweetened Masala” tea is said to contain 45 to 50 percent Whole Milk Powder, 35 to 40 percent Chicory Root Inulin, 8 to 10 percent Black Tea Extract, 1 to 2 percent Cinnamon Spice Powder and less than 1 percent of Clove Spice Powder, Ginger Spice Powder, Cardamom Spice Powder and Pepper Spice Powder. The Whole Milk Powder is a product of the United States. The Chicory Root Inulin is a product of Belgium. The Black Tea Extract is a product of Kenya. The Cinnamon Spice Powder is a product of Vietnam. The Clove Spice Powder may be sourced from Brazil, Comoros, Indonesia, Madagascar, Vietnam or Zanzibar. The Ginger Spice Powder may be sourced from China, India, or Nigeria. The Cardamom Spice Powder may be sourced from Guatemala, Honduras or India. The Pepper Spice Powder may be sourced from India, Indonesia, Malaysia or Vietnam.

All ingredients will be shipped to Mexico where they will be manufactured into Chai Tea products. They are then packaged in individual units (sticks) varying from 12.5g to 25g. These individual packages are then packaged in boxes of either 10 or 20 units each. Both are then bulk packed in master cartons of 6 each. The boxes that have 10 sticks each will be put up for retail sale. The boxes with 20 sticks will be sold as individual single serve per stick. The product is steeped in a cup of hot water to make a beverage.

The applicable tariff provision for the “Chai Moments Plain Chai”, “Chai Moments Matcha Latte”, “Chai Moments Plain Chai”, and “Chai Moments Ginger Turmeric” Instant Chai tea sticks will be 2101.20.5400, Harmonized Tariff Schedule of the United States (HTSUS), which provides for Extracts, essences and concentrates of coffee, tea or maté and preparations with a basis of these products or with a basis of coffee, tea or maté; roasted chicory and other roasted coffee substitutes, and extracts, essences and concentrates thereof: Extracts, essences and concentrates of tea or maté, and preparations with a basis of these extracts, essences or concentrates or with a basis of tea or maté: Other: Other: Articles containing over 10 percent by dry weight of sugar described in additional U.S. note 3 to chapter 17: Described in additional U.S. note 8 to chapter 17 and entered pursuant to its provisions. The rate of duty will be 10 percent ad valorem. If the quantitative limits of additional U.S. note 8 to chapter 17 have been reached, the product will be classified in subheading 2101.20.5800, HTSUS, and dutiable at the rate of 30.5 cents per kilogram plus 8.5 percent ad valorem. In addition, products classified in subheading 2101.20.5800, HTSUS, will be subject to additional duties based on their value, as described in subheadings 9904.17.49 to 9904.17.56, HTSUS.

The applicable tariff provision for the “Chai Moments Unsweetened Masala” Instant Chai tea sticks will be 2101.20.9000, HTSUS, which provides for Extracts, essences and concentrates of coffee, tea or mate and preparations with a basis of these products or with a basis of coffee, tea or mate; roasted chicory and other roasted coffee substitutes, and extracts, essences and concentrates thereof: Extracts, essences and concentrates, of tea or mate, and preparations with a basis of these extracts, essences or concentrates or with a basis of tea or mate: Other: Other: Other. The rate of duty will be 8.5 percent ad valorem.

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

General Note 12(b), HTSUS, sets forth the criteria for determining whether a good is originating under the NAFTA. General Note 12(b), HTSUS, (19 U.S.C. § 1202) states, in pertinent part, that

For the purposes of this note, goods imported into the customs territory of the United States are eligible for the tariff treatment and quantitative limitations set forth in the tariff schedule as “goods originating in the territory of a NAFTA party” only if—

- (i) they are goods wholly obtained or produced entirely in the territory of Canada, Mexico and/or the United States; or
- (ii) they have been transformed in the territory of Canada, Mexico and/or the United States so that—

(A) except as provided in subdivision (f) of this note, each of the non-originating materials used in the production of such goods undergoes a change in tariff classification described in subdivisions (r), (s) and (t) of this note or the rules set forth therein, or

(B) the goods otherwise satisfy the applicable requirements of subdivisions (r), (s) and (t) where no change in tariff classification is required, and the goods satisfy all other requirements of this note; or

- (iii) they are goods produced entirely in the territory of Canada, Mexico and/or the United States exclusively from originating materials.

The “Chai Moments Ginger Chai”, “Chai Moments Matcha Latte”, “Chai Moments Plain Chai”, “Chai Moments Ginger Turmeric” and “Chai Moments Unsweetened Masala” Instant Chai tea sticks do not qualify for preferential treatment under the NAFTA because one or more of the non-originating materials used in the production of the goods will not undergo the change in tariff classification required by General Note 12(t)/21.2, HTSUS. The goods will therefore not be entitled to a free rate of duty under NAFTA.

The marking statute, section 304, Tariff Act of 1930, as amended (19 U.S.C. 1304), provides that, unless excepted, every article of foreign origin (or its container) imported into the U.S. shall be marked in a conspicuous place as legibly, indelibly and permanently as the nature of the article (or its container) will permit, in such a manner as to indicate to the ultimate purchaser in the U.S. the English name of the country of origin of the article. Part 134, Customs Regulations (19 CFR Part 134) implements the country of origin marking requirements and exceptions of 19 U.S.C. 1304.

The country of origin marking requirements for a “good of a NAFTA country” are also determined in accordance with Annex 311 of the North

American Free Trade Agreement (“NAFTA”), as implemented by section 207 of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat 2057) (December 8, 1993) and the appropriate Customs Regulations.

The Marking Rules used for determining whether a good is a good of a NAFTA country are contained in Part 102, Customs Regulations. The marking requirements of these goods are set forth in Part 134, Customs Regulations. Section 134.1(b) of the regulations, defines “country of origin” as the country of manufacture, production, or growth of any article of foreign origin entering the U.S. Further work or material added to an article in another country must effect a substantial transformation in order to render such other country the “country of origin” within this part; however, for a good of a NAFTA country, the NAFTA Marking Rules will determine the country of origin. (Emphasis added).

Section 134.1(j) of the regulations, provides that the “NAFTA Marking Rules” are the rules promulgated for purposes of determining whether a good is a good of a NAFTA country. Section 134.1(g) of the regulations, defines a “good of a NAFTA country” as an article for which the country of origin is Canada, Mexico or the United States as determined under the NAFTA Marking Rules. Section 134.45(a)(2) of the regulations, provides that a “good of a NAFTA country” may be marked with the name of the country of origin in English, French or Spanish. Part 102 of the regulations, sets forth the “NAFTA Marking Rules” for purposes of determining whether a good is a good of a NAFTA country for marking purposes. Section 102.11 of the regulations, sets forth the required hierarchy for determining country of origin for marking purposes.

Part 102 of the regulations, sets forth the “NAFTA Marking Rules” for purposes of determining whether a good is a good of a NAFTA country for marking purposes. Section 102.11 of the regulations, sets forth the required hierarchy for determining country of origin for marking purposes. Sections 102.11(a)(1) and 102.11(a)(2) do not apply to the facts presented in this case because the “Chai Moments” Instant Chai tea sticks are produced from materials originating in Canada, United States and various other countries and therefore are neither wholly obtained or produced, nor produced exclusively from domestic materials. Since an analysis of sections 102.11(a)(1) and 102.11(a)(2) will not yield a country of origin determination, we look to section 102.11(a)(3).

Section 102.11(a)(3) provides that the country of origin is the country in which each foreign material incorporated in that good undergoes an applicable change in tariff classification as set forth in 19 CFR 102.20. Since we have determined that “Chai Moments” Plain Chai”, “Chai Moments Matcha Latte”, “Chai Moments Plain Chai”, and “Chai Moments Ginger Turmeric” Instant Chai tea sticks will be 2101.20.5400 or 2101.20.5800 and the “Chai Moments” Unsweetened Masala Instant Chai tea sticks are classified in subheading 2101.20.9000, HTSUS, the applicable tariff shift rule found in section 102.20(d) requires a change to heading 2101 from any other heading. We find that the products fail to achieve the required tariff shift specified in section 102.20(d) hence we progress to section 102.11(b)(1). 102.11(b)(1) provides that the country of origin of the good is the country or countries of origin of the single material that imparts the essential character to the good. Pursuant to 19 CFR 102.18(b)(1), for purposes of identifying the material that imparts the essential character to a good under section 102.11, the only

materials that shall be taken into consideration are those domestic or foreign materials that are classified in a tariff provision from which a change in tariff classification is not allowed.

Therefore, since the Black Tea Extract is the only material that does not undergo the requisite tariff shift, the country of origin of the “Chai Moments” Ginger Chai, “Chai Moments” Plain Chai, “Chai Moments” Ginger Turmeric and “Chai Moments” Unsweetened Masala Instant Chai tea sticks for marking purposes is the United States, on the basis of 19 CFR 102.11(b)(1). Since the Green Tea Matcha Flavor is the only material that does not undergo the requisite tariff shift, the country of origin of the “Chai Moments” Matcha Latte Instant Tea sticks for marking purposes is Kenya, on the basis of 19 CFR 102.11(b)(1).

The question of whether merchandise labeling may consist of or include the phrase “Product of USA” is under the jurisdiction of the Federal Trade Commission (FTC), which may be contacted for advice at 1700 Pennsylvania Avenue, N.W., Washington, D.C. 20006.

Section 134.11 of the Customs Regulations (19 C.F.R. 134.11) provides in part:

Unless excepted by law...every article of foreign origin (or its container) imported into the U.S. shall be marked in a conspicuous place as legibly, indelibly, and permanently as the nature of the article (or container) will permit, in such a manner as to indicate to an ultimate purchaser in the U.S. the English name of the country of origin of the article, at the time of importation into the Customs territory of the U.S.

Pursuant to 19 U.S.C. § 1304(f), the marking requirements of subsections (a) and (b) shall not apply to articles described in subheadings 0901.21, 0901.22, 0902.10, 0902.20, 0902.30, 0902.40, 2101.10, and 2101.20 of the Harmonized Tariff Schedule of the United States, as in effect on January 1, 1995. As a result, due to the fact that “Chai Moments Ginger Chai”, “Chai Moments Matcha Latte”, “Chai Moments Plain Chai”, and “Chai Moments Ginger Turmeric” and “Chai Moments Unsweetened Masala” Instant Chai tea sticks are all classified in subheading 2101.20, neither the imported products nor their containers are required to be marked with the foreign country of origin. This statutory exemption is effective for goods entered, or withdrawn from warehouse, for consumption on or after October 11, 1996.

This merchandise is subject to The Public Health Security and Bioterrorism Preparedness and Response Act of 2002 (The Bioterrorism Act), which is regulated by the Food and Drug Administration (FDA). Information on the Bioterrorism Act can be obtained by calling FDA at telephone number (301) 575-0156, or at the Web site www.fda.gov/oc/bioterrorism/bioact.html.

This ruling is being issued under the provisions of Part 181 of the Customs Regulations (19 C.F.R. 181).

A copy of the ruling or the control number indicated above should be provided with the entry documents filed at the time this merchandise is imported. If you have any questions regarding the ruling, contact National Import Specialist Frank Troise at frank.l.troise@cbp.dhs.gov.

Sincerely,

STEVEN A. MACK

Director

National Commodity Specialist Division

HQ H312440

OT:RR:CTF:VS H312440 EE

CATEGORY: Classification

MR. HAROLD C. AVERILL
 PARKER & COMPANY
 P.O. BOX 271
 4694 JAIME ZAPATA AVE.
 BROWNSVILLE, TX 78522

RE: Modification of NY N306886; Preferential Tariff Treatment under NAFTA; Instant Chai Teas

DEAR MR. AVERILL:

This letter is to inform you of the reconsideration of New York Ruling Letter (“NY”) N306886 which was issued to you by U.S. Customs and Border Protection (“CBP”) on November 18, 2019. NY N306886 concerns the tariff classification of certain instant chai teas and their eligibility for preferential tariff treatment under the North American Free Trade Agreement (“NAFTA”). We have reviewed NY N306886 and determined that it is partially incorrect with respect to the eligibility of the instant chai teas for preferential tariff treatment under NAFTA. For the reasons set forth below, we are modifying that ruling letter.

FACTS:

The subject merchandise is described as instant chai teas under the brand name “Tea India.” There are four varieties of sweetened teas and one unsweetened tea under the product name “Chai Moments.”

Chai Moments Ginger Chai sweetened tea contains 55 to 60 percent cane sugar, 12 to 14 percent whole milk powder, 11 to 13 percent skim milk powder, 6 to 7 percent black tea extract, 4 to 5 percent chicory root inulin, 1 to 2 percent ginger flavor, and 1 to 2 percent ginger spice powder. The cane sugar, whole milk powder, skim milk powder, and ginger flavor are products of the United States. The total dry weight of sugar is said to be 59.86 percent. The non-originating ingredients of the Chai Moments Ginger Chai are as follows:

Ingredient	Origin	HTSUS Classification
Black Tea Extract	Kenya	2101.20.20
Chicory Root Inulin	Belgium	1108.20.00
Ginger Spice Powder	China, India or Nigeria	2106.90.09
Cane Sugar	United States	1701.99.50
Whole Milk Powder	United States	0402.10.00
Skim Milk Powder	United States	0402.10.00
Ginger Flavor	United States	2106.90.09

Chai Moments Matcha Latte sweetened tea contains 55 to 60 percent cane sugar, 17 to 19 percent non-dairy creamer, 10 to 12 percent malted milk powder, 4 to 6 percent matcha green tea, 4 to 6 percent skim milk powder, 3 to 5 percent whole milk powder, 1 to 2 percent green tea matcha flavor, and less than 1 percent of pectin and tara gum. The cane sugar, non-dairy creamer, malted milk powder, skim milk powder, whole milk powder, and green tea matcha flavor are products of the United States. The total dry

weight of sugar is said to be 55.25 percent. The non-originating ingredients of the Chai Moments Matcha Latte are as follows:

Ingredient	Origin	HTSUS Classification
Matcha Green Tea	Japan	0902.10.10
Pectin	Mexico, China or Spain	1302.20.00
Tara Gum	Peru	1302.20.00
Cane Sugar	United States	1701.99.50
Non Dairy Creamer	United States	2106.90.09
Malted Milk Powder	United States	2106.90.09
Skim Milk Powder	United States	0402.10.00
Whole Milk Powder	United States	0402.10.00
Green Tea Matcha Flavor	United States	2106.90.09

Chai Moments Plain Chai sweetened tea contains 55 to 60 percent cane sugar, 14 to 16 percent whole milk powder, 11 to 13 percent skim milk powder, 6 to 8 percent black tea extract, and 9 to 11 percent chicory root inulin. The cane sugar, whole milk powder, and skim milk powder are products of the United States. The total dry weight of sugar is said to be 56.39 percent. The non-originating ingredients of the Chai Moments Plain Chai are as follows:

Ingredient	Origin	HTSUS Classification
Black Tea Extract	Kenya	2101.20.20
Chicory Root Inulin	Belgium	1108.20.00
Cane Sugar	United States	1701.99.50
Whole Milk Powder	United States	0402.10.00
Skim Milk Powder	United States	0402.10.00

Chai Moments Ginger Turmeric sweetened tea contains 55 to 65 percent cane sugar, 12 to 14 percent whole milk powder, 11 to 13 percent skim milk powder, 5 to 6 percent black tea extract, 5 to 6 percent chicory root inulin, 1 to 2 percent ginger flavor, less than 1 percent of ginger spice powder, turmeric spice powder, cinnamon spice powder, and pepper spice powder. The cane sugar, whole milk powder, skim milk powder, and ginger flavor are products of the United States. The total dry weight of sugar is said to be 59.45 percent. The non-originating ingredients of the Chai Moments Ginger Turmeric are as follows:

Ingredient	Origin	HTSUS Classification
Black Tea Extract	Kenya	2101.20.20
Chicory Root Inulin	Belgium	1108.20.00
Ginger Spice Powder	China, India or Nigeria	2106.90.09
Turmeric Spice Powder	India	2106.90.09
Cinnamon Spice Powder	Vietnam	2106.90.09

Ingredient	Origin	HTSUS Classification
Pepper Spice Powder	India, Indonesia, Malaysia or Vietnam	2106.90.09
Cane Sugar	United States	1701.99.50
Whole Milk Powder	United States	0402.10.00
Skim Milk Powder	United States	0402.10.00
Ginger Flavor	United States	2106.90.09

Chai Moments Unsweetened Masala tea contains 45 to 50 percent whole milk powder, 35 to 40 percent chicory root inulin, 8 to 10 percent black tea extract, 1 to 2 percent cinnamon spice powder, and less than 1 percent of clove spice powder, ginger spice powder, cardamom spice powder, and pepper spice powder. The whole milk powder is a product of the United States. The non-originating ingredients of the Chai Moments Unsweetened Masala are as follows:

Ingredient	Origin	HTSUS Classification
Chicory Root Inulin	Belgium	1108.20.00
Black Tea Extract	Kenya	2101.20.20
Cinnamon Spice Powder	Vietnam	2106.90.09
Clove Spice Powder	Brazil, Comoros, Indonesia, Madagascar, Vietnam or Zanzibar	2106.90.09
Ginger Spice Powder	China, India, or Nigeria	2106.90.09
Cardamom Spice Powder	Guatemala, Honduras or India	2106.90.09
Pepper Spice Powder	India, Indonesia, Malaysia or Vietnam	2106.90.09
Whole Milk Powder	United States	0402.10.00

All ingredients will be shipped to Mexico where they will be manufactured into instant chai tea products. They are then packaged into individual units (sticks) varying from 12.5g to 25g. These individual packages are then packaged in boxes of either 10 or 20 units each. Both are then bulk packed in master cartons of 6 each. The boxes that have 10 sticks each will be put up for retail sale. The boxes with 20 sticks will be sold as individual single serve per stick. The product is steeped in a cup of hot water to make a beverage.

In NY N306886, CBP determined the Chai Moments Ginger Chai, Chai Moments Matcha Latte, Chai Moments Plain Chai, and Chai Moments Ginger Turmeric were classified under subheading 2101.20.54, Harmonized Tariff Schedule of the United States (“HTSUS”), or 2101.20.58, HTSUS, if the quantitative limits of Additional U.S. Note 8 to Chapter 17 have been reached. The Chai Moments Unsweetened Masala was classified under subheading, 2101.20.90, HTSUS. Additionally, CBP determined none of the five instant chai teas qualified for preferential tariff treatment under NAFTA because the non-originating materials used in the production of the instant chai teas did not undergo the change in tariff classification required by General Note 12(t)/21.2, HTSUS. CBP also determined that the country of origin of the Chai Moments Ginger Chai, Chai Moments Plain Chai, Chai

Moments Ginger Turmeric and Chai Moments Unsweetened Masala for marking purposes was the United States and that the country of origin of the Chai Moments Matcha Latte for marking purposes was Kenya.

ISSUE:

Whether the instant chai teas classified under subheadings 2101.20.54, 2101.20.58, and 2101.20.90, HTSUS, imported into the United States from Mexico are eligible for preferential tariff treatment under the NAFTA.

What is the country of origin of the instant chai teas for purposes of country of origin marking?

LAW AND ANALYSIS:

General Note (“GN”) 12, HTSUS, incorporates Article 401 of the NAFTA into the HTSUS. GN 12(a)(ii), HTSUS, provides that goods are eligible for the NAFTA rate of duty if they originate in the territory of a NAFTA party and qualify to be marked as goods of Mexico. GN 12(b), HTSUS, sets forth the various methods for determining whether a good originates in the territory of a NAFTA party. Specifically, these provisions provide, in relevant part, as follows:

(a) Goods originating in the territory of a party to the North American Free Trade Agreement (NAFTA) are subject to duty as provided herein. For the purposes of this note—

* * * *

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

(b) For the purposes of this note, goods imported into the customs territory of the United States are eligible for the tariff treatment and quantitative limitations set forth in the tariff schedule as “goods originating in the territory of a NAFTA party” only if—

(i) they are goods wholly obtained or produced entirely in the territory of Canada, Mexico and/or the United States; or

(ii) they have been transformed in the territory of Canada, Mexico and/or the United States so that—

(A) except as provided in subdivision (f) of this note, each of the non-originating materials used in the production of such goods undergoes a change in tariff classification described in subdivisions (r), (s) and (t) of this note or the rules set forth therein, or

(B) the goods otherwise satisfy the applicable requirements of subdivisions (r), (s) and (t) where no change in tariff classification is required, and the goods satisfy all other requirements of this note; or

(iii) they are goods produced entirely in the territory of Canada, Mexico and/or the United States exclusively from originating materials.

Since the instant chai teas contain non-originating materials, they are not considered goods wholly obtained or produced entirely in a NAFTA party under GN 12(b)(i). We must next determine whether the instant chai sticks qualify under GN 12(b)(ii).

There is no dispute that the instant chai teas are classified in heading 2101, HTSUS. The applicable rule is in GN 12(t)/21.2, HTSUS, which provides: “[a] change to heading 2101 from any other chapter.” All of the instant chai teas with the exception of the Chai Moments Matcha Latte contain ingredients classified in Chapter 21. Therefore, we agree with NY N306886 that the four teas, Chai Moments Ginger Chai, Chai Moments Plain Chai, Chai Moments Ginger Turmeric, and Chai Moments Unsweetened Masala, do not meet the tariff shift rule since they contain ingredients classified in Chapter 21. As such, they do not qualify as NAFTA originating goods.

However, the Chai Moments Matcha Latte contains only three ingredients which are non-originating: matcha green tea from Japan classified under subheading 0902.10.10, HTSUS; pectin from China or Spain, classified under subheading 1302.20.00, HTSUS; and tara gum from Peru, classified under subheading 1302.20.00, HTSUS. Since all three non-originating ingredients are classified in a chapter other than chapter 21, the tariff shift rule is met. Accordingly, we disagree with NY N306886 that the Chai Moments Matcha Latte does not qualify as a NAFTA originating good.

We must next determine whether the Chai Moments Matcha Latte qualifies to be marked as a good of Mexico. *See* GN 12(a)(ii), HTSUS (NAFTA-originating goods must also qualify to be marked as products of Mexico under the NAFTA Marking Rules to be eligible for preferential treatment).

In this regard, 19 C.F.R. § 134.1(j) provides that “[t]he ‘NAFTA Marking Rules’ are the rules promulgated for purposes of determining whether a good is a good of a NAFTA country.” 19 C.F.R. § 134.1(j) defines a “good of a NAFTA country” as “an article for which the country of origin is Canada, Mexico or the United States as determined under the NAFTA Marking Rules.”

19 C.F.R. § 102.11 sets forth the required hierarchy for determining whether a good is a good of a NAFTA country for marking purposes. 19 C.F.R. § 102.11(a) provides that the country of origin of a good is the country in which:

- (1) The good is wholly obtained or produced;
 - (2) The good is produced exclusively from domestic materials;
- or
- (3) Each foreign material incorporated in that good undergoes an applicable change in tariff classification set out in § 102.20 and satisfies any other applicable requirements of that section, and all other applicable requirements of these rules are satisfied.

Because the Chai Moments Matcha Latte is produced in Mexico from non-originating materials, it is neither wholly obtained or produced (19 C.F.R. § 102.11(a)(1)), nor produced exclusively from domestic materials (19 C.F.R. § 102.11(a)(2)). Accordingly, 19 C.F.R. § 102.11(a)(3) is the applicable rule that must next be applied to determine the origin of the Chai Moments Matcha Latte for marking purposes. “Foreign material” is defined in 19 C.F.R. § 102.1(e) as “a material whose country of origin as determined under

these rules is not the same country as the country in which the good is produced.” In order to determine whether Mexico is the country of origin, we must look at those ingredients whose country of origin is other than Mexico. Pursuant to 19 C.F.R. § 102.20(d), the applicable tariff shift rule for the Chai Moments Matcha Latte is “[a] change to heading 2101 from any other heading.” Since the matcha green tea from Japan, the pectin from China or Spain, the tara gum from Peru, the cane sugar, non-dairy creamer, malted milk powder, skim milk powder, whole milk powder, and green tea matcha flavor from the United States are classified in a heading other than heading 2101, the tariff shift rule is met. As such, we find that the Chai Moments Matcha Latte qualifies to be marked as a good of Mexico under the NAFTA Marking Rules.

We note that subheading 2101.20.54, HTSUS, is not a NAFTA eligible provision for goods of Mexico. Examining the special column for subheading 2101.20.54, HTSUS, the article may only be duty-free under NAFTA if it qualifies to be marked as a good of Canada, as the special column only has an indicator for “CA” and not for “MX.” Indeed, additional U.S. note 8 to chapter 17 referenced in subheading 2101.20.54, HTSUS, indicates that “articles the product of Mexico shall not be permitted or included under this quantitative limitation and no such articles shall be classifiable therein.” Accordingly, we disagree with NY N306886 that the Chai Moments Matcha Latte is classified under subheading 2101.20.54, HTSUS, which is not a NAFTA eligible provision for goods of Mexico. Rather, we find that the Chai Moments Matcha Latte is classified under subheading 2101.20.58, HTSUS, and qualifies as a NAFTA originating good.

Regarding making a NAFTA claim for the Chai Moments Matcha Latte, if an importer fails to make a claim for NAFTA at the time of entry, the NAFTA claim may be made by filing a request under 19 U.S.C. § 1520(d). Specifically, that provision states in pertinent part that:

Notwithstanding the fact that a valid protest was not filed, the Customs Service may . . . reliquidate an entry to refund any excess duties (including any merchandise processing fees) paid on a good qualifying under the rules of origin set out in section 202 of the North American Free Trade Agreement Implementation Act [19 USCS § 3332], . . . for which no claim for preferential tariff treatment was made at the time of importation if the importer, within 1 year after the date of importation, files, in accordance with those regulations, a claim that includes—

- (1) a written declaration that the good qualified under the applicable rules at the time of importation;
- (2) copies of all applicable certificates or certifications of origin; and
- (3) such other documentation and information relating to the importation of the goods as the Customs Service may require.

Although the remaining four teas do not qualify for NAFTA preference, the NAFTA Marking Rules will still apply for purposes of this marking decision modification. As the black tea extract from Kenya in the Chai Moments Ginger Chai, Chai Moments Plain Chai, Chai Moments Ginger Turmeric, and Chai Moments Unsweetened Masala is classified under heading 2101, HTSUS, the tariff shift rule is not satisfied for these four instant chai teas. Because 19 C.F.R. § 102.11(a)(1)-(3) is not determinative of origin, the analysis continues to 19 C.F.R. § 102.11(b) which provides in pertinent part:

Except for a good that is specifically described in the Harmonized System as a set, or is classified as a set pursuant to General Rule of Interpretation 3, where the country of origin cannot be determined under paragraph (a) of this section:

- (1) The country of origin of the good is the country or countries of origin of the single material that imparts the essential character to the good, or...

When determining the essential character of a good under 19 C.F.R. § 102.11, 19 C.F.R. § 102.18(b) provides that only domestic and foreign materials that are classified in a tariff provision from which a change is not allowed shall be taken into consideration. Therefore, only the black tea extract from Kenya may be considered for purposes of determining the essential character of the instant chai teas. Accordingly, we disagree with N306886 and find that the country of origin of the Chai Moments Ginger Chai, Chai Moments Plain Chai, Chai Moments Ginger Turmeric, and Chai Moments Unsweetened Masala teas is Kenya for country of origin marking purposes.

HOLDING:

The Chai Moments Matcha Latte, classified under subheading 2101.20.58, HTSUS, is eligible for preferential tariff treatment under NAFTA. The country of origin of the Chai Moments Matcha Latte is Mexico for purposes of the marking requirements. The Chai Moments Ginger Chai, Chai Moments Plain Chai, Chai Moments Ginger Turmeric, classified under subheading 2101.20.58, HTSUS, and Chai Moments Unsweetened Masala teas, classified under subheading 2101.20.90, HTSUS, are not eligible for preferential tariff treatment under NAFTA, and their country of origin is Kenya for marking purposes.

EFFECT ON OTHER RULINGS:

To the extent that a post-importation 19 U.S.C. 1520(d) will be made, HQ N306886, dated November 18, 2019, is hereby MODIFIED with respect to the eligibility of Chai Moments Matcha Latte, classified under subheading 2101.20.58, HTSUS, for preferential tariff treatment under NAFTA and the country of origin of all five instant chai teas for marking purposes.

Sincerely,

for

CRAIG T. CLARK,

Director

Commercial and Trade Facilitation Division



**PROPOSED REVOCATION OF A RULING LETTER AND
REVOCATION OF TREATMENT RELATING TO THE
TARIFF CLASSIFICATION OF CERTAIN NETWORK
DEVICES KNOWN AS RANGE EXTENDERS**

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

ACTION: Notice of proposed revocation of a ruling letter, and revocation of treatment relating to the tariff classification of a certain network devices known as range extenders.

SUMMARY: Pursuant to section 625(c), 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. 103–182, 107 Stat. 2057), this notice advises interested parties that U.S. Customs and Border Protection (CBP) intends to revoke a ruling letter concerning tariff classification of networking equipment known as range extenders under the Harmonized Tariff Schedule of the United States (HTSUS). Similarly, CBP intends to revoke any treatment previously accorded by CBP to substantially identical transactions. Comments on the correctness of the proposed actions are invited.

DATE: Comments must be received on or before November 27, 2020.

ADDRESS: Written comments are to be addressed to U.S. Customs and Border Protection, Office of Trade, Regulations and Rulings, Attention: Trade and Commercial Regulations Branch, 90 K St., NE, 10th Floor, Washington, DC 20229–1177. Submitted comments may be inspected at the address stated above during regular business hours. Arrangements to inspect submitted comments should be made in advance by calling Ms. Cammy Canedo at (202) 325–0439.

FOR FURTHER INFORMATION CONTACT: Tom P. Beris, Electronics, Machinery, Automotive, and International Nomenclature Branch, Regulations and Rulings, Office of Trade, at (202) 325–0292.

SUPPLEMENTARY INFORMATION:

BACKGROUND

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

information necessary to enable CBP to properly assess duties, collect accurate statistics, and determine whether any other applicable legal requirement is met.

Pursuant to 19 U.S.C. § 1625(c)(1), this notice advises interested parties that CBP is proposing to revoke a ruling letter pertaining to the tariff classification of certain network devices known as range extenders. Although in this notice, CBP is specifically referring to New York Ruling Letter (NYRL) N300883, dated October 16, 2018 (Attachment A), this notice also covers any rulings on this merchandise which may exist, but have not been specifically identified. CBP has undertaken reasonable efforts to search existing databases for rulings in addition to the one identified. No further rulings have been found. Any party who has received an interpretive ruling or decision (i.e., a ruling letter, internal advice memorandum or decision, or protest review decision) on the merchandise subject to this notice should advise CBP during the comment period.

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

In NYRL N300883, CBP classified network devices referred to as range extenders in subheading 8517.62.0020, HTSUSA (Annotated), which provides for "Telephone sets...; other apparatus for the transmission or reception of voice, images or other data...: Other apparatus for transmission or reception...: Machines for the reception, conversion, and transmission or regeneration of voice, images or other data, including switching and routing apparatus: Switching and routing apparatus." CBP has reviewed N300883 and has determined the classification of these devices to be in error.

It is now CBP's position that the range extenders should be classified under subheading 8517.62.0090, HTSUSA, which provides for "Telephone sets...; other apparatus for the transmission or reception of voice, images or other data...: Other apparatus for transmission or reception...: Machines for the reception, conversion & transmission or regeneration of voice, images or other data, including switching and routing apparatus: Other."

Pursuant to 19 U.S.C. § 1625(c)(1), CBP is proposing to revoke NYRL N300883 as indicated above and to revoke any other ruling not

specifically identified to reflect the analysis contained in the proposed Headquarters Ruling Letter (“HQ”) H306942, set forth as Attachment B to this notice. Additionally, pursuant to 19 U.S.C. § 1625(c)(2), CBP is proposing to revoke or modify any treatment previously accorded by CBP to substantially identical transactions.

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

Dated:

GREGORY CONNOR
for

CRAIG T. CLARK,
Director

Commercial and Trade Facilitation Division

Attachments

ATTACHMENT A

N300883

October 16, 2018

CLA-2-85:OT:RR:NC:N2:209

CATEGORY: Classification

TARIFF NO.: 8517.62.0020

CARL W. MERTZ

TP-LINK USA CORP

145 SOUTH STATE COLLEGE BLVD, SUITE 400

BREA, CA 92821

RE: The tariff classification of Wi-Fi Range Extenders from China

DEAR MR. MERTZ:

In your letter dated October 1, 2018, you requested a tariff classification ruling.

The items concerned are referred to as Wi-Fi extenders (Models: RE200 AC750 Wi-Fi range extender, AC 1900 Wi-Fi Range Extender RE580D, AC2600 MU-MIMO Wi-Fi Range Extender, 300 Mbps Wi-Fi Range Extender TL-WA850RE).

The Wi-Fi extenders are plug in devices that wirelessly connect to a customer's router and expands the coverage area. These devices are either single band or dual band and operate on the 2.4GHz or 5GHz wireless spectrum. Devices may have ethernet ports rated at Fast or Gigabit speeds for wired expansion.

The applicable subheading for the Wi-Fi extenders (Models: RE200 AC750 Wi-Fi range extender, AC 1900 Wi-Fi Range Extender RE580D, AC2600 MU-MIMO Wi-Fi Range Extender, 300 Mbps Wi-Fi Range Extender TL-WA850RE) will be 8517.62.0020, Harmonized Tariff Schedule of the United States (HTSUS), which provides for "Telephone sets...; other apparatus for the transmission or reception of voice, images or other data...: Other apparatus for transmission or reception...: Machines for the reception, conversion, and transmission or regeneration of voice, images or other data, including switching and routing apparatus: Switching and routing apparatus." The general rate of duty will be Free.

Effective July 6, 2018, the Office of the United States Trade Representative (USTR) imposed an additional tariff on certain products of China classified in the subheadings enumerated in Section XXII, Chapter 99, Subchapter III U.S. Note 20(b), HTSUS. The USTR imposed additional tariffs, effective August 23, 2018, on products classified under the subheadings enumerated in Section XXII, Chapter 99, Subchapter III U.S. Note 20(d), HTSUS. Subsequently, the USTR imposed further tariffs, effective September 24, 2018, on products classified under the subheadings enumerated in Section XXII, Chapter 99, Subchapter III U.S. Note 20(f) and U.S. Note 20(g), HTSUS. For additional information, please see the relevant Federal Register notices dated June 20, 2018 (83 F.R. 28710), August 16, 2018 (83 F.R. 40823), and September 21, 2018 (83 F.R. 47974). Products of China that are provided for in subheading 9903.88.01, 9903.88.02, 9903.88.03, or 9903.88.04 and classified in one of the subheadings enumerated in U.S. Note 20(b), U.S. Note 20(d), U.S. Note 20(f) or U.S. Note 20(g) to subchapter III shall continue to be

subject to antidumping, countervailing, or other duties, fees and charges that apply to such products, as well as to those imposed by the aforementioned Chapter 99 subheadings.

Products of China classified under subheading 8517.62.00, HTSUS, unless specifically excluded, are subject to the additional 10 percent ad valorem rate of duty. At the time of importation, you must report the Chapter 99 subheading, i.e., 9903.88.04, in addition to subheading 8517.62.0020, HTSUS, listed above.

The tariff is subject to periodic amendment so you should exercise reasonable care in monitoring the status of goods covered by the Notice cited above and the applicable Chapter 99 subheading.

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

This ruling is being issued under the provisions of Part 177 of the Customs Regulations (19 C.F.R. 177).

A copy of the ruling or the control number indicated above should be provided with the entry documents filed at the time this merchandise is imported. If you have any questions regarding the ruling, contact National Import Specialist Steven Pollichino at steven.pollichino@cbp.dhs.gov.

Sincerely,

STEVEN A. MACK

Director

National Commodity Specialist Division

ATTACHMENT B

HQ H306942

CLA-2 OT:RR:CTF:EMAIN H306942 TPB

CATEGORY: Classification

TARIFF NO.: 8517.62.0090

CARL W. MERTZ

TP-LINK USA CORP

145 SOUTH STATE COLLEGE BLVD., SUITE 400

BREA, CA 92821

RE: Revocation of New York (NY) ruling letter N300883; Classification of network devices; re-classification of range extenders

DEAR MR. MERTZ:

In your letter dated October 1, 2018, you requested a tariff classification ruling on certain network devices from China. The items concerned are referred to as Wi-Fi extenders (Models: RE200 AC750 Wi-Fi range extender, AC 1900 Wi-Fi Range Extender RE580D, AC2600 MU-MIMO Wi-Fi Range Extender, 300 Mbps Wi-Fi Range Extender TL-WA850RE).

In NY N300883, dated October 16, 2018, U.S. Customs and Border Protection (CBP) classified the range extenders in subheading 8517.62.0020, Harmonized Tariff Schedule of the United States Annotated (HTSUSA), which provides for “Telephone sets...; other apparatus for the transmission or reception of voice, images or other data...: Other apparatus for transmission or reception...: Machines for the reception, conversion, and transmission or regeneration of voice, images or other data, including switching and routing apparatus: Switching and routing apparatus.”

We have now determined that the network devices subject to N300883 are classifiable in subheading 8517.62.0090, HTSUSA, by application of GRIs 1 and 6. For the reasons set forth below, we hereby propose to revoke NY N300883.

FACTS:

As described in the original ruling request, the items concerned are as Wi-Fi extenders (model #'s RE200 AC750 Wi-Fi range extender, AC 1900 Wi-Fi Range Extender RE580D, AC2600 MU-MIMO Wi-Fi Range Extender, and 300 Mbps Wi-Fi Range Extender TL-WA850RE). The Wi-Fi extenders are plug-in devices that wirelessly connect to a customer's router or access point (AP) and expand the coverage area. These devices are either single band or dual band and operate on the 2.4GHz or 5GHz wireless spectrum. Devices may have Ethernet ports rated at fast or gigabit speeds for wired expansion.

Devices that connect to the wireless network through them communicate with the router or AP and access the internet or internal network resources that would otherwise be unreachable from their locations. Range extenders do not assign IP addresses nor create routing tables. Likewise, they do not have the physical incoming and outgoing communications ports and links of a network switch and so cannot set up a transmission path through them. The Wi-Fi extenders wirelessly transmit requests to and from the router based on instructions provided in the message address.

ISSUE:

Whether the network devices at issue should be classified as switching and routing apparatus under the HTSUS.

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.

There is no dispute that the subject merchandise is properly classified under heading 8517, HTSUS. Accordingly, the question is controlled by GRI 6, which provides as follows:

For legal purposes, the classification of goods in the subheadings of a heading shall be determined according to the terms of those subheadings and any related subheading notes and, *mutatis mutandis*, to the above rules, on the understanding that only subheadings at the same level are comparable. For the purposes of this rule, the relative section, chapter and subchapter notes also apply, unless the context otherwise requires.

The HTSUSA subheadings under consideration are:

8517	Telephone sets, including telephones for cellular networks or for other wireless networks; other apparatus for the transmission or reception of voice, images or other data, including apparatus for communication in a wired or wireless network (such as a local or wide area network), other than transmission or reception apparatus of heading 8443, 8525, 8527 or 8528; parts thereof:
	Other apparatus for transmission or reception of voice, images or other data, including apparatus for communication in a wired or wireless network (such as a local or wide area network):
8517.62.00	Machines for the reception, conversion and transmission or regeneration of voice, images or other data, including switching and routing apparatus:
8517.62.0020	Switching and routing apparatus
8517.62.0090	Other

As indicated by you in a supplemental submission, range extenders are network expansion devices that wirelessly link to a main router or wireless AP for the sole purpose of extending the range of the router or AP’s existing network to client devices that would otherwise be outside the wireless transmission range of the router or AP.

To be classified as switching or routing apparatus, the devices must perform switching or routing themselves and not merely rely on an external switching or routing device. A routing device performs the traffic directing function. It is used to forward IP packets in a wide area network (WAN) to a destined client in a local area network (LAN) based on reading the network address information in the data packet, which determines the destination. Then using information in its routing table, or routing policy, it actively

directs the packet to the next network on its journey. A routing table file is stored in random access memory (RAM) that contains network information.

A network switch is a multiple-Ethernet-port device that physically connects individual network devices in a computer network, so they can communicate with one another. It is the key component in a business network, connecting multiple network devices such as: PCs, printers, servers and peripherals, and it associates each device's address with one of the physical ports on the switch.

Unlike a router or a switch, Wi-Fi range extenders have no intelligence and make no decisions as to where the data goes next. They do not contain a software or firmware routing table and cannot read the network address information in the data packet to determine the specific destination of the data packet.

Based on the supplemental information provided and the notion that the range extenders do not act as a switch or a router within the realm of networking terminology, CBP is now of the view that these devices are properly classified under subheading 8517.62.0090, HTSUS, which provides for "Telephone sets...; other apparatus for the transmission or reception of voice, images or other data...: Other apparatus for transmission or reception...: Machines for the reception, conversion, and transmission or regeneration of voice, images or other data, including switching and routing apparatus: Other." The general rate of duty will be Free.

HOLDING:

For the reasons set forth above, the Wi-Fi Extenders (Models RE200 AC750 Wi-Fi range extender, AC 1900 Wi-Fi Range Extender RE580D, AC2600 MU-MIMO Wi-Fi Range Extender, 300 Mbps Wi-Fi Range Extender TL-WA850RE) are classified in subheading 8517.62.0090, HTSUS, which provides for "Machines for the reception, conversion & transmission or regeneration of voice, images or other data, including switching and routing apparatus: Other." The column one, general rate of duty is free.

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

EFFECT ON OTHER RULINGS:

NY N300883, dated October 16, 2018, is hereby REVOKED.

Sincerely,

CRAIG T. CLARK,
Director

Commercial and Trade Facilitation Division

U.S. Court of Appeals for the Federal Circuit

POSCO, Plaintiff v. UNITED STATES, Defendant STEEL DYNAMICS, INC., AK
STEEL CORPORATION, ARCELORMITTAL USA LLC, UNITED STATES STEEL
CORPORATION, Intervenor-Defendants NUCOR CORPORATION,
Intervenor-Defendant-Appellant

NUCOR CORPORATION, Plaintiff-Appellant AK STEEL CORPORATION,
ARCELORMITTAL USA LLC, UNITED STATES STEEL CORPORATION,
Intervenor-Plaintiffs v. UNITED STATES, Defendant-Appellee
HYUNDAI STEEL COMPANY, POSCO, GOVERNMENT OF KOREA, Intervenor-
Defendants

Appeal No. 2019–1213

Appeal from the United States Court of International Trade in Nos. 1:16-cv-00225-
MAB, 1:16-cv-00226-MAB, Judge Mark A. Barnett.

Decided: October 15, 2020

ROBERT E. DEFRANCESCO, III, Wiley Rein, LLP, Washington, DC, argued for
appellant. Also represented by TIMOTHY C. BRIGHTBILL, TESSA V. CAPELOTO,
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KELLY A. KRSTYNYIAK, Commercial Litigation Branch, Civil Division, United
States Department of Justice, Washington, DC, argued for defendant-appellee. Also
represented by JEFFREY B. CLARK, JEANNE DAVIDSON, PATRICIA M. MCCAR-
RTHY; EMMA T. HUNTER, Office of the Chief Counsel for Trade Enforcement &
Compliance, United States Department of Commerce, Washington, DC.

Before REYNA, TARANTO, and STOLL, *Circuit Judges*.

REYNA, *Circuit Judge*.

This appeal comes to us from the U.S. Court of International Trade. The Trade Court affirmed the U.S. Department of Commerce’s final affirmative determination in the countervailing duty investigation on certain cold-rolled steel flat products from the Republic of Korea. Plaintiff-Appellant Nucor Corporation challenges Commerce’s final determination, raising two issues: first, whether Commerce’s reliance on a preferential-rate standard to determine whether a conferred benefit is a countervailable subsidy is contrary to law and, second, whether Commerce’s determination that the Government of Korea did not confer a benefit to Korean producers of cold-rolled steel flat products for less than adequate remuneration is contrary to law and unsupported by substantial evidence. We conclude that Commerce’s

final determination is contrary to law and unsupported by substantial evidence. We vacate and remand.

BACKGROUND

A. Countervailable Subsidies

Foreign governments subsidize their domestic industries when they provide financial assistance for the production, manufacture, or exportation of goods. 19 U.S.C. § 1677(5)(B). Generally, goods that have been provided countervailable subsidies are assessed countervailing duties upon their entry into the U.S. Customs territory. 19 U.S.C. § 1671(a). A subsidy becomes countervailable when an “authority,” or the government of a country or any public entity within the territory of the country, provides a financial contribution in the form of goods or services that results in a “benefit” conferred to the recipient. *See* § 1677(5)(B). The U.S. trade statute provides that a “benefit shall normally be treated as conferred” when those goods or services “are provided for *less than adequate remuneration.*” § 1677(5)(E)(iv) (emphasis added). The statute provides that Commerce determines the “less than adequate remuneration” question by evaluating “prevailing market conditions for the good or service being provided” in the country that is subject to the investigation. § 1677(5)(E). Prevailing market conditions include “price, quality, availability, marketability, transportation, and other conditions of purchase or sale.” *Id.*

When Congress enacted the Uruguay Round Agreements Act (“URAA”) in 1994, it changed the definition of what constitutes a benefit conferred. Pub. L. No. 103–465, § 101, 108 Stat. 4809, 4814 (codified as 19 U.S.C. § 3511). Prior to the enactment of the URAA, the statute provided that an authority conferred a benefit when it provided a good or service at a “preferential rate.” § 1677(5)(A)(ii)(II) (1988). “Preferential rate” means “more favorable to some within the relevant jurisdiction than to others within that jurisdiction.”¹ As a result of the Uruguay Round negotiations and subsequent enactment of the URAA, Congress amended the statute and changed the standard for determining whether a benefit is conferred by expressly replacing “preferential rate” with “less than adequate remuneration.” *See* § 1677(5)(E)(iv). Specifically, the amended statute provides that “a benefit shall normally be treated as conferred” where in the case of goods or services, such services (here, electricity) “are provided *for less than adequate remuneration.*” *Id.* (emphasis added).

¹ *Certain Softwood Prods. from Canada*, 48 Fed. Reg. 24,159, 24,167, 1983 WL 126683 (Dep’t of Commerce May 31, 1983) (final negative countervailing duty determination) (*Softwood from Canada*).

After enactment of the URAA, Commerce sought to develop a methodology for determining “adequacy of remuneration.”² Commerce noted “[p]articular problems . . . in applying the [adequate-remuneration] standard when the government is the sole supplier of the good or service in the country or within the area where the respondent is located.”³ Commerce found that these problems arise because “there may be no alternative market prices available” to use as a benchmark in its analysis. *Steel Wire Rod from Trinidad and Tobago*, 62 Fed. Reg. at 55,006. To address these problems, Commerce developed a three-tier methodology to evaluate adequacy of remuneration. 19 C.F.R. § 351.511. In Tier 1, Commerce compares the government price to a market-based price for the good or service under investigation in the country in question (a “Tier 1” analysis). § 351.511(a)(2)(i). When an in-country, market-based price is unavailable, Commerce will compare the government price to a world-market price if the world-market price is available to purchasers in the country in question (a “Tier 2” analysis). § 351.511(a)(2)(ii). When both an in-country, market-based price and a world-market price are unavailable, Commerce considers “whether the government price is consistent with market principles” (a “Tier 3” analysis). § 351.511(a)(2)(iii). Under a Tier 3 analysis, if Commerce determines that government pricing is not consistent with market principles, then “a benefit shall normally be treated as conferred.” 19 U.S.C. § 1677(5)(E)(iv). Only Tier 3 is at issue in this appeal.

B. The Investigation

On July 28, 2015, Commerce received requests for initiation of countervailing duty (“CVD”) investigations on imports of certain cold-rolled steel flat products (“cold-rolled steel” or “CRS”) from several countries including the Republic of Korea (“Korea”). *See* J.A. 1269. Countervailing duty petitions were filed on behalf of AK Steel Corporation, ArcelorMittal USA EEC, Nucor Corporation, Steel Dynamics, Inc., and United States Steel Corporation (collectively, “Petitioners”). *See id.* Petitioners alleged that the Government of Korea provided countervailable subsidies to Korean producers of CRS, and that imports of CRS from Korea were materially injuring, or threatening

² Countervailing Duties: Final Rule, 63 Fed. Reg. 65,348, 65,377 (Dep’t of Commerce Nov. 25, 1998) (CVD Preamble); *see also* Countervailing Duties: Proposed Rule, 62 Fed. Reg. 8,818 (Dep’t of Commerce Feb. 26, 1997) (notice of proposed rulemaking and request for public comments) (1997 Proposed Rule).

³ *Steel Wire Rod from Trinidad and Tobago*, 62 Fed. Reg. 55,003, 55,006–07 (Dep’t of Commerce Oct. 22, 1997) (final affirmative countervailing duty determination); *Steel Wire Rod from Germany*, 62 Fed. Reg. 54,990, 54,994 (Dep’t of Commerce Oct. 22, 1997) (final affirmative countervailing duty determination).

material injury to, an industry in the United States.⁴ J.A. 1269. Petitioners alleged, inter alia, that the Korean government conferred a specific benefit on Korean CRS producers through the provision of a good or service—electricity—for less than adequate remuneration. J.A. 353–76.

In August 2015, Commerce initiated a CVD investigation on CRS from Korea. *See* J.A. 1269–1274; *see also* J.A. 109, J.A. 346–376. The period of investigation encompassed January 1 to December 31, 2014. J.A. 1269. Commerce selected POSCO and Hyundai Steel Co., Ltd., as mandatory “respondents” for the investigation. J.A. 13034. Commerce issued questionnaires requesting that the Korean government provide information about the Korean electricity industry and market, including the Korea Electric Power Corporation (“KEPCO”), which is a state-owned entity and the sole provider of electricity in Korea. J.A. 13075, J.A. 1293, J.A. 12769.

In its questionnaire responses, the Korean government explained that electricity is generated by “[i]ndependent power generators, community energy systems, and KEPCO’s six subsidiaries.” *See* J.A. 18. The Korean government further explained that all electricity generated in Korea, including that of private generators, must be sold to KEPCO in a wholesale market known as the Korea Power Exchange (“KPX”), which is wholly owned by KEPCO and its six subsidiaries. J.A. 1300, J.A. 3137. KEPCO then sells electricity to end users based on a tariff schedule that provides different rates for classes of consumers including industrial, residential, agricultural, and business users. J.A. 4437–4449. The Korean government noted that the prices in KEPCO’s tariff schedule are established in consultation with other Korean-government agencies, through a “lengthy deliberative process” that seeks the approval of the Ministry of Trade, Industry, and Energy, the Ministry of Strategy and Finance, and the Korea Energy Regulatory Commission. J.A. 1296, J.A. 3111. While KEPCO and other government entities establish the ultimate prices to end users, the basis of these prices is the cost of KEPCO’s purchases from the KPX. J.A. 13083. The Korean government reported in its questionnaire response that KPX is a wholly owned subsidiary of KEPCO and that all sales of electricity in Korea are administered by KPX. *See* J.A.

⁴ Under U.S. trade law, countervailing duty investigations are concurrently conducted by Commerce and the U.S. International Trade Commission (“ITC”). Generally, Commerce determines whether any alleged subsidies are countervailable and the extent, if any, of applicable countervailing duty rates. *See* 19 U.S.C. § 1671e(b) (Imposition of Duties); § 1677f-1(e) (Determination of Countervailable Subsidy Rate). The ITC investigation determines whether U.S. industry is materially injured, or threatened with material injury, by reason of imported goods that have been deemed subject to countervailing duty rates. *See* 19 U.S.C. § 1675b(a)(1) (Investigation by Commission Upon Request). This appeal involves only the Commerce side of the investigation.

18 n.17 (citing the Korean government's questionnaire response, Ex. E-3 at 31); *see also* J.A. 3111 (Ex. E-3, KEPCO Form 20-F, explaining that KEPCO "wholly own[s]" KPX).

In its preliminary determination, Commerce found that KEPCO, through its six subsidiaries, generates the "substantial majority of the electricity produced in Korea." J.A. 12769. Commerce found that the Korean government regulates and approves electricity tariffs charged by KEPCO. *Id.* Commerce further found that the Korean government "exercises significant control over KEPCO through its majority ownership and pursues government policy objectives through KEPCO's business and operations." *Id.* Commerce therefore determined that KEPCO is an authority of the Korean government and that the Korean government is providing to producers of CRS "a financial contribution in the form of the provision of a good or service." *Id.* To determine whether that financial contribution constitutes a "benefit," Commerce conducted a Tier 3 analysis. J.A. 12772. In its analysis, Commerce started by considering KEPCO's "price-setting philosophy" by analyzing "electricity rates charged to the respondents to determine whether the price charged is consistent with KEPCO's standard pricing mechanism." *Id.* Commerce considered KEPCO's overall cost, including its "operational cost for generating and supplying electricity." *Id.* Commerce's analysis then turned on whether respondents were given preferential treatment:

If the rate charged is consistent with the standard pricing mechanism and the company under investigation is, in all other respects, essentially treated no differently than other companies and industries which purchase comparable amounts of electricity, then there is no benefit.

Id. (citing *Pure Magnesium & Alloy Magnesium from Canada*, 57 Fed. Reg. 30,946 (Dep't Commerce July 13, 1992) (*Magnesium from Canada*)).

Commerce conducted verification of the Korean government's questionnaire responses in March 2016, but it did not verify the Korean government's provision of electricity for less than adequate remuneration. *See* J.A. 13075. Rather, Commerce relied on the verification it previously conducted in its investigation of corrosion-resistant steel ("CORE") from Korea, which is the subject of Nucor Corporation's ("Nucor") appeal in *Nucor Corporation v. United States*, 927 F.3d 1243 (Fed. Cir. 2019).⁵

⁵ In *Nucor*, Commerce did not obtain from the Korean government KPX's cost of generating electricity. 927 F.3d at 1247-48. KPX's costs were therefore not verified in the *Nucor* investigation.

In its Final Determination, Commerce determined that, “consistent with 19 § CFR 351.511 and *Magnesium from Canada*,” the Korean government provided respondents no benefit “because the prices charged to these respondents under the applicable industrial tariff were consistent with KEPCO’s standard pricing mechanism.” J.A. 13079 (Issue and Memorandum Decision accompanying *Countervailing Duty Investigation of Certain Cold-Rolled Steel Flat Products from the Republic of Korea*, 81 Fed. Reg. 49,943 (Dep’t Commerce July 29, 2016) (final affirmative determination, 2014)). Commerce found no evidence in the record suggesting that that respondents received preferential treatment over other industrial users of electricity that purchase comparable amounts of electricity. *Id.*

Commerce justified its reliance on a preferentiality standard despite the amendment of the Trade statute to replace preferential rate with adequate remuneration. J.A. 13079–80. Commerce opined that its regulations regarding the provision of a good or service, especially 19 C.F.R. § 351.511, were enacted as a result of the URAA and with reference to the methodology developed in *Magnesium from Canada*. *Id.* Commerce further reasoned that the CVD Preamble, which cites *Magnesium from Canada*, references “possible price discrimination” as one factor that the department may consider when assessing whether a government price is consistent with market principles. J.A. 13080. Commerce opined that the URAA’s move away from preferentiality merely “flipped the regulatory hierarchy,” promoting in-country, market prices and world-market prices over price discrimination—i.e., the creation of Tiers 1–3. *Id.* Commerce suggested that a price discrimination analysis alone may be sufficient to assess adequate remuneration. J.A. 13081.

Commerce also addressed Petitioners’ allegations that Commerce’s analysis of electricity tariffs failed to include the full cost of generation, including, e.g., electricity from nuclear-power generators. J.A. 13083. Petitioners alleged that CRS producers purchase electricity predominantly during off-hours when electricity is primarily generated from nuclear-generation units. *See id.* Commerce noted that it did not request information regarding costs to electricity generators because the costs of electricity to KEPCO are determined by the KPX. *Id.* Commerce therefore found relevant only KEPCO’s purchase price from the KPX and not the costs underlying KPX’s price. *Id.* In particular, Commerce did not review quality, availability, marketability, transportation, or other conditions affecting KEPCO’s purchase or sale of electricity from KPX.

Nucor appealed Commerce’s final determination to the Trade Court. J.A. 13132–13181.

C. U.S. Court of International Trade

On appeal, Nucor argued that Commerce’s final determination is unlawful for three reasons. First, Nucor contended that Commerce erred in using preferentiality to determine whether a benefit was conferred to Korean producers of CRS. J.A. 13154. Second, Nucor argued that Commerce unreasonably excluded cost recovery when interpreting “adequate remuneration.” J.A. 13160. Third, Nucor alleged that Commerce ignored arguments and evidence (e.g., that Commerce failed to account for KPX’s role in setting KEPCO’s tariff schedule) demonstrating that Korean electricity-price setting does not follow market principles. J.A. 13168–13174.

The trial court rejected all three challenges and found that Commerce’s CVD determination was supported by substantial evidence and otherwise not contrary to law. J.A. 5–81. This appeal ensued. We have jurisdiction under 28 U.S.C. § 1295(a)(5).

DISCUSSION

We review decisions of the Trade Court *de novo*. *Boomerang Tube LLC v. United States*, 856 F.3d 908, 912 (Fed. Cir. 2017). We apply the same standard of review used by the Trade Court in reviewing Commerce’s determinations. *See* 19 U.S.C. § 1516(a)(b)(1)(B); *Union Steel v. United States*, 713 F.3d 1101, 1106 (Fed. Cir. 2013). We therefore review Commerce’s final determination to assess whether it is supported by substantial evidence or otherwise contrary to law. *Union Steel*, 713 F.3d at 1106.

We address two issues on appeal: first, whether Commerce erred as a matter of law when it based its benefit-conferred analysis on a preferential-rate standard, and second, whether substantial evidence supports Commerce’s finding that the Korean government does not provide a countervailable subsidy to respondents. Because Commerce’s final determination is unsupported by substantial evidence and contrary to law, we vacate and remand.

A. Adequate Remuneration

Commerce failed to properly measure less-than-adequate remuneration under post-URAA principles.

In *Nucor*, we addressed essentially the same issues raised in this appeal, including Commerce’s reliance on the pre-URAA preferential-rate standard. 927 F.3d 1243. We rejected Commerce’s “broad theory” that “if the foreign government authority engaged in a uniform, non-discriminatory, tariffed practice of charging a price so low that the authority consistently lost large sums of money in a way no private seller could sustain, sales pursuant to that practice would not

be properly viewed as for ‘less than adequate remuneration.’” *Id.* at 1249. We concluded that the plain language of § 1677(5)(E), its context within the overall statutory scheme, its legislative history, and our related precedent did not support Commerce’s reliance on a preferential-rate standard. *Id.* at 1249–54. We held that Commerce’s “position is beyond any reasonable interpretation of the statute, or of its implementation regulation.” *Id.* at 1249.

Our decision in *Nucor* issued on June 21, 2019, after the parties filed their briefs in this appeal. On June 26, 2019, Commerce filed a citation of supplemental authority advising the court of the *Nucor* decision and explaining that “Nucor’s opening brief filed in this appeal is substantially identical to Nucor’s opening brief filed in [*Nucor*].” ECF No. 39. Commerce also explained that the *Nucor* decision “pertains to nearly the entirety of [its] brief filed in this appeal on March 29, 2019.” *Id.* In its response, Nucor clarified that the issue of “whether Commerce may lawfully apply an analysis of ‘preferential rates’ to measure ‘adequate remuneration’” is identical in both cases. ECF No. 40. We conclude that Commerce’s position on preferentiality here is identical to its position in *Nucor* and that our decision in *Nucor* rejecting Commerce’s use of the preferentiality standard applies to this appeal.

As in *Nucor*, Commerce’s use of the pre-URAA preferential-rates standard in this case is inconsistent with the adequate-remuneration standard under § 1677(5)(E)(iv). Commerce cannot rely on price discrimination to the exclusion of a thorough evaluation of fair-market principles to determine whether a recipient is receiving an unlawful benefit. *See Nucor*, 927 F.3d at 1251 (reasoning that “the existence of a ‘benefit’ of an unjustifiably low price . . . cannot depend on [a] finding that the producer is being discriminatorily favored compared to others in the exporting country”).

In *Nucor*, we highlighted the Statement of Administrative Action, which provides that preferentiality be *replaced* with the new standard of less-than-adequate remuneration. 927 F.3d at 1252 (citing Uruguay Round Agreements Act, Statement of Administrative Action, H.R. Doc. No. 103–316, vol. 1, at 927 (1994) (“SAA”). We noted that “[t]his authoritative interpretation confirms what the statutory language, in its ordinary and in-context meaning, entails. It makes clear that the new standard rests on a concept different from mere lack of preferentiality.” *Id.* Thus, the words used in the statute, understood in their ordinary sense, make it unreasonable that lack of discrimination is sufficient to establish adequacy of remuneration. *See id.* at 1250.

Consistent with our holding in *Nucor*, we hold that Commerce’s reliance on a preferential-rate standard is inconsistent with the Trade statute, in particular with the less-than-adequate-remuneration requirement, and is therefore contrary to law.

B. Cost Recovery

Commerce’s cost-recovery analysis is limited to a discussion of KEPCO’s costs. *See* J.A. 13081–83. The limited analysis does not support its conclusion that electricity prices paid to KEPCO by respondents are consistent with prevailing market conditions because Commerce failed to evaluate KPX’s impact on the Korean electricity market.

In *Nucor*, Plaintiff Nucor argued that Commerce erred by limiting the analysis to the prices that KEPCO charged in relation to its costs, which included the price paid to KPX, instead of considering the adequacy (less-than-adequate remuneration) of the prices that KPX charged in relation to its costs.. 927 F.3d at 1255. We agreed with the Trade Court’s determination that Nucor’s argument was, “in substance, a contention that KPX is part of KEPCO as the ‘authority’ whose prices Commerce had to analyze.” *Id.* The Trade Court, however, concluded that Nucor “failed to exhaust this argument at the agency level.” *Id.* As a result, the Trade Court affirmed Commerce’s final determination on this point. We agreed that Nucor failed to exhaust its KPX-related arguments and, as a result, our decision also did not address the KPX issue. *Id.*

In this appeal, Nucor again argues that Commerce erred by failing to consider KPX’s impact on KEPCO’s pricing. *See* Appellant Br. 36–47; *see also* J.A. 71–73 (Trade Court opinion rejecting Nucor’s argument); J.A. 12898–914 (Nucor’s Case Brief to Commerce addressing KPX’s impact on KEPCO’s electricity pricing). The government does not raise an exhaustion argument in this case, and we conclude that Nucor preserved this issue for appeal. *Cf. Novosteel SA v. United States*, 284 F.3d 1261, 1274 (Fed. Cir. 2002) (applying the waiver doctrine but explaining that a party preserves an issue for appeal where it exhausts that issue before an administrative agency “so as to give a court the proper basis to review that issue on appeal”).

Here, the administrative record does not support Commerce’s determination that KEPCO is the only relevant entity for purposes of analyzing costs. J.A. 13083. To the contrary, evidence in the record suggests that KPX has a significant impact on KEPCO’s pricing, and that Commerce failed to adequately investigate and consider KPX’s impact on the Korean electricity market. For example, the record

shows that all electricity generated in Korea must be sold to KEPCO by KPX (J.A. 1300, 3137); KPX is wholly owned by KEPCO and its six electricity-generation subsidiaries (*id.*); KEPCO bases its prices on the cost of its purchases from the KPX (*see* J.A. 13083); and KPX's pricing accounts for upwards of 90% of KEPCO's total cost (*see Nucor*, 927 F.3d at 1259 (Reyna, J., dissenting) (citing J.A. 8316, Letter from Yoon & Yang LLC to Sec'y Commerce, re: *Countervailing Duty Investigation: Certain Corrosion-Resistant Steel Products (CORE) from the Republic of Korea: Response to 2nd Supplemental Questionnaire* (Oct. 15, 2015))). That KPX's pricing constitutes a significant portion of KEPCO's total cost makes it implausible that Commerce adequately investigated Korea's prevailing market condition for electricity without a thorough understanding of the costs associated with generating and acquiring that electricity.

Yet, Commerce did not request information regarding KPX's cost of electricity generation such as variable fuel prices, the construction and maintenance costs of a standard electricity generation unit, and the fixed costs of producing electricity (e.g., constructing facilities to generate electricity). Instead, Commerce determined that only the costs to KEPCO, not the costs associated with the generators themselves, were relevant to price because KEPCO purchases electricity through KPX, which purchases from the generators. *See* J.A. 13083. Commerce's determination that KPX was not relevant to its analysis leaves unresolved whether a benefit was conferred by way of the price charged by KPX to KEPCO. *See* § 1677-1; *see also* SAA at 927.

The government argues that “[n]othing in the statute requires Commerce to consider how the authority acquired the good or service that was later provided to respondents.” Appellee Br. 35 (citation and internal quotation marks omitted). We disagree. Commerce has an affirmative duty to investigate any appearance of subsidies related to the investigation that are discovered during an investigation. *See* 19 U.S.C. § 1677d; *Allegheny Ludlum Corp. v. United States*, 112 F. Supp. 2d 1141, 1150 (Ct. Int'l Trade 2000). Section 1677(5) requires Commerce to evaluate subsidies “without regard to whether the subsidy is provided directly or indirectly on the manufacture, production, or export of merchandise,” and it requires Commerce to consider the adequacy of remuneration “in relation to prevailing market conditions.” § 1677(5)(C), (E). Here, Commerce failed to investigate an appearance of a potential subsidy that was disclosed during the investigation within the Korean government's own questionnaire responses. *See* 19 U.S.C. § 1677d.

The government's argument assumes that KPX is not, itself, an authority of the Korean government. That assumption, however, is

unsupported by the evidence. Under § 1677(5)(B)(iii), an authority is defined as “a government of a country or any public entity within the territory of the country.” In *Guangdong Wireking Housewares & Hardware Co. v. United States*, the Trade Court affirmed Commerce’s determination that certain wire-rod manufacturers under investigation were authorities under § 1677(5)(b) where the government of China held a majority ownership position in those wire-rod manufacturers. 900 F. Supp. 2d 1362, 1376–78 (Ct. Int’l Trade 2013). The court explained that § 1677(5)(B)’s “public entity” provision includes entities that are majority owned by a government and it relied on “Commerce’s longstanding practice of treating most government-owned corporations as the government itself.” *Id.* at 1376–77 (internal quotation marks omitted). Here, the Korean government’s questionnaire response clarifies that KPX is a wholly owned subsidiary of KEPCO. J.A. 3111. There is no dispute that KEPCO is a state-owned entity and the sole provider of electricity in Korea. This evidence strongly suggests that KPX, like KEPCO, is an authority under § 1677(5)(B). Commerce disregarded this evidence when it assumed that it adequately accounted for KPX via the price paid by KEPCO. KPX is an authority. And Commerce’s failure to treat KPX as an authority—or, at a minimum, investigate whether it is an authority—constitutes error as a matter of law. Because the role of KPX in the Korean electricity market remains unaddressed, Commerce’s final determination is not supported by substantial evidence.

CONCLUSION

We have considered the government’s remaining arguments and find them unpersuasive. Because Commerce improperly based its benefit-conferred analysis on a “preferential price” standard, we conclude that Commerce’s final determination is contrary to law. In addition, Commerce’s failure to investigate and include KPX’s generation costs in its analysis renders its final determination unsupported by substantial evidence. We vacate and remand for further proceedings consistent with this opinion.

VACATED AND REMANDED

COSTS

Costs to Appellant.

U.S. Court of International Trade

Slip Op. 20–142

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

Before: Claire R. Kelly, Judge
Court No. 20–00031

[Denying Defendant-Intervenors’ motion to stay. Granting in part and denying in part Defendant-Intervenors’ motion for an extension of time.]

Dated: October 8, 2020

Valerie Ellis and Daniel Porter, Curtis, Mallet-Prevost Colt & Mosle LLP, of Washington, DC, for plaintiffs Novolipetsk Steel Public Joint Stock Company and NOVEX Trading (Swiss) SA.

Roger B. Schagrin, Elizabeth J. Drake, Luke A. Meisner, and Kelsey M. Rule, Schagrin Associates, of Washington, DC, for defendant-intervenor Steel Dynamics Inc.

Alan H. Price, Christopher B. Weld, and Cynthia C. Galvez, Wiley Rein LLP, of Washington, DC, for defendant-intervenor Nucor Corporation.

MEMORANDUM AND ORDER

Kelly, Judge:

Before the court are Defendant-Intervenors Nucor Corporation (“Nucor”) and Steel Dynamics, Inc.’s (“SDI”) motion to stay deadlines pending resolution of their motion to dismiss, *see* Mot. to Stay Deadlines Pending Final Resolution of Def.-Intervenors’ Mots. to Dismiss Pls.’ Compl., Sept. 16, 2020, ECF No. 46 (“Nucor & SDI’s Mot. to Stay”), as well as their motion to amend the scheduling order to extend by twenty-one (21) days the current deadlines for briefing the merits of this action. *See* [Nucor & SDI’s] Mot. to Amend Scheduling Order, Oct. 5, 2020, ECF No. 54 (“Nucor & SDI’s Mot. to Extend”). Plaintiffs Novolipetsk Steel Public Joint Stock Company (“NLMK”) and NOVEX Trading (Swiss) SA (“NOVEX”) oppose both motions. *See* Pls.’ Resp. Opp’n [Nucor & SDI’s Mot. to Stay] and [Nucor & SDI’s Mot. to Extend], Oct. 7, 2020, ECF No. 56 (“Pls.’ Resp.”). Upon consideration of the parties’ filings, the court denies Nucor and SDI’s motion to stay, but extends the deadlines set forth in its scheduling order by seven (7) days.

BACKGROUND

On March 4, 2020, NLMK and NOVEX commenced the present action by filing a summons and complaint. *See* Summons, Feb. 3, 2020, ECF No. 1; Compl., Mar. 4, 2020, ECF No. 15. On May 18, 2020, the parties filed a joint status report and proposed briefing schedule. *See* Joint Status Report & Proposed Briefing Schedule, May 15, 2020, ECF No. 30 (“Joint Status Report”). There, Defendant, as well as Nucor and SDI, noted their intention to “move to dismiss at least a portion of the complaint for lack of subject matter jurisdiction,” Joint Status Report at 2, and “propose[d] that the [c]ourt postpone establishment of a briefing schedule until it rules on . . . any motions to dismiss filed by Defendant and/or Defendant-Intervenors.” Joint Status Report at 3. Defendant and Defendant-Intervenors nonetheless consented to and included a proposed briefing schedule, *see id.*, which the court subsequently implemented. *See* Scheduling Order, May 18, 2020, ECF No. 31. That same day, Nucor and SDI moved to dismiss Plaintiffs’ complaint for failure to state a claim upon which relief may be granted and for lack of subject matter jurisdiction. *See* Def.-Intervenor [SDI’s] Mot. to Dismiss Pls.’ Compl., May 18, 2020, ECF No. 32 (“SDI’s Mot. to Dismiss”); Def.-Intervenor [Nucor’s] Mot. to Dismiss, May 22, 2020, ECF No. 33 (“Nucor’s Mot. to Dismiss”). Defendant, United States, did not file a motion to dismiss. Neither Defendant nor Defendant-Intervenors moved to stay the briefing schedule for Plaintiffs’ pending motion for judgment on the agency record at that time.

On June 19, 2020, Defendant, Nucor and SDI consented to Plaintiffs’ motion for an extension of time to respond to the motion to dismiss. *See* Con. Mot. Ext. of Time to Resp. to Def-Intervenors’ Mots. to Dismiss, June 19, 2020, ECF No. 34. The court granted the motion. *See* Order, June 19, 2020, ECF No. 35. Neither Defendant nor Defendant-Intervenors moved to stay the briefing schedule for Plaintiffs’ motion for judgment on the agency record at that time.

On July 24, 2020, Defendant, Nucor and SDI consented to Plaintiffs’ motion for an extension of time to file its motion for judgment on the agency record. Con. Mot. Ext. of Time to File 56.2 Mot. J. Agency R., July 24, 2020, ECF No. 41. The court granted the motion. *See* Amended Scheduling Order, July 24, 2020, ECF No. 42. Again, neither Defendant nor Defendant-Intervenor filed a motion to stay the briefing schedule for Plaintiffs’ motion for judgment on the agency record. Briefing on Nucor and SDI’s motion to dismiss concluded on July 28, 2020.

On August 10, 2020, Plaintiffs NLMK and NOVEX filed its motion for judgment on the agency record. *See* [NLMK & NOVEX's] 56.2 Mot. J. Agency R. & accompanying Br. Supp. 56.2 Mot. J. Agency R., Aug. 10, 2020, ECF No. 44. On September 2, 2020, the court requested that the parties file additional written submissions clarifying certain issues with respect to Nucor and Steel Dynamic's pending motion to dismiss. *See* Ct. Letter, Sept. 2, 2020, ECF No. 45.¹ On September 16, 2020, Nucor and SDI moved to stay all deadlines related to the merits of this action pending final resolution of their motion to dismiss. *See* Nucor & SDI's Mot. to Stay. Defendant consented, and Plaintiffs indicated their intent to oppose. *See id.* at 3.

On October 5, Nucor and SDI filed their motion for an extension of all deadlines related to the pending motion for judgment on the agency record. *See generally* Nucor & SDI's Mot. to Extend. Defendant consented, and Plaintiffs indicated their intent to oppose. *See id.* at 3–4. That same day, Plaintiffs filed their response to both the motion to stay and the motion to extend the deadlines for briefing the pending motion for judgment on the agency record. *See* Pls.' Resp.

JURISDICTION AND STANDARD OF REVIEW

The asserted basis for jurisdiction is section 516A(a)(2)(A)(I) and 516A(a)(2)(B)(iii) of the Tariff Act of 1930, as amended, 19 U.S.C. § 1516a(a)(2)(A)(I) and 1516a(a)(2)(B)(iii) (2012) and 28 U.S.C. § 1581(c) (2012), which grant the court authority to review actions contesting the final determination in an administrative review. The power to stay proceedings, however, “is incidental to the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants.” *Landis v. North American Co.*, 299 U.S. 248, 254 (1936) (“*Landis*”). Although the decision to grant or deny a stay rests within the court's sound discretion, courts must weigh and maintain an even balance between competing interests when deciding whether a stay is appropriate. *See Landis*, 299 U.S. at 254–55; *see also Cherokee Nation v. United States*, 124 F.3d 1413, 1416 (Fed. Cir. 1997) (citations omitted).

¹ On September 30, 2020, the court received responses to its request for additional submissions. In response to one of the court's questions, Defendant indicated that it intended to include a motion to dismiss as part of its forthcoming response to Plaintiffs' motion for judgment on the agency record. *See* Def.'s Resp. Ct.'s Questions at 1–2, Sept. 30, 2020, ECF No. 50. Defendant noted, however, that should the court grant the motion to stay, it would seek leave to file a motion to dismiss within 21 days of the court's order. *See id.*

DISCUSSION

I. Motion to Stay

Nucor and SDI argue that staying proceedings pending the court's disposition of the pending motion to dismiss would avoid unnecessary waste of resources, will cause no harm to the parties with an interest in the outcome of this action, and is in accordance with past cases of this court. *See* Nucor & SDI's Mot. to Stay. at 1–4. Plaintiffs counter that these assertions ring hollow given the timing of Nucor and SDI's motion. *See* Pls.' Resp. at 2–4. For the following reasons, the court denies the motion to stay.

“A court may properly determine that ‘it is efficient for its own docket and the fairest course for the parties to enter a stay of an action before it, pending resolution of independent proceedings which bear upon the case.’” *Diamond Sawblades Mfrs' Coal. v. United States*, 34 CIT 404, 406 (2010) (“*Diamond Sawblades*”) (quoting *Leyva v. Certified Grocers of California*, 593 F.2d 857, 863–64 (9th Cir. 1979)). However, if there is “even a fair possibility that [a] stay” will do damage to the opposing party, the movant “must make out a clear case of hardship or inequity in being required to go forward[.]” *See Landis*, 299 U.S. at 255. The court may also consider whether the stay promotes judicial economy. *See, e.g., Diamond Sawblades*, 34 CIT at 406–08.

Nucor and SDI untimely move to stay despite having ample opportunity to do so. Regardless of whether this Court has granted motions to stay briefing the merits of an action pending disposition of a motion to dismiss, the utility of such a stay lessens when requested after briefing on the merits has commenced. Here, Plaintiffs filed their complaint on March 4, 2020, giving Defendant, Nucor, and SDI ample notice of Plaintiffs' claims. *See generally* Compl. Indeed, in consenting to implementation of the jointly proposed scheduling order, Defendant, Nucor and SDI indicated that the court lacks subject matter jurisdiction over at least a portion of these claims and expressed their intention to file a motion to dismiss. *See* Joint Status Report at 2–3. Nucor and SDI then moved to dismiss the complaint. *See generally* Nucor's Mot. to Dismiss; SDI's Mot. to Dismiss. Defendant did not join, later noting that it intended to move to dismiss as part of its opposition to Plaintiffs' motion for judgment on the agency record. *See* Def.'s Resp. Ct.'s Questions at 1–2, Sept. 30, 2020, ECF No. 50. Thereafter, the parties consented to motions to extend deadlines for briefing both the motion for judgment on the agency record and the motion to dismiss. Even at these points, neither Nucor, SDI, nor Defendant, moved for a stay. On the other hand, Plaintiffs have

already filed their motion for judgment on the agency record. A stay now would be unfair to Plaintiffs, since they have already expended resources preparing their motion for judgment on the agency record as well as their responses to the pending motions to dismiss. As such, Nucor and SDI's motion to stay is denied.

II. Motion to Extend

For the same reasons explicated in its motion to stay, Nucor and SDI also move for a twenty-one (21) day extension of the deadlines for briefing the merits of this action pursuant to U.S. Court of International Trade ("USCIT") Rules 6 and 7. *See* Nucor & SDI's Mot. to Extend. Plaintiffs oppose on the same grounds. *See* Pls.' Resp. at 4–5. For the following reasons, the court grants Nucor and SDI's motion in part.

Under USCIT Rule 6, the court may, for "good cause", extend an established deadline for a party to act. To the extent Nucor and SDI predicate their showing of "good cause" on the same submissions raised in their motion to stay, the court is not convinced that good cause exists to extend the deadlines for briefing Plaintiffs' motion for judgment on the agency record by 21 days. As explained, Defendant, Nucor and SDI had ample opportunity to communicate their preferences with respect to the current briefing schedule. However, cognizant of the possibility that the parties have diverted themselves in filing and responding to this motion to amend the scheduling order, and considering that Nucor and SDI express concerns with having to respond to the court's letter "just four days" after filing their responses to Plaintiffs' motion for judgment on the agency record, *see* Nucor & SDI's Mot. to Extend at 2, the court partially grants the motion for an extension of time and extends all outstanding deadlines set forth by the briefing schedule for the pending motion for judgment on the agency record by seven (7) days.

CONCLUSION

As such, and pursuant to USCIT Rule 6(b), it is:

ORDERED that Nucor and SDI's motion to stay is denied; and it is further

ORDERED that the motion to amend the scheduling order is granted in part and denied in part; and it is further

ORDERED that the court's Amended Scheduling Order, July 24, 2020, ECF No. 42, is amended as follows:

1. Defendant and Defendant-Intervenors shall file any responsive briefs on or before Friday, October 16, 2020;

2. Plaintiffs shall file any reply brief on or before Friday, November 13, 2020;
3. Plaintiffs shall file the Joint Appendix on or before Friday, November 27, 2020;
4. Any motions for oral argument shall be filed on or before Friday, November 27, 2020.

Dated: October 8, 2020
New York, New York

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

Slip Op. 20–143

BOURGAULT INDUSTRIES, LTD., Plaintiff, v. UNITED STATES, Defendant.

Before: Richard K. Eaton, Judge
Court No. 19–00111

[United States Department of Commerce’s final scope ruling sustained.]

Dated: October 13, 2020

George W. Thompson, Thompson & Associates, PLLC, of Washington, DC, argued for Plaintiff.

Kelly A. Krystyniak, Trial Counsel, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC, argued for Defendant. With her on the brief were *Joseph H. Hunt*, Assistant Attorney General, *Jeanne E. Davidson*, Director, and *L. Misha Preheim*, Assistant Director. Of Counsel on the brief was *James Henry Ahrens II*, Office of the Chief Counsel for Trade Enforcement & Compliance, U.S. Department of Commerce, of Washington, DC.

OPINION

Eaton, Judge:

This case involves a challenge to the United States Department of Commerce’s (“Commerce” or the “Department”) ruling that the coultter disc hubs imported by Bourgault Industries, Ltd. (“Bourgault” or “Plaintiff”) are “tapered roller housings” within the scope of the antidumping duty order on tapered roller bearings from the People’s Republic of China (“Order”).¹ *See Antidumping Duty Order on Tapered Roller Bearings and Parts Thereof, Finished and Unfinished,*

¹ *See Tapered Roller Bearings and Parts Thereof, Finished or Unfinished, From the People’s Rep. of China*, 52 Fed. Reg. 22,667 (Dep’t Commerce June 15, 1987) (original final antidumping duty order) amended by *Tapered Roller Bearings From the People’s Rep. of China*, 55 Fed. Reg. 6669 (Dep’t Commerce Feb. 26, 1990) (correcting errors in calculated dumping margins).

from the People's Rep. of China: *Final Scope Ruling on Bourgault Industries Ltd.'s Coulter Disc Hubs* (June 3, 2019), P.R. 18 ("Final Scope Ruling").

Bourgault, a U.S. manufacturer of agricultural equipment, imports coulters disc hubs to make plows. A coulters disc hub "consists of a specialty casted [sic] flange, a specialty designed indexed stub-axle, generic [tapered roller bearings], a crown nut, and a flattened end-cap." Letter from Junker & Nakachi to Sec'y Wilbur Ross (Feb. 19, 2019), P.R. 1 ("Scope Ruling Request") at 2 (emphasis added). Together with a blade, called a coulters disc, the hub is incorporated into an "opener" assembly that is mounted to a plow. The coulters disc is mounted ahead and somewhat above the plow blades. It cuts on an even edge to the furrow, and buries organic material (such as the remains of cut corn stalks) to aid in their decomposition. The hub facilitates the functioning of the disc by resisting the twisting and lateral forces caused when the disc encounters rocks, roots, and other material as it is pulled through the earth. See *Scope Ruling Request* at 3.

The tapered roller bearings inside the coulters disc hub are highly compressed, *i.e.*, they are tightened with what Plaintiff calls "excess preload."² See *Final Scope Ruling* at 2. Because of this preload, "coulters disc hubs turn only when sufficient lateral and twisting forces are applied against the coulters blade when engaged with soil." *Scope Ruling Request* at 4.

Bourgault disputes Commerce's finding that its coulters disc hubs are within the scope of the Order. It argues that (1) prior agency determinations interpreting the Order have identified friction reduction as an "essential function" of in-scope merchandise; and that (2) substantial record evidence shows that its preloaded tapered roller bearings inside the coulters disc hub prevent the hub from reducing friction; rather, the load *increases* friction. That is, the hub's design ensures that the coulters disc does not rotate, *unless* it is acted upon by sufficient force. See Pl.'s Mem. Supp. Mot. J. Admin. R., ECF No. 14 ("Pl.'s Br."); Pl.'s Reply, ECF No. 18. In this way, Plaintiff claims, its coulters disc hubs are different from the "wheel hub units" that Commerce has found to be within the scope of the Order, in previous scope rulings. See Pl.'s Br. 20. Plaintiff further argues that if there were any question about the functionality of the coulters disc hubs, Commerce should have commenced a scope inquiry. See Pl.'s Br. 27; 19 C.F.R. § 351.225(e), (k)(2) (2019). Plaintiff thus asks the court to remand the *Final Scope Ruling* to Commerce "for reconsideration and redetermination." Pl.'s Br. 28.

² As shall be seen, "excess preload" has had two meanings in this proceeding.

Defendant the United States (“Defendant”), on behalf of Commerce, argues that, like in-scope wheel hub units, coultter disc hubs are “tapered roller housings” (1) under the plain meaning of the Order, and (2) because when sufficient pressure is applied, they do reduce friction. *See* Def.’s Mem. Opp’n Pl.’s Mot. J. Admin. R., ECF No. 16 (“Def.’s Br.”). Defendant urges the court to sustain the Final Scope Ruling as supported by substantial evidence and in accordance with law.

Jurisdiction is found under 28 U.S.C. § 1581(c) (2012) and 19 U.S.C. § 1516a(a)(2)(B)(vi) (2012). The Final Scope Ruling is sustained.

BACKGROUND

I. The Order

The cornerstone in a scope determination is the language of the order itself. *Walgreen Co. v. United States*, 620 F.3d 1350, 1357 (Fed. Cir. 2010) (citation omitted). On June 15, 1987, Commerce issued the subject Order, which covered:

tapered roller bearings and parts thereof . . . ; flange, take up cartridge, and hanger units incorporating tapered roller bearings . . . ; and tapered roller housings (except pillow blocks) incorporating tapered rollers, with or without spindles, whether or not [for] automotive use

Order, 52 Fed. Reg. at 22,667 (references to Tariff Schedules of the United States omitted). The Order does not mention functionality or use, except to say that it covered products “whether or not” they were for “automotive use.” For more than thirty years, the Order’s language has remained the same, except for updated references to the tariff schedule. *See Tapered Roller Bearings and Parts Thereof, Finished and Unfinished, From the People’s Rep. of China*, 84 Fed. Reg. 6132 (Dep’t Commerce Feb. 26, 2019) (final results of thirtieth admin. rev.) (citing the Order). Over the years, however, Commerce has had occasion to review the scope of the Order, by way of “scope rulings,” which are provided for in its regulations.

II. Regulatory Background on Scope Rulings

In a scope determination, “Commerce must first examine the language of the final order.” *Mid Continent Nail Corp. v. United States*, 725 F.3d 1295, 1302 (Fed. Cir. 2013) (citations omitted). If the language is clear, the plain meaning of the order controls. If the order is ambiguous, the Department may issue scope rulings “that clarify the scope of an order . . . with respect to particular products.” 19 C.F.R. §

351.225(a). The regulations set out rules regarding scope rulings, including standards used in determining whether a product is within the scope of an order. *Id.* Whether an order is ambiguous is a question of law. See *Meridian Prods., LLC v. United States*, 851 F.3d 1375, 1382 (Fed. Cir. 2017).

“[I]n considering whether a particular product is included within the scope of an order . . . , [Commerce] will take into account . . . [t]he descriptions of the merchandise contained in the petition, the initial investigation, and the determinations of [Commerce] (including prior scope determinations) and the [U.S. International Trade] Commission.” 19 C.F.R. § 351.225(k)(1).³ If the sources listed in § 351.225(k)(1) are dispositive, Commerce will look no further.

If the (k)(1) sources are not dispositive, Commerce may commence a formal scope inquiry, in which it will consider additional factors, listed in § 351.225(k)(2): (1) the physical characteristics of the product, (2) the expectations of the ultimate purchasers, (3) the ultimate use of the product, (4) the channels of trade in which the product is sold, and (5) the manner in which the product is advertised and displayed. 19 C.F.R. § 351.225(k)(2), (e).

III. The Petition

On August 25, 1986, The Timken Company (“Timken”)⁴ filed a petition, on behalf of the U.S. tapered roller bearing industry, alleging that imports of tapered roller bearings from China were being, or were likely to be, sold at less than fair value in the United States, and were causing, or threatened to cause, material injury to the U.S. industry. The petition stated that it covered “the full range of [tapered roller bearings]”:

The scope of the petition includes the full range of TRBs⁵, including single-row bearings made with various angles and roller lengths and multiple-row bearing assemblies. These bearings are available in two-row and four-row assemblies and used where greater bearing rating is needed. Thrust bearings and self-contained bearing packages (sometimes referred to as “unitized” bearings) are also included.

³ The regulations set out different scope determination procedures for “products completed or assembled” in the United States or foreign countries other than a country to which an order applies, products with minor alterations, and later-developed products, none of which apply here. See 19 C.F.R. § 351.225(g)-(j).

⁴ Timken is not a party to this lawsuit, but it participated in the scope ruling proceeding before Commerce.

⁵ “TRBs” means tapered roller bearings.

Letter from Stewart and Stewart to Sec’y Wilbur Ross (Mar. 25, 2019), P.R. 7–9 (“Timken Opp’n”), Attach. 2 at 9 (excerpts from petition). Unlike the eventual Order itself, the petition identified different purposes for which tapered roller bearings could be used, including agricultural and industrial applications. *See* Timken Opp’n, Attach. 2.

Products identified in the petition included tapered roller bearings with different “settings,” *i.e.*, “a specific amount of play or preload.” Letter from Junker & Nakachi to Sec’y Wilbur Ross (May 19, 2019), P.R. 15 (“Bourgault Rebuttal”), Ex. C at 2. For example, a Timken brochure attached to the petition described, *inter alia*, two types of preloaded tapered roller bearings—the “Hydra-Rib” and the “Spring-Rib”:

[The Hydra-Rib] is a self-contained tapered roller bearing that has a floating outer race (or cup) rib which contacts the rollers. The floating rib is controlled by hydraulic or pneumatic pressure in the sealed chamber behind the rib. Variable pressure capabilities provide the unique capability of changing the preload in the system to handle variable load or speed situations. This bearing is designed for applications where bearing adjustment is critical over [a] wide range of speeds or loads.

[The Spring-Rib] is a self-contained tapered roller bearing that has a floating outer race (or cup) rib which contacts the rollers. The floating rib is controlled by springs. This bearing is available in three grades of preload. They are light[,] medium and heavy preload. The amount of preload is determined by the number of springs used in the assembly. Use this bearing only where load and speed conditions are relatively constant.

Timken Opp’n at 8–9 (quoting Timken brochure in Collective Ex. 3). In other words, Timken sought investigation of tapered roller bearings with different grades of preload. As explained by a Timken engineer in a declaration attached to the petition:

All tapered roller bearings use settings to optimize bearing performance which are either specific amounts of axial end play or axial preload adjusted at assembly to control the internal clearances between the rolling elements and the inner and outer rings’ contacting races. . . . *Preload is an axial interference or light compression between rollers and races such that there is no measurable axial shaft movement when a small force is applied. A preloaded [tapered roller bearing] has no internal clearance (measured either axially or radially) between the bearing’s rolling elements and its inner and out[er] races.*

Timken Opp'n, Attach. 4 ¶ 7 (emphasis added). Thus, preload is a common feature of tapered roller bearings.

Bourgault notes that the petition addressed “excessive preload” in the context of how a bearing’s setting impacts its useful life:

Some applications are set with preload to increase rigidity and positioning of highly stressed parts that would otherwise be dramatically affected by excessive deflection and misalignment.

Excessive preload must be avoided as bearing fatigue life can be drastically reduced. Also, excessive preload can lead to lubrication problems and premature bearing damage due to high operating temperature.

Bourgault Rebuttal, Ex. C at 2 (Timken’s Bearing Setting Techniques Manual) (emphasis added).

It is worth noting that the word excessive in this context is used in the sense of “too much”—not in the sense of a “large amount.” That is, the Timken manual quoted by Bourgault was warning that too much preload would cause the bearings to wear out.

IV. The Initial Investigation

In response to Timken’s petition, Commerce initiated a dumping investigation. *See Tapered Roller Bearings, Rollers and Parts Thereof, Finished or Unfinished, From the People’s Rep. of China*, 51 Fed. Reg. 33,283 (Dep’t Commerce Sept. 19, 1986) (notice of initiation). In its preliminary determination, Commerce defined the scope of the investigation, which would later be reflected in the Order:

tapered roller bearings and parts thereof . . . ; flange, take up cartridge, and hanger units incorporating tapered roller bearings . . . ; and tapered roller housings (except pillow blocks) incorporating tapered rollers, with or without spindles, whether or not for automotive use

Tapered Roller Bearings and Parts Thereof, Finished or Unfinished, From the People’s Rep. of China, 52 Fed. Reg. 3833 (Dep’t Commerce Feb. 6, 1987) (preliminary determination of sales at less than fair value) (references to Tariff Schedules of the United States omitted). The scope of the investigation did not include an inquiry into preload, excessive or otherwise. Commerce made a preliminary determination that dumping was occurring.

Following Commerce’s affirmative preliminary determination, the United States International Trade Commission (“Commission”) commenced a material injury investigation. The Commission applied Commerce’s scope definition.

In its report, the Commission pointed out some differences between ball bearings and tapered roller bearings:

Tapered roller bearings are a part of the larger product category of antifriction bearings. Antifriction bearings are machine components that permit free motion between moving and fixed parts by holding or guiding the moving parts to minimize friction and wear. In a bearing, a series of rollers or balls are usually mounted in a separation or cage and enclosed between two rings called races. The rolling elements are very important, since they transmit the physical load or force from the moving parts to the stationary support. The two principal types of antifriction bearings are ball bearings and roller bearings, depending on which type of rolling elements [is] employed. Tapered roller bearings are preferred instead of ball bearings for many applications because they are able to *absorb both radial and thrust loads*, unlike ball bearings, which typically withstand only radial force.

Tapered Roller Bearings and Parts Thereof, and Certain Housings Incorporating Tapered Rollers from Hungary, Italy, Japan, the People's Rep. of China, Romania and Yugoslavia, Inv. Nos. 731-TA-341-346, USITC Pub. 1899 (Oct. 1986) (Prelim.) (“ITC Investigation Preliminary Determination”) at A-2 to A-3 & A-3 n.1 (emphasis added) (describing radial loads as “those perpendicular to the axis rotation,” and thrust loads as “normally parallel to the level of rotation”). As a result of its investigation, the Commission preliminarily determined that imports of the subject merchandise were causing material injury to the U.S. industry.

Commerce and the Commission confirmed their respective preliminary findings in their final affirmative determinations. See *Tapered Roller Bearings From the People's Rep. of China*, 52 Fed. Reg. 19,748 (Dep't Commerce May 27, 1987) (final determination of sales at less than fair value); see also *Tapered Roller Bearings and Parts Thereof, and Certain Housings Incorporating Tapered Rollers from Hungary, the People's Rep. of China, and Romania*, Inv. Nos. 731-TA-341, -344, -345, USITC Pub. 1983 (June 1987) (Final) (“ITC Investigation Final Determination”).

V. Prior Scope Determinations

In the Final Scope Ruling, Commerce considered prior scope determinations under the Order, and found that “Bourgault’s coultter disc hubs . . . are not substantially different from other hub units Commerce has found to be in-scope merchandise.” Final Scope Ruling at 7. In particular, Commerce cited several prior rulings on wheel hub units (also called wheel hub “assemblies”), including a 2011 ruling

requested by New Trend Engineering Ltd.⁶ See Mem. from Wendy J. Frankel, Director, Office 8, Antidumping and Countervailing Duty Operations to Gary Taverman, Acting Deputy Assistant Sec’y for Antidumping and Countervailing Duty Operations (Apr. 18, 2011) (“New Trend Scope Ruling”).

In the New Trend Scope Ruling, the merchandise at issue was wheel hub units with and without antilock braking sensors. Commerce undertook an analysis of the § 351.225(k)(2) factors with respect to wheel hub units *with* the sensors, and a § 351.225(k)(1) analysis of those *without* the sensors. Ultimately, Commerce found that wheel hub units, both with and without antilock braking sensors, were “tapered roller housings” because they had flanges that incorporated tapered roller bearings. See New Trend Scope Ruling at 5, 10.

Additionally, in the New Trend Scope Ruling, after having considered the (k)(2) factors with respect to wheel hub assemblies with antilock braking sensors, Commerce observed that the wheel hub units’ “essential function” was “reducing friction.” Specifically, it stated that although the wheel hubs had other features, those features, while adding functionality, “[did] not alter the wheel hub assemblies’ essential function of reducing friction.” New Trend Scope Ruling at 11. Because it reached this conclusion using a (k)(2) analysis, Commerce necessarily examined the “ultimate use” factor. See New Trend Scope Ruling at 8; see also Mem. from Wendy J. Frankel, Director, Office 8, Antidumping and Countervailing Duty Operations to Christian Marsh, Deputy Assistant Sec’y for Antidumping and Countervailing Duty Operations (Dec. 8, 2010) at 10 (“Preliminary New Trend Scope Ruling”).

This Court sustained Commerce’s New Trend Scope Ruling as supported by substantial evidence and in accordance with law in *Power Train Components, Inc. v. United States*, 37 CIT 781, 791, 911 F. Supp. 2d 1338, 1345, 1348 (2013). In its discussion, the Court recited Commerce’s finding that the wheel hub assemblies’ additional features did not alter their “essential function,” *i.e.*, friction reduction.

⁶ The New Trend Scope Ruling pertained to splined and non-splined wheel hub units (assemblies) with and without antilock braking sensors. See Mem. from Wendy J. Frankel, Director, Office 8, Antidumping and Countervailing Duty Operations to Gary Taverman, Acting Deputy Assistant Sec’y for Antidumping and Countervailing Duty Operations (Apr. 18, 2011).

In addition to the New Trend Scope Ruling, Commerce cited other rulings on “hub units” consisting of housed tapered roller bearings which it found to be covered by the Order. See Final Scope Ruling at 7 (citing *Tapered Roller Bearings from the People’s Rep. of China: Final Scope Determination on Blackstone OTR’s Wheel Hub Assemblies* (Feb. 7, 2011) and *Tapered Roller Bearings from the People’s Rep. of China: Final Scope Determination on Bosda’s Wheel Hub Assemblies* (June 14, 2011)).

Id., 37 CIT at 785–86, 911 F. Supp. 2d at 1343–44. The Court found no error with respect to that finding.

Finally, in addition to its own prior scope rulings, Commerce took into account a Commission report from the investigation that led to the Order. *See* Final Scope Ruling at 7 & n.44 (citing ITC Investigation Preliminary Determination); *see also* 19 C.F.R. § 351.225(k)(1) (“[Commerce] will take into account . . . [t]he descriptions of the merchandise contained in . . . the determinations of [Commerce] (including prior scope determinations) and the Commission.”). Bourgault had cited the Commission report in its brief before the agency to support the argument that the Order only covers tapered roller bearings whose primary purpose is the reduction of friction—an argument that Commerce rejected because there was nothing in the Order that supported it: “The scope language itself does not contemplate that [tapered roller bearings] must be entirely free-turning; to the contrary, the documents in the underlying Petition (as supplemented by a Timken engineer’s statement on this scope record) note that [tapered roller bearings] may have different pre-load settings, depending upon their end-use.” *See* Final Scope Ruling at 8.⁷

VI. The Subject Merchandise: Coultter Disc Hubs

As noted, Bourgault’s coultter disc hubs “consist[] of a specialty casted [sic] flange, a specialty designed indexed stub-axle, generic [tapered roller bearings], a crown nut, and a flattened end-cap.” Scope Ruling Request at 2. Together with a blade (a coultter disc), the hub is incorporated into an “opener” assembly that is mounted to a plow. The disc cuts a crisp line on the furrow and buries organic material. The hub facilitates the functioning of the disc by resisting the twisting and lateral forces caused when the disc encounters rocks, roots, and other material as it is pulled through the earth. When sufficient pressure is applied, however, supposedly by more immoveable objects, the bearing permits the disc to rotate. *See* Scope Ruling Request at 3.

⁷ In full text, Commerce stated:

[W]e disagree with Bourgault that the scope requires [tapered roller bearings] to function *solely* to minimize friction and that only [tapered roller bearings] that operate solely to minimize friction are covered by the *Order*. The scope language itself does not contemplate that [tapered roller bearings] must be entirely free-turning; to the contrary, the documents in the underlying Petition (as supplemented by a Timken engineer’s statement on this scope record) note that [tapered roller bearings] may have different pre-load settings, depending upon their end-use. In this case, the [tapered roller bearings] are free-turning under the proper load, and, like all [tapered roller bearings], they are optimized to resist lateral and shear forces with even and minimal wear [of the bearings, the hub unit, and coultter disc].

Final Scope Ruling at 8.

The tapered roller bearings in the coultter disc hub are highly compressed, *i.e.*, according to Plaintiff, they are tightened with “excess preload.” See Final Scope Ruling at 2. Because of this preload, “coultter disc hubs turn only when sufficient lateral and twisting forces are applied against the coultter blade when engaged with soil.” Scope Ruling Request at 4.

VII. The Final Scope Ruling Now Before the Court

On February 19, 2019, Bourgault filed its Scope Ruling Request, seeking a determination by Commerce that its coultter disc hubs were outside the scope of the Order. In other words, Bourgault maintained that its products were not:

tapered roller bearings and parts thereof . . . ; flange, take up cartridge, and hanger units incorporating tapered roller bearings . . . ; and tapered roller housings (except pillow blocks) incorporating tapered rollers, with or without spindles, whether or not [for] automotive use

Order, 52 Fed. Reg. at 22,667.

In the Final Scope Ruling, Commerce considered the product’s description provided by Bourgault in its Scope Ruling Request, *i.e.*:

an indexed spindle (*i.e.*, indexed stub-axle), cotter pin, triple lip seal, tapered roller bearings, hub casting (*i.e.*, casted [sic] flange), a second set of tapered roller bearings, washer, crown nut, and a flattened end-cap.

Final Scope Ruling at 2. It concluded that the product was within the plain language of the Order:

We find that Bourgault’s imported coultter disc hubs meet the physical characteristics of [tapered roller bearings] covered by the scope of the Order, *because they are tapered roller housings incorporating tapered rollers, including a spindle*. Further, there are no exclusions from the order for merchandise which is subject to a different end use, and, in fact, the scope of the Order specifically covers all [tapered roller bearings] and tapered roller housing (except pillow blocks), “whether or not for automotive use.” Thus, we find that Bourgault’s coultter disc hub units meet the plain language of the scope.

Final Scope Ruling at 6 (emphasis added). In other words, coultter disc hubs fell within the plain meaning of the language of the Order because it was a “tapered roller housing.” Commerce specifically found that the end use of the “tapered roller housing” was immaterial to the determination of whether it was covered by the Order.

Commerce reached its determination after conducting a (k)(1) analysis. And although Bourgault argues to the contrary, it is apparent that when reaching its conclusion, Commerce considered the sources of information listed in 19 C.F.R. § 351.225(k)(1).⁸ See Final Scope Ruling at 6 (citing 19 C.F.R. § 351.225(k)(1)). For instance, Commerce cited its prior scope rulings, in particular the New Trend Scope Ruling, regarding wheel hub units. It found that Bourgault's coultter disc hubs were like New Trend's wheel hub units, in that they both housed tapered roller bearings:

In [the New Trend Scope Ruling], Commerce found that hub units were covered by the Order; this was upheld by the Court in *Power Train Components*. Similarly, Commerce also found both automotive and non-automotive hub units, consisting of housed [tapered roller bearings], to be covered by the Order in prior scope rulings. Thus, we find that there is precedent in our prior consideration of various tapered roller housings similar to Bourgault's coultter disc hubs (also consisting of [tapered roller bearings]) to support a finding that Bourgault's coultter disc hubs are within the scope of the Order.

Final Scope Ruling at 7 (first citing *Power Train Components*, 37 CIT at 787, 911 F. Supp. 2d at 1345; then citing *Tapered Roller Bearings from the People's Rep. of China: Final Scope Determination on Blackstone OTR's Wheel Hub Assemblies* (Feb. 7, 2011) and *Tapered Roller Bearings from the People's Rep. of China: Final Scope Determination on Bosda's Wheel Hub Assemblies* (June 14, 2011)).

The Department acknowledged some differences between Bourgault's coultter disc hubs and the wheel hub units: "Unlike typical wheel hub assemblies, which principally function as anti-friction devices, the purpose of the coultter disc hub is to resist the extreme twisting lateral forces, and jarring impact forces, caused by plowing the soil in a spiral twisting fashion." Final Scope Ruling at 2. Com-

⁸ Subsection 351.225(k) provides:

[I]n considering whether a particular product is included within the scope of an order . . . , [Commerce] will take into account the following:

- (1) The descriptions of the merchandise contained in the petition, the initial investigation, and the determinations of [Commerce] (including prior scope determinations) and the Commission.
- (2) When the above criteria are not dispositive, [Commerce] will further consider:
 - (i) The physical characteristics of the product;
 - (ii) The expectations of the ultimate purchasers;
 - (iii) The ultimate use of the product;
 - (iv) The channels of trade in which the product is sold; and
 - (v) The manner in which the product is advertised and displayed.

19 C.F.R. § 351.225(k)(1)-(2).

merce also recognized that the tapered roller bearings housed within Bourgault's coulters disc hubs "are tightened with excess preload,⁹ which *reduces* the ability of the hub to spin freely." Final Scope Ruling at 2 (emphasis added). It did not, however, find that the differences were material because this preload did not alter the fact that Bourgault's coulters disc hubs contained tapered roller bearings within the plain meaning of the Order.

Commerce also rejected Bourgault's argument that its coulters disc hubs were not in-scope, because their "essential function" was to reduce friction:

Bourgault attempts to differentiate its coulters disc hub units from automotive hub units, citing to the Commission's report and other scope rulings, which state that the primary purpose of [tapered roller bearings] is to minimize friction and allow for the free rotation of the hub unit. As an initial matter, we disagree that Bourgault's coulters disc hubs do not also fulfill these same criteria. Contrary to Bourgault's assertions, the [tapered roller bearings] in Bourgault's coulters disc hubs allow free rotation of the coulters disc, *under the correct load*, and they facilitate even wear of the bearings, the hub unit, and coulters disc.

Final Scope Ruling at 7. Commerce found that "Bourgault's coulters disc hub . . . allows the coulters disc, which is attached to the plow frame, to turn freely through 360 degrees of motion, while guiding the disc at the prescribed angle." Final Scope Ruling at 7 n.44. It stated: "In this case, the [tapered roller bearings] are free-turning under the proper load, and, like all [tapered roller bearings], they are optimized to resist lateral and shear forces with even and minimal wear." Final Scope Ruling at 8. In other words, although sufficient force is required to overcome the "excess" preload compressing the tapered roller bearings inside the coulters disc hub, the bearings permitted the coulters disc to rotate.

Finding the language of the Order and the (k)(1) sources of information on the record dispositive, Commerce did not consider the factors listed in § 351.225(k)(2). *See* Final Scope Ruling at 6 ("We find that these sources are, together, dispositive as to whether the product at issue is subject merchandise, in accordance with 19 CFR 351.225(k)(1). Therefore, we find it unnecessary to consider the additional factors under 19 CFR 351.225(k)(2)."). This action followed.

⁹ Here, Commerce adopts Plaintiff's use of "excess preload" as "a lot of preload," rather than "too much preload."

STANDARD OF REVIEW

Commerce’s Final Scope Ruling will be upheld 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).

LEGAL FRAMEWORK

If the language of the Order clearly and unambiguously covers the subject merchandise, the language controls. “The relevant scope terms are unambiguous if they have a single clearly defined or stated meaning.” *Meridian Prods.*, 851 F.3d at 1381 n.7 (citation omitted). “[T]he question of whether the unambiguous terms of [the] scope [of an order] control the inquiry, or whether some ambiguity exists, is a question of law” that the court reviews de novo. *Id.* at 1382.

If the order’s language is ambiguous, then Commerce “must turn to available [§ 351.225 (k)(1)] sources, including the petition, the initial investigation, and any earlier determinations by Commerce and the [Commission].” *Sunpreme Inc. v. United States*, 946 F.3d 1300, 1309 (Fed. Cir. 2020) (citations omitted); *see also Atkore Steel Components, Inc. v. United States*, 42 CIT __, __, 313 F. Supp. 3d 1374, 1380 (2018) (citations omitted) (“If . . . the language of the scope order is ambiguous, Commerce more fully analyzes the sources listed in § 351.225(k)(1). Where those sources are dispositive, in other words, the history of the original investigation is clear, Commerce will close the scope ruling proceedings with a ‘final scope ruling.’”).

Where § 351.225(k)(1) sources are not dispositive, Commerce commences a formal scope inquiry. *See* 19 C.F.R. § 351.225(e). In that case, “Commerce must turn to available [§ 351.225(k)(2)] sources, including the product’s physical characteristics, ultimate purchasers’ expectations, the product’s ultimate use, the channels of trade in which the product is sold, and the way the product is marketed.” *Sunpreme*, 946 F.3d at 1309 (citing *Mid Continent*, 725 F.3d at 1302; 19 C.F.R. § 351.225(k)(2)).

DISCUSSION

Plaintiff argues that the Final Scope Ruling is legally flawed because Commerce failed to “take into account” prior agency determinations as required by its regulations. *See* 19 C.F.R. § 351.225(k)(1). In particular, Plaintiff claims that Commerce previously interpreted the Order to include only merchandise that had as its “essential function” the reduction of friction, and that Commerce failed to apply that “requirement” here. *See* Pl.’s Br. 24. For Plaintiff,

in-scope [tapered roller bearings] have been defined as products intended to reduce friction from the outset of the antidumping

duty investigation. That capability is the *sine qua non* of the Order's coverage. Merchandise that does not reduce friction fails to meet that criterion and is excluded.

Pl.'s Br. 18. Plaintiff relies on excerpts from the New Trend Scope Ruling and Commission reports to support its claims that in-scope tapered roller bearings' "essential function" is reducing or minimizing friction. *See* Pl.'s Br. 18–19 (citing New Trend Scope Ruling; ITC Investigation Final Determination; *Tapered Roller Bearings from China*, Inv. No. 731-TA-344, USITC Pub. 4824 (Sept. 2018) (Fourth Rev.)).

For its part, Defendant maintains that Commerce correctly found that coulters disc hubs are in-scope based on the plain meaning of the Order:

Commerce began its analysis with the language of the order, which includes "tapered roller housings . . . [and] incorporating tapered rollers." Commerce explained that "Bourgault's imported coulters disc hubs meet the physical characteristics of [tapered roller bearings] covered by the scope of the order, because they are tapered roller housings incorporating tapered rollers, including a spindle." Commerce further explained that "there are no exclusions from the {order} for merchandise which is subject to a different end use, and, in fact, the scope of the order specifically covers all [tapered roller bearings] and tapered roller housing[s] (except pillow blocks), 'whether or not for automotive use.'" Commerce thus determined that Bourgault's coulters disc hubs units "meet the plain language of the scope."

Def.'s Br. 9–10 (internal citations omitted) (quoting Final Scope Ruling at 7–8).

In addition, Commerce found that coulters disc hubs did, in fact, reduce friction, "under the correct load." Final Scope Ruling at 7; *see also* Def.'s Br. 12 ("As Commerce explained, contrary to its assertions, Bourgault's coulters disc hubs *do* serve the purpose of reducing friction and allowing free movement under the correct load, facilitating even wear of the bearings, the hub unit, and coulters disc.").

Moreover, Defendant maintains that Commerce satisfied the regulatory requirement to "take into account" its prior rulings and those of the Commission, including the New Trend Scope Ruling:

[In the New Trend Scope Ruling,] Commerce determined that New Trend's wheel hub units, which include "two non[-]removable tapered roller bearings in an inner race and c[u]p that is machined into the unit's flange, an outer [r]ace machined into the assembly forging, and mounting studs for attachment of

the assembly to an automobile,” are “tapered roller housings” within the meaning of the order. . . . Commerce reviewed that determination and found that “there is precedent in its prior consideration of various tapered roller housing similar to Bourgault’s coultter disc hubs (also consisting of [tapered roller bearings]) to support a finding that Bourgault’s coultter disc hubs are within the scope of the Order.”

Def.’s Br. 10 (first quoting *Power Train Components*, 37 CIT at 783, 911 F. Supp. 2d at 1341–42; then quoting Final Scope Ruling at 7).

The court is not persuaded by Plaintiff’s argument that Commerce committed legal or factual error here. First, starting, as it must, with the language of the Order, Commerce found that the subject coultter disc hubs fell within the plain meaning of the Order, *i.e.*, as they are “tapered roller housings.” *Sunpreme*, 946 F.3d at 1309. Plaintiff does not dispute that “a coultter disc hub’s bearings are imported in a housing.” Pl.’s Br. 23. It insists, rather, that the Order’s language was not the “final word” on what it includes. For Bourgault, use of the (k)(1) factors demonstrates that there is an exception in the Order for its bearings.

Specifically, Plaintiff maintains that Commerce violated its regulations by failing to adequately consider prior agency rulings that, in Plaintiff’s view, established friction reduction as a *requirement* of the Order. For example, Plaintiff relies on the New Trend Scope Ruling, which pertained to wheel hub assemblies used in the front wheels of automobiles, both with and without antilock braking sensors. All of the wheel hub assemblies subject to the scope request incorporated

two non-removable [tapered roller bearings] in an inner race and cup that are machined into the unit’s flange, an outer race machined into the assembly forging, wheel and brake “pilots” for aligning the wheels and brake rotors, and mounting wheel studs. The majority of the assemblies consist of a flanged outer hub with two [tapered roller bearings], into which has been pressed a flanged spindle having a splined inner surface and mounting studs. The wheel hub assemblies are “sealed for life,” “greased at factory,” and “the bearing preload is set at factory.” Certain of the products do not have a splined spindle and certain of the products include [antilock braking sensor] capability. New Trend’s wheel hub assemblies may be categorized into the following types of merchandise: (1) splined without [antilock brak-

ing sensor] elements; (2) non-splined without [antilock braking sensor] elements; and (3) with [antilock braking sensor] elements.¹⁰

Preliminary New Trend Scope Ruling at 4.

Before Commerce, New Trend argued that its wheel hub assemblies were outside the scope of the Order because of additional features and functions, *e.g.*, flanges with wheel and brake pilots, to align wheel and brake rotors, that went “beyond the antifriction and load bearing capabilities” of covered products. *See* Preliminary New Trend Scope Ruling at 7. Commerce disagreed with that argument, and found that the additions were not sufficient to take the product outside the Order.

In the New Trend case, Commerce found that the Order was ambiguous because there, some of the subject hubs had the additional elements of an antilock braking system—a feature that was not expressly covered by the Order. Importantly, this ambiguity had nothing to do with the load of the tapered roller bearings that were part of the hub, excessive or otherwise.

Finding itself unable to resolve this ambiguity using the (k)(1) factors, Commerce went to the (k)(2) factors. Among the factual findings Commerce made using these factors was that the ultimate use of the bearings under review was to reduce friction. Thus, while the New Trend Scope Ruling does observe that: “wheel hub units with additional features and functions retain the essential function of wheel hub units covered by the Order; that is, they continue to reduce friction[, and] thus, the additional features found on wheel hub units are engineering and design variations . . . do not alter the fundamental nature of the subject [tapered roller bearing],” this observation is in the context of the factual finding that the subject bearings did not differ from other bearings covered by the Order. *See* Preliminary New Trend Scope Ruling at 7; *see also* New Trend Scope Ruling at 11 (finding that added functionality did “not alter the wheel hub assemblies’ essential function of reducing friction.”).

¹⁰ Commerce analyzed wheel hub assemblies without antilock braking sensors under 19 C.F.R. § 351.225(k)(1) because it found that (1) the plain language of the Order covered them: “tapered roller housings . . . with or without spindles” (and whether or not the spindles had grooves, *i.e.*, were splined or non-splined); and (2) they were discussed in the ITC Investigation Final Determination. *See* Preliminary New Trend Scope Ruling at 7–8. Although wheel hub assemblies *with* antilock braking sensors were also “tapered roller housings,” they were not discussed in the ITC Investigation Final Determination. Thus, Commerce found that it was less clear whether wheel hub assemblies with antilock braking sensors were covered by the Order, and so conducted an analysis of the factors in § 351.225(k)(2).

Here, because the “essential function” language was found in a scope determination using the factor in (k)(2) based on the “ultimate use of the product,” the Department found the New Trend Scope Ruling irrelevant to its (k)(1) examination. *See* Def.’s Br. 14 (internal citations omitted) (“Bourgault omits that Commerce determined – and the Court sustained – that ‘wheel hub assemblies with [antilock braking sensor] elements’ were within the scope of the order based on an analysis *under the (k)(2) factors*. Indeed, the language quoted by Bourgault comes from Commerce’s analysis of the ‘ultimate use of the product.’”).

Although Bourgault cites New Trend as adding the requirement that, to be within the scope of the Order, a tapered roller bearing must have the “essential function” of reducing friction, that is not the case. For this kind of requirement to be added, the Order would have to be found to be ambiguous. Ambiguity is a question of law. *See Meridian Prods.*, 851 F.3d at 1382 (“[T]he question of whether the unambiguous terms of [the] scope [of an order] control the inquiry, or whether some ambiguity exists, is a question of law.”). While a scope ruling can resolve an ambiguity, it cannot create one. Thus, the New Trend factual finding that two bearings are similar because they reduce friction cannot serve to introduce an ambiguity into the language of the Order as a matter of law.

As to the Commission’s report, the report does indeed describe tapered roller bearings as being “a part of the larger product category of antifriction bearings.” *See* ITC Investigation Preliminary Determination at A-2. It is included in order to draw a distinction between ball bearings and tapered roller bearings on the basis of tapered roller bearings’ ability to “absorb both radial and thrust loads.” *See* ITC Investigation Preliminary Determination at A-3. There is no indication that this explanation of the differences in bearings was meant to limit the kinds of tapered roller bearings included in the Order or to add a requirement that to be included in the Order a bearing must have as its essential function the reduction of friction.

As noted, when interpreting the scope of an order, Commerce must start with the plain language of the order itself. *See Mid Continent*, 725 F.3d at 1302. Commerce did not identify an ambiguity in the Order, and there is little to convince the court that Commerce was wrong. Indeed, although Commerce undertook a (k)(1) analysis, it is not clear that Commerce was required to do so because Bourgault has not shown the Order’s language to be ambiguous. Thus, the plain language of the Order controls, and covers Plaintiff’s merchandise as “tapered roller housings.”

Moreover, even if it could be said that the reduction of friction is an essential function of a tapered roller bearing for it to be found within the scope of the Order, the outcome would be the same. Here, Plaintiff's tapered roller bearings perform two tasks. First, because of their load, they keep the coulter disc rigid and at the proper angle for turning the soil as it is dragged across a field. Second, when sufficient force is applied (when, it can be assumed, the disc hits on an immovable object) the pressure applied by the load is relieved and the bearings turn allowing rotation of the coulter disc. *See* Def.'s Br. 12 (quoting Final Scope Ruling at 5) (“[E]ven though the coulter [tapered roller bearings] do not allow for rotation as fast or reduce friction at the same level as [tapered roller bearings] with different preload settings, they still allow rotation”); *see also* Final Scope Ruling at 7 (“Contrary to Bourgault’s assertions, the [tapered roller bearings] in Bourgault’s coulter disc hubs allow free rotation of the coulter disc, *under the correct load*, and they facilitate even wear of the bearings, the hub unit, and coulter disc.”). Commerce reached these conclusions as a matter of fact, and Bourgault does not dispute that fact. There being nothing unreasonable about these conclusions, the court finds that substantial evidence supports Commerce’s finding that coulter disc hubs reduce friction. *See Sunpreme*, 946 F.3d at 1308 (citations omitted) (“A decision is supported by substantial evidence if the evidence amounts to more than a mere scintilla and a reasonable mind might accept it as adequate to support a conclusion.”).

Finally, the court is not convinced that Commerce failed in its duty to “take into account” the information required by its regulations. Subsection 351.225(k)(1) requires that “in considering whether a particular product is included within the scope of an order . . . , [Commerce] will *take into account* . . . [t]he descriptions of the merchandise contained in the petition, the initial investigation, and the determinations of [Commerce] (including prior scope determinations) and the Commission.” Although it may have been unnecessary, it is apparent from the Final Scope Ruling that Commerce met that standard. Indeed, it is clear that Commerce did take this information into account, but reached different conclusions in doing so than Bourgault wished. *See Atkore*, 313 F. Supp. 3d at 1380 (“If . . . the language of the scope order is ambiguous, Commerce more fully analyzes the sources listed in § 351.225(k)(1).”).

CONCLUSION

For the reasons stated above, Plaintiff’s motion for judgment on the agency record is denied, and the Final Scope Ruling is sustained. Judgment shall be entered accordingly.

Dated: October 13, 2020
New York, New York

/s/ Richard K. Eaton
RICHARD K. EATON, JUDGE

Slip Op. 20–144

INVENERGY RENEWABLES LLC, Plaintiff, and SOLAR ENERGY INDUSTRIES ASSOCIATION, CLEARWAY ENERGY GROUP LLC, EDF RENEWABLES, INC. and AES DISTRIBUTED ENERGY, INC., Plaintiff-Intervenors, v. UNITED STATES OF AMERICA, OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE, UNITED STATES TRADE REPRESENTATIVE ROBERT E. LIGHTHIZER, U.S. CUSTOMS AND BORDER PROTECTION, AND ACTING COMMISSIONER OF U.S. CUSTOMS AND BORDER PROTECTION MARK A. MORGAN, Defendants, and HANWHA Q CELLS USA, INC. and AUXIN SOLAR, INC, Defendant-Intervenors.

Before: Judge Gary S. Katzmann
Court No. 19–00192

[The court denies Defendants’ motion to dissolve the PI, vacates the *First Withdrawal*, grants Plaintiffs’ cross-motion to modify the PI, grants Plaintiffs’ motion to complete the administrative record, and denies Plaintiffs’ motion to stay pending appeal.]

Dated: October 15, 2020

Amanda Shafer Berman, John Brew and Larry F. Eisenstat, Crowell & Moring LLP, of Washington, DC and New York, NY, argued for plaintiff, *Invenergy Renewables LLC* and plaintiff-intervenors, *Clearway Energy Group LLC* and *AES Distributed Energy, Inc.* With them on the briefs were *Kathryn L. Clune, Frances Hadfield* and *Leland P. Frost*.

Matthew R. Nicely and *Daniel M. Withowski*, Akin, Gump, Strauss, Hauer & Feld LLP, of Washington, DC, argued for plaintiff-intervenor, *Solar Energy Industries Association*. With them on the prior briefs were Hughes Hubbard & Reed LLP, of Washington, D.C.

Christine M. Streatfeild and *Kevin M. O’Brien*, Baker & McKenzie LLP, of Washington, DC, argued for plaintiff-intervenor, *EDF Renewables, Inc.*

Stephen C. Tosini, Senior Trial Counsel, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC, argued for defendants. With him on the briefs were *Joseph H. Hunt*, Assistant Attorney General, *Ethan P. Davis*, Acting Assistant Attorney General, *Jeanne E. Davidson*, Director, and *Tara K. Hogan*, Assistant Director.

John M. Gurley, Dianna Dimitriuc-Quaia and *Friederike S. Görgens*, Arent Fox LLP, of Washington, DC, argued for defendant-intervenors, *Hanwha Q CELLS USA, Inc.* and *Auxin Solar Inc.* With them on the briefs was *Jessica R. DiPietro*.

OPINION

Katzmann, Judge:

The court returns to its order preliminarily enjoining the United States and the Office of the United States Trade Representative (“USTR”) from withdrawing its previously granted exclusion from safeguard duties on imported bifacial solar modules, duties which the President imposed by proclamation to protect domestic industry.¹ For the third time in this hotly contested litigation, the court is presented with a failure to comply with foundational principles of administrative law—in this case, to act with transparency and to provide adequate, public explanation of agency decisions. Consequently, the court is precluded once again from conducting a full and final review of the merits of the USTR claim that its effort to withdraw the exclusion from safeguard duties should be sustained. The Defendants’ renewed motion to dissolve the preliminary injunction (“PI”) is denied. In so holding, the court reiterates that it no way intimates a view as to the ultimate outcome of this litigation to exclude bifacial solar products from safeguard duties or to withdraw that exclusion.

Plaintiff Invenergy Renewables LLC (“Invenergy”), a renewable energy company, joined by Plaintiff-Intervenors Solar Energy Industries Association (“SEIA”), Clearway Energy Group LLP (“Clearway”), EDF Renewables, Inc. (“EDF-R”), and AES Distributed Energy, Inc. (“AES DE”) (collectively, “Plaintiffs”), filed a motion for a PI to enjoin the United States, USTR, U.S. Trade Representative Robert E. Lighthizer, U.S. Customs and Border Protection (“CBP”), and CBP Acting Commissioner Mark A. Morgan (collectively, “the Government”) from implementing the *Withdrawal of Bifacial Solar Panels Exclusion to the Solar Products Safeguard Measure*, 84 Fed. Reg. 54,244–45 (USTR Oct. 9, 2019) (“*First Withdrawal*”). Invenergy’s Mot. for Prelim. Inj., Nov. 1, 2019, ECF No. 49. Defendant-Intervenors Hanwha Q CELLS USA, Inc. (“Hanwha Q CELLS”) and Auxin Solar Inc. (“Auxin Solar”) (collectively, “Defendant-Intervenors”) join the Government in this case. Hanwha Q CELLS’ Mot. to Intervene as Def.-Inter., Nov. 4, 2019, ECF No. 50; Order Granting Mot., Nov. 4, 2019, ECF No. 54; Auxin Solar’s Mot. to Intervene as Def.-Inter., Feb. 7, 2020, ECF No. 136; Order Granting Mot., Feb. 10, 2020, ECF No. 141. The court granted Plaintiffs’ motion for a PI on December 5, 2019, observing that “[t]he Government must follow its own laws and procedures when it acts.” Prelim. Inj. Order and Op., *Invenergy Renewables LLC v. United States*, 43 CIT __, __,

¹ For the purposes of this opinion, the terms “solar modules” and “solar panels” are used interchangeably.

422 F. Supp. 3d 1255, 1265 (2019), ECF No. 113 (“*Invenergy I*”). *Invenergy I* was followed by two more litigated motions and opinions. See Order and Op. Denying Mot. to Show Cause, *Invenergy Renewables LLC v. United States*, 44 CIT __, 427 F. Supp. 3d 1402 (2020), ECF No. 149 (“*Invenergy II*”); Order and Op. Denying Mot. to Dissolve PI, Mots. to Dismiss, and Granting Mot. to Suppl. Compls., *Invenergy Renewables LLC v. United States*, 44 CIT __, 450 F. Supp. 3d 1347 (2020), ECF No. 185 (“*Invenergy III*”).

The court’s most recent decision in this case, *Invenergy III*, resolved several motions in light of USTR’s second determination to withdraw the exclusion for bifacial solar modules from safeguard duties. *Determination on the Exclusion of Bifacial Solar Panels From the Safeguard Measure on Solar Products*, 85 Fed. Reg. 21,497–99 (USTR Apr. 17, 2020) (“*Second Withdrawal*”). There, the court denied, *inter alia*, the Government’s first motion to dissolve the PI and an earlier motion asking the court to vacate the PI and dismiss the case as moot. *Invenergy III*, 450 F. Supp. 3d at 1351. Thereafter, USTR issued a notice of rescission of the *First Withdrawal*. *Rescission of the First Withdrawal of the Bifacial Solar Panels Exclusion From the Safeguard Measure on Solar Products*, 85 Fed. Reg. 35,975 (USTR June 12, 2020) (“*June 2020 Rescission*”). The Government then filed a renewed motion to dissolve the PI based on the *June 2020 Rescission*. Def.’s Mot. to Dissolve PI, June 12, 2020, ECF No. 198 (“Def.’s Renewed Mot. to Dissolve PI”). Plaintiffs responded with a cross motion to amend the PI to include the *Second Withdrawal*, and also filed a motion to complete the administrative record. Pls.’ Resp. to Def.’s Mot. To Dissolve PI and Cross-Mot. To Modify PI, June 29, 2020, ECF No. 206 (“Pls.’ Br.”); Pls.’ Mot. to Complete A.R., June 19, 2020, ECF No. 201. Without in any way reaching the merits of the Government’s action seeking to withdraw the exclusion from safeguard duties, the court now denies the Government’s renewed motion to dissolve the PI, vacates the *First Withdrawal*, modifies the PI to enjoin enforcement of the *Second Withdrawal*, grants Plaintiffs’ motion to complete the record, in part, and denies Plaintiffs’ motion to stay the case pending appeal.

BACKGROUND

The court presumes familiarity with its previous opinions—(1) *Invenergy I, supra*, (2) *Invenergy II, supra*, and (3) *Invenergy III, supra*,—each of which provide additional information on the factual and legal background of this case. Information pertinent to this decision follows.

As the court has noted:

This case emerges from a debate within the American solar industry between entities that rely on the importation of bifacial solar panels and entities that produce predominately monofacial solar panels in the United States. Plaintiffs here, who include consumers, purchasers, and importers of utility-grade bifacial solar panels, argue that the importation of bifacial solar panels does not harm domestic producers because domestic producers do not produce utility-scale bifacial solar panels; they thus oppose safeguard duties that they contend increase the cost of these bifacial solar panels. Domestic producers, however, contend that solar project developers can use either monofacial or bifacial solar panels, and thus safeguard duties are necessary to protect domestic production of solar panels. Both sides contend that their position better supports expanding solar as a source of renewable energy in the United States.

Invenergy I, 422 F. Supp. 3d at 1264.

The statutory scheme for imposition of safeguard duties has been summarized by the court as follows:

Through Section 201, Congress provided a process by which the executive branch could implement temporary safeguard measures to protect a domestic industry from the harm associated with an increase in imports from foreign competitors. Trade Act of 1974 §§ 201–04, 19 U.S.C. §§ 2251–54 (2012). Section 201 dictates that, upon petitions from domestic entities or industries, the International Trade Commission (“ITC”) may make an affirmative determination that serious injury or a threat of serious injury to that industry exists. 19 U.S.C. § 2252. The President may then authorize discretionary measures, known as “safeguards,” to provide a domestic industry temporary relief from serious injury. 19 U.S.C. § 2253. The statute vests the President with decision making authority based on consideration of ten factors. 19 U.S.C. § 2253(a)(2). Safeguard measures have a maximum duration of four years, unless extended for another maximum of four years based upon a new determination by the ITC. 19 U.S.C. § 2253(e)(1). The statute also outlines certain limits on the President’s ability to act under this statute, including to limit new actions after the termination of safeguard measures regarding certain articles. *See* 19 U.S.C. § 2253(e). Further, the safeguard statute mandates that the President “shall by regulation provide for the efficient and fair administration of all actions taken for the purpose of providing import relief.” 19 U.S.C. § 2253(g)(1).

Id. at 1265–66 (footnote omitted).

Through *Presidential Proclamation 9693* issued on January 23, 2018, the President imposed safeguard duties, designed to protect the domestic industry, on imported monofacial and bifacial solar panels but delegated authority to USTR to exclude products from the duties. 83 Fed. Reg. 3,541–51 (“*Presidential Proclamation*”). After a sixteen-month notice-and-comment process through which USTR considered requests for exclusions, USTR decided to exclude bifacial solar panels from safeguard duties. *Exclusion of Particular Products From the Solar Products Safeguard Measure*, 84 Fed. Reg. 27,684–85 (USTR June 13, 2019) (“*June 2019 Exclusion*”). Four months later, however, USTR published the *First Withdrawal*. The *First Withdrawal* explained that, “[s]ince publication of [the *June 2019 Exclusion*] notice, the U.S. Trade Representative has evaluated this exclusion further and, after consultation with the Secretaries of Commerce and Energy, determined it will undermine the objectives of the safeguard measure.” *First Withdrawal*, 84 Fed. Reg. at 54,244. Absent intervening court action, therefore, the *First Withdrawal* would have reinstated safeguard duties on certain bifacial solar panels.

Plaintiff Invenegy initiated this case in response to the *First Withdrawal*. Summons, Oct. 21, 2019, ECF No. 1; Invenegy’s Compl., Oct. 21, 2019, ECF No. 13. The court issued a temporary restraining order, Nov. 7, 2019, ECF No. 68, and later a PI, to enjoin USTR from reinstating safeguard duties on certain bifacial solar panels through implementation of the *First Withdrawal*. *Invenegy I*, 422 F. Supp. 3d at 1294. The PI found that USTR made the decision with only nineteen days’ notice to the public, without an opportunity for affected or interested parties to comment, and without reasoned explanation on a developed public record. *Id.* at 1286–88. The PI included enjoining USTR from amending the Harmonized Tariff Schedule of the United States (“HTSUS”) to reflect withdrawal of the *Exclusion*, “until entry of final judgment as to Plaintiffs’ claims against Defendants in this case.” *Id.* at 1295. In so ruling, the court held that the *First Withdrawal* of the *June 2019 Exclusion* by the Government likely violated the Administrative Procedure Act (“APA”) on two grounds: (1) the rulemaking occurred without notice and comment, *id.* at 1286–87; and (2) it was likely done in an arbitrary and capricious manner. *Id.* at 1287–88.

On January 24, 2020, the Government filed a status report notifying the court and the other parties of USTR’s publication of “a notice in the Federal Register, requesting interested party comment regarding whether to withdraw the [*June 2019 Exclusion*] from the safeguard measure pursuant to section 201 of the Trade Act of 1974, 19

U.S.C. § 2251, *et seq.*, for bifacial solar panels contained in [*June 2019 Exclusion*].” Def.’s Status Report at 1, ECF No. 131. USTR published the notice in the Federal Register three days later, thereby initiating the comment period. *Procedures to Consider Retention or Withdrawal of the Exclusion of Bifacial Solar Panels From the Safeguard Measure on Solar Products*, 85 Fed. Reg. 4,756–58 (USTR Jan. 27, 2020) (“*January 2020 Notice*”). The *January 2020 Notice* acknowledged the court’s PI “enjoining the U.S. Trade Representative from withdrawing the exclusion on bifacial solar panels from the safeguard measure,” and noted that “[i]f the U.S. Trade Representative determines after receipt of comments pursuant to this notice that it would be appropriate to withdraw the bifacial exclusion or take some other action with respect to the exclusion, the U.S. Trade Representative will request that the [c]ourt lift the injunction.” *Id.* at 4,756.

In response, Plaintiffs Invenergy, Clearway, and AES DE filed their Motion to Show Cause as to Why the Court Should Not Enforce the Preliminary Injunction, Jan. 30, 2020, ECF No. 132, alleging that the Government’s publication of the *January 2020 Notice* violated the PI. The Government responded with a motion to dismiss and vacate the *First Withdrawal* as moot. Def.’s Resp. to Invenergy’s Mot. to Show Cause and Mot. to Vacate Withdrawal and Dismiss Case as Moot, Jan. 7, 2020, ECF No. 139. The court ruled exclusively on the Plaintiffs’ motion stating, “the Government’s [*January 2020 Notice*] did not violate the text of [the PI] because the [*January 2020 Notice*] does not (1) implement the [*First Withdrawal*]; (2) modify the HTSUS; or (3) enforce or make effective the [*First Withdrawal*] or modifications to the HTSUS related to the [*First Withdrawal*].” *Invenergy II*, 427 F. Supp. 3d at 1407. The court further held that the *January 2020 Notice* alone did “not constitute a final decision to implement the previous or any new withdrawal of the *Exclusion* of bifacial solar panels.” *Id.* The court, moreover, made clear that “[it] retains exclusive jurisdiction over the implementation, enforcement, or modification of the [*First Withdrawal*] until such date as a final judgment is entered in this case.” *Id.* The court did not rule on the Government’s motion to dismiss at that time because it required further briefing. *Id.*

On April 14, 2020, the Government filed another status report to inform the court of the issuance of USTR’s *Second Withdrawal*. Def.’s Status Report, ECF No. 155. The *Second Withdrawal* withdraws the *Exclusion* of bifacial solar panels from safeguard duties—the same conclusion as the *First Withdrawal*. In that status report, the Government explained that “[i]n response to the [c]ourt’s preliminary conclusion that repealing the withdrawal of the exclusion ‘requires rulemaking subject to . . . APA notice and comment,’ USTR ‘opened a

public docket,’ and received 15 comments regarding the bifacial exclusion and 49 subsequent comments responding to the initial comments.” *Id.* at 2 (citations omitted). Further, the Government explained that USTR “based the [*Second Withdrawal*] on the comments and evidence received.” *Id.* Based on this new decision by USTR, the Government filed its first motion to dissolve the PI, pursuant to USCIT Rule 60(b)(5). Def.’s Mot. to Dissolve PI, Apr. 16, 2020, ECF No. 156. The Government argued that the *Second Withdrawal* “cured the sole reason for which the injunctive relief was granted.” *Id.* at 1. Plaintiffs argued that the *Second Withdrawal* was an arbitrary and capricious decision and thus did not cure the second likely APA violation previously identified by the court. *E.g.*, *Invenergy*, Clearway, and AES DE’s Resp. in Opp’n to Def.’s Mot. to Dissolve Prelim. Inj., May 7, 2020, ECF No. 163. Shortly thereafter, Plaintiffs filed motions to supplement their complaints to include the *Second Withdrawal*. Pls.’ Mot. for Leave to File Suppl. Compls., May 8, 2020, ECF No. 170.

Prior to holding oral argument on those motions, the court issued questions to parties for written answers. May 8, 2020, ECF No. 169. In responding to these questions, the Government attached two memoranda to its responses to the court’s questions. Mem. from DUSTR Jeffrey D. Gerrish and General Counsel Joseph Barloon to USTR Robert Lighthizer, Apr. 13, 2020, Attach. 1 to Def.’s Resp. to Ct.’s Questions, ECF No. 172–1; Mem. from DUSTR Jeffrey D. Gerrish and General Counsel Joseph Barloon to USTR Robert Lighthizer, Apr. 10, 2020, Attach. 2 to Def.’s Resp. to Ct.’s Questions, ECF No. 172–2 (“Gerrish Memorandum”). The USTR Memoranda consist of Deputy U.S. Trade Representative Jeffrey D. Gerrish’s and U.S. Trade Representative General Counsel Joseph Barloon’s analysis of USTR’s authority to withdraw an exclusion, their analysis of comments received pursuant to the *January 2020 Notice*, and a recommended decision, initialed by U.S. Trade Representative Robert Lighthizer. *Id.* The court then held oral argument and issued *Invenergy III* in which it decided multiple outstanding motions. Oral Arg., May 13, 2020, ECF No. 177; 450 F. Supp. 3d 1347. First, the court denied the Government’s motion to dismiss for failure to join an indispensable party. *Invenergy III*, 450 F. Supp. 3d at 1356–57. Second, the court granted Plaintiffs’ motion to supplement their complaints to include the *Second Withdrawal*. *Id.* at 1357–58. Third, the court denied the Government’s motion to vacate the *First Withdrawal* and dismiss the case as moot because the Government had not shown that the *First Withdrawal* was moot nor did the court have the authority to vacate

the *First Withdrawal* without a decision on the merits. *Id.* at 1358–60. Finally, the court denied the Government’s first motion to dissolve the PI because the Government had not proved sufficiently changed circumstances. *Id.* at 1360–64. Thus, the litigation continued on the basis of USTR’s decisions to withdraw the *Exclusion* through the *First Withdrawal* and *Second Withdrawal*. The Government appealed the denial of its first motion to dissolve the PI on August 5, 2020. *Invenergy III*, appeal docketed No. 2020–2130 (Fed. Cir. Aug. 5, 2020), ECF No. 240.

As the litigation proceeded, on June 5, 2020, the Government filed the administrative record. ECF Nos. 195, 196. Plaintiffs subsequently moved to complete the agency record. Pls.’ Mot. to Complete A.R. The Government and Defendant-Intervenors responded in opposition on July 10, 2020. Def.’s Opp’n to Pls.’ Mot. to Suppl. the A.R., ECF No. 210 (“Def.’s Resp. to Mot. to Complete A.R.”); Resp. of Def.-Inters.’ to Pls.’ Mot. to Complete the A.R., ECF No. 211 (“Def.-Inters.’ Resp. to Mot. to Complete A.R.”).

Further, in response to *Invenergy III*, USTR published the *June 2020 Rescission* in which it “expressly rescind[ed] the [*First Withdrawal*].” 85 Fed. Reg. at 35,975. Subsequently, the Government made its second motion to dissolve the PI. Def.’s Renewed Mot. to Dissolve PI. Plaintiffs responded and made a cross-motion to modify the PI. Pls.’ Br. The Government and Defendant-Intervenors responded in opposition to the cross-motion. Def.’s Resp. to Pls.’ Mot. to Modify the PI, July 17, 2020, ECF No. 219 (“Def.’s Br.”); Def.-Inters.’ Resp. to Pls.’ Cross-Mot. to Modify PI, July 17, 2020, ECF No. 220 (“Def.-Inters.’ Br.”). Plaintiffs moved for leave to file a reply, which the court granted. Pls.’ Mot. for Leave to File Reply, July 21, 2020, ECF No. 226; Ct.’s Order, July 23, 2020, ECF No. 230. Plaintiffs then replied to the Government’s and Defendant-Intervenors’ responses to their cross-motion to modify the PI. Pls.’ Reply in Support of Cross-Mot. to Modify PI, July 31, 2020, ECF No. 238 (“Pls.’ Reply”). After the court set a date for oral argument on the outstanding motions, the Government filed its above-mentioned appeal. On August 5, 2020, Plaintiffs moved to stay further proceedings regarding the PI. Pls.’ Motion to Stay Further Proceedings Regarding the PI, ECF No. 239 (“Pls.’ Mot. to Stay”). The Government and Defendant-Intervenors responded in opposition. Defs.’ Resp. to Pls.’ Mot. for Stay Pending Appeal, Aug. 8, 2020, ECF No. 243 (“Def.’s Resp. to Mot. to Stay”); Resp. of Q CELLS and Auxin Solar to Pls.’ Mot. to Stay Further Proceedings Regarding the PI, Aug. 7, 2020, ECF No. 242 (“Def.-Inter.’s Resp. to Mot. to Stay”).

The court held oral argument via videoconference on August 10, 2020. Oral Arg., ECF No. 245. The parties filed supplemental submissions on August 19, 2020. Invenergy, Clearway, and AES DE's Post-Arg. Br. in Supp. of Mot. to Modify the PI, ECF No. 249 ("Invenergy's Suppl. Br."); Pl.-Inter. SEIA's Post-Arg. Suppl. Br., ECF No. 247; EDF-R's Post-Arg. Br. in Opp'n to the Gov't's Second Mot. to Dissolve, ECF No. 248 ("EDF-R's Suppl. Br."); Def.'s Post-Hearing Br., ECF No. 246 ("Def.'s Suppl. Br."); Suppl. Br. of Def.-Inters., ECF No. 250 ("Def.-Inters.' Suppl. Br.").

JURISDICTION

The court has jurisdiction over this case pursuant to 28 U.S.C. § 1581(i) (2012), which provides that the court "shall have exclusive jurisdiction of any civil action commenced against the United States, its agencies, or its officers, that arises out of any law of the United States providing for . . . [the] administration and enforcement" of tariffs and duties.

The court also notes that the Government's pending interlocutory appeal of *Invenergy III* denying the Government's first motion to dissolve affects its jurisdiction over parts of this case involved in the appeal. The impact of this appeal will be addressed as to each motion individually, below.

DISCUSSION

The court addresses three outstanding motions in turn: (1) Defendants' motion to dissolve the PI, Def.'s Renewed Mot. to Dissolve PI; (2) Plaintiffs' motion to modify the PI, Pls.' Br.; and (3) Plaintiffs' motion to complete the administrative record, Pls.' Mot. to Complete A.R. Further, the court addresses Plaintiffs' motion to stay, Pls.' Mot. to Stay, as it is relevant to each of those motions.

I. Defendants' Renewed Motion to Dissolve the PI and Abandonment of the First Withdrawal

The Government again asks the court to dissolve the PI. Def.'s Renewed Mot. to Dissolve PI. The Government argues that (1) the *First Withdrawal* is moot, particularly in light of USTR's issuance of the *June 2020 Rescission*, *id.* at 8–9; and (2) that the *Second Withdrawal* constitutes changed circumstances that further warrants dissolution of the PI because of its provision of notice and comment process and reasoned decision, *id.* at 10–13. As detailed further below, Plaintiffs oppose dissolution of the PI because the *First Withdrawal* is not mooted by the *June 2020 Rescission* and that the *Second Withdrawal* does not constitute sufficiently changed circumstances to warrant the PI's dissolution. Pls.' Br. at 7–12.

First, the court will not dissolve the PI because it concludes that it could not do so while the Government's appeal is pending. Second, even if an appeal were not pending, the court concludes that the Government's motion should be denied because the court grants Plaintiffs' cross-motion to modify the PI to include the *Second Withdrawal*. However, noting the Government's *June 2020 Rescission* and subsequent abandonment of defending the *First Withdrawal*, the court holds that the *First Withdrawal* was unlawful on the merits and vacates the agency decision accordingly.

A. The Court Does Not Have Jurisdiction Over the Motion Because of the Pending Interlocutory Appeal.

Just before the most recent oral argument was held and nearly two months after filing its second motion to dissolve the PI, the Government appealed this court's decision not to grant its first motion to dissolve the PI to the Federal Circuit. *Invenergy III, appeal docketed* No. 2020–2130 (Fed. Cir. Aug. 5, 2020), ECF No. 240. The Government characterizes its appeal as “a protective notice of appeal” because the “Solicitor General has not yet reached a decision on whether to appeal.” Def.'s Resp. to Mot. to Stay at 4.

USCIT Rule 62(c)² states, “[w]hile an appeal is pending from an interlocutory order or final judgment that grants, dissolves, or denies an injunction, the court may suspend, modify, restore, or grant an injunction on terms for bond or other terms that secure the opposing party's rights.” The Government argues that this rule does not apply to orders that refuse to dissolve a PI, such as its appeal of *Invenergy III*. Def.'s Resp. to Mot. to Stay at 4 (“Congress recognized that orders ‘refusing to dissolve or modify injunctions’ are appealable as of right, 28 U.S.C. § 1292(a)(2), yet the [c]ourt’s Rule omitted such orders among the situations in which parties may seek injunctions pending appeal.”). Regardless, USCIT Rule 62.1 allows the court to deny or contingently rule on a motion for relief that is barred by a pending appeal. Rule 62.1(a) states, “[i]f a timely motion is made for relief that the court lacks authority to grant because of an appeal that has been docketed and is pending, the court may: (1) defer considering the motion; (2) deny the motion; or (3) state either that it would grant the motion if the court of appeals remands for that purpose or that the motion raises a substantial issue.”

The Supreme Court stated in *Griggs v. Provident Consumer Discount Co.* that it is “generally understood that a federal district court and a federal court of appeals should not attempt to assert jurisdic-

² The court's rules are modeled on the Federal Rules of Civil Procedure and USCIT Rule 1 notes that “[t]he court may refer for guidance to the rules of other courts.”

tion over a case simultaneously. The filing of a notice of appeal is an event of jurisdictional significance—it confers jurisdiction on the court of appeals and divests the district court of its control over those aspects of the case involved in the appeal.” 459 U.S. 56, 58 (1982) (citations omitted). The Federal Circuit has stated that “[o]rordinarily, the act of filing a notice of appeal confers jurisdiction on an appellate court and divests the trial court of jurisdiction over matters related to the appeal.” *Gilda Indus. Inc. v. United States*, 511 F.3d 1348, 1350 (Fed. Cir. 2008). This interpretation is further supported by the rationale of the rule, which the Federal Circuit has described as “promot[ing] judicial economy and avoid[ing] the confusion and inefficiency that might flow from putting the same issue before two courts at the same time.” *Id.* at 1359 (internal quotation omitted). However, the Federal Circuit, in the context of post-appellate mandate issuance, also stated that “district courts possess broad equitable authority to modify injunctions . . . particularly under . . . circumstances where it is done to preserve the status quo while motions affecting that injunction are under advisement.” *Amado v. Microsoft Corp.*, 517 F.3d 1354, 1358 (Fed. Cir. 2008). Other Circuits have also interpreted the *Griggs* principle in the context of interlocutory appeals to limit the jurisdiction of district courts while there is an appeal pending over a PI to maintaining the status quo of the parties involved. *See Prudential Real Estate Affiliates, Inc. v. PPR Realty, Inc.*, 204 F.3d 867, 880 (9th Cir. 2000) (“A district court lacks jurisdiction to modify an injunction once it has been appealed except to maintain the status quo among the parties.”); *Sierra Club, Lone Star Chapter v. Cedar Point Oil Co.*, 73 F.3d 546, 578 (5th Cir. 1996) (citing *Coastal Corp. v. Texas Eastern Corp.*, 869 F.2d 817, 819–20 (5th Cir. 1989)) (“We have held, however, that the authority granted by Rule 62(c) does not extend to the dissolution of an injunction. In addition, we have held that the district court’s power to alter an injunction pending appeal is limited to ‘maintaining the status quo.’”); *Lewis v. Tobacco Workers’ Int’l Union*, 577 F.2d 1135, 1139 (4th Cir. 1978) (quoting Fed. R. Civ. P. 62(c)); *Ideal Toy Corp. v. Sayco Doll Corp.*, 302 F.2d 623, 625 (2d Cir. 1962) (stating that Rule 62(c) “permits modification of injunction orders during the pendency of an appeal. But this rule is described as ‘merely expressive of a power inherent in the court to preserve the status quo where, in its sound discretion, the court deems the circumstances to justify.’”) (“[T]he power given to the district court through FRCP 62(c) . . . only applies to allow the district court to make provision for the ‘security of the rights of the adverse party’”). Furthermore, any action taken pursuant to Rule 62(c) “may not

materially alter the status of the case on appeal.” *Nat. Res. Def. Council v. Southwest Marine, Inc.*, 242 F.3d 1163, 1166 (9th Cir. 2001) (citation omitted). See also *Ortho Pharmaceutical Corp. v. Amgen, Inc.*, 887 F.2d 460, 464 (3d Cir. 1989) (stating that district court may modify a PI to alter the status quo to “preserve the integrity” of the appeal). Thus, these cases indicate that any jurisdiction retained by the court during the pendency of the Government’s appeal of the court’s denial of its first motion to dissolve the PI is limited to preserving the case on appeal and preserving the status quo of the parties. However, the court may, pursuant to Rule 62.1, stay consideration of the motion, deny the motion, or state that it would grant the motion on remand of the issue, or state that the motion raises a substantial issue.

The court concludes that a ruling on the Government’s renewed motion that dissolves the PI would interfere with the case on appeal. For these reasons the court concludes that it does not retain the jurisdiction to dissolve the PI while the appeal is pending. However, for the reasons stated below, the court vacates the *First Withdrawal* on the merits as a deficient rulemaking and modifies the PI to explicitly incorporate the *Second Withdrawal*. Thus, the court denies the Government’s renewed motion to dissolve the PI.

B. The Court Vacates the First Withdrawal on the Merits.

At oral argument, the Government, for the first time in this litigation, explicitly confessed error regarding the *First Withdrawal*. Compare Transcript of Oral Arg. of Aug. 10, 2020 at 9, Aug. 19, 2020, ECF No. 249–1 (“we agree that the [*First Withdrawal*] did not follow APA notice and comment procedures.”) with Transcript of Oral Arg. of Feb. 12, 2020 at 84, May 8, 2020, ECF No. 168–3 (answering “No.” in response to court’s question of “Is the Government confessing error?”). This confession of error and USTR’s publication of the *June 2020 Rescission*³ in which USTR clarified that it has no intention of implementing the *First Withdrawal* allows the court to now conclude that the *First Withdrawal* should be set aside as unlawful decision pursuant to the APA. 5 U.S.C. § 706(2) (requiring that courts shall “hold

³ Plaintiffs argue that USTR’s *June 2020 Rescission* is not effective to rescind the *First Withdrawal* because the court previously held that the *First Withdrawal* was a rule and that an agency can only rescind a rule through notice and comment rulemaking. Pls.’ Br. at 9. The Government responds that the “[*June 2020 Rescission*] resolves any uncertainties about USTR’s intentions,” Def.’s Br. at 16, and, at oral argument, further argued that at most the *June 2020 Rescission* was an interpretative statement not subject to notice and comment requirements, Transcript of Oral Arg. of Aug. 10, 2020 at 10. Because the court vacates the *First Withdrawal*, it need not reach these issues.

unlawful and set aside” agency action that is found to be “without observance of procedure required by law”). Furthermore, the parties agree that this course of action is permissible regarding the *First Withdrawal*. See EDF-R’s Suppl. Br. at 7 (“the [c]ourt can now vacate the *First Withdrawal*, but it must do so on the merits, with substantive decisions with respect to *inter alia*, jurisdiction, standing, and APA rulemaking regarding the *First Withdrawal*”); Def.’s Suppl. Br. at 3 (stating that the court “may ‘set aside’ the *First Withdrawal*” on the basis that “the *First Withdrawal* did not follow notice and comment procedures” (citing *Virgin Islands Tel. Corp. v. FCC*, 444 F.3d 666, 671 (D.C. Cir. 2006)); see also Def.-Inter.’s Suppl. Br. at 5–6 (providing authority for the court’s ability to vacate the *First Withdrawal*, but stating that it may vacate without assessing the merits (citing *Daimler Truck N. Am. LLC v. EPA*, 737 F.3d 95, 103 (D.C. Cir. 2013); *Shell Oil Co. v. EPA*, 950 F.2d 741, 765 (D.C. Cir. 1991))).

For that reason, the court incorporates its analysis in *Invenergy I*, decides that each of its preliminary conclusions apply to the merits of the *First Withdrawal*, and concludes that the *First Withdrawal* must be vacated pursuant to 5 U.S.C. § 706(2) of the APA as an agency action that is not in accordance with the law. See *Nat’l Parks Conservation Ass’n v. Salazar*, 660 F. Supp. 2d 3, 5 (D.D.C. 2009) (“[N]otice and comment procedure is not required where a court vacates a rule after making a finding on the merits.”) (citing *Cement Kiln Recycling Coal. v. EPA*, 255 F.3d 855, 872 (D.C.C. 2001)); *Ass’n of Private Sector Colleges and Univs. v. Duncan*, 681 F.3d 427, 462–63 (D.C. Cir. 2012) (vacating a rule that did not follow APA notice and comment rulemaking procedures). The court notes that Plaintiffs’ claims regarding the *Second Withdrawal*, including USTR’s authority to withdraw exclusions to the safeguard measure, remain for final adjudication on the merits.

II. Plaintiffs’ Motion to Modify the Preliminary Injunction

In response to the Government’s renewed motion to dissolve the PI, Plaintiffs filed a cross-motion to modify the PI to expressly incorporate the *Second Withdrawal* “to explicitly prevent Defendants from entering into force or making effective the [*Second Withdrawal*].” Pls.’ Br. at 1. Plaintiffs argue that they remain “likely to succeed on the merits of their challenge to USTR’s withdrawal action” because the *Second Withdrawal* “remains an arbitrary and capricious action lacking sufficient explanation” and that “USTR lacks the authority to withdraw the [*June 2019 Exclusion*] and violated procedures required by statute to modify a safeguard action.” *Id.* at 13. The Government

responds that a presumption of regularity applies to the *Second Withdrawal*, Plaintiffs are not likely to succeed on the merits of the challenge to the *Second Withdrawal*, and that Plaintiffs no longer face irreparable procedural harm as identified in the PI. Def.'s Br. at 19–20, 22, 40. Defendant-Intervenors make similar arguments and also argue that the harm to the domestic industry caused by the *June 2019 Exclusion* for bifacial solar modules outweighs any harm to Plaintiffs. Def.-Inters.' Br. at 2–4, 40–43.

The court concludes that it retains jurisdiction over modification of the PI despite the Government's appeal and that the PI should be modified in order to preserve the status quo during the pendency of the appeal and until final resolution of this case on the merits. Thus, the court grants Plaintiffs' cross motion.

A. Jurisdiction Over this Motion Because of the Pending Interlocutory Appeal

First, as a threshold matter, the court concludes that it retains jurisdiction over this motion despite the Government's pending appeal. The caselaw is clear that a court may exercise continuing supervision over a PI while an interlocutory appeal is pending to the extent necessary to maintain the status quo. *See Amado*, 517 F.3d at 1358 (“district courts possess broad equitable authority to modify injunctions, . . . particularly under . . . circumstances where it is done to preserve the status quo while motions affecting that injunction are under advisement.”); *Prudential Real Estate Affiliates*, 204 F.3d at 880 (“A district court lacks jurisdiction to modify an injunction once it has been appealed except to maintain the status quo among the parties.”); *Sierra Club*, 73 F.3d at 578 (“We have held, however, that the authority granted by Rule 62(c) does not extend to the dissolution of an injunction. In addition, we have held that the district court's power to alter an injunction pending appeal is limited to ‘maintaining the status quo.’”) (citation omitted). The Government and Defendant-Intervenors also acknowledge this authority. *See* Def.'s Resp. to Mot. to Stay at 5 (explaining that “in [*Sierra Club*], the appeals court held that the district court was authorized to modify an injunction that had been appealed” (citing 73 F.3d at 578)); Def.-Inters.' Resp. to Mot. to Stay at 3 (“Thus, the district court retains jurisdiction during the pendency of an appeal to act to preserve the status quo.”) (citations omitted).

Plaintiffs here ask the court to modify the injunction in order to explicitly incorporate the *Second Withdrawal* in acknowledgement of USTR's actions subsequent to the court's issuance of the PI last

December and because they claim that the *Second Withdrawal* is similarly flawed. Pls.' Br. at 2–3. For that reason, they argue, modification is necessary to avoid the inequity of the imposition of a new agency action with the same effect as the enjoined *First Withdrawal* and with at least one of the same deficiencies the court identified in the PI—a lack of reasoned explanation. *Id.* at 3. The court concludes that it retains jurisdiction over this motion despite the Government's appeal because Plaintiffs seek modification in order to further preserve the status quo of the case while their claims are decided on the merits. The court will not stay decision on this motion and proceeds to the question of whether the status quo would be preserved by modification of the PI.

B. Modification of PI

As the court noted in *Ad Hoc Shrimp Trade Action Committee v. United States*, 32 CIT 666, 670, 562 F. Supp. 2d 1383, 1388 (2008), in order for the court to modify a PI, the moving party must show (1) “a change in circumstances of the parties from the time the injunction would issue that would make the modification necessary”; and (2) continuation of the unmodified PI would be inequitable. *Id.* at 670. The first requirement is based on the Supreme Court's decision in *Sys Fed'n No. 91 v. Wright*, in which it stated that “[t]he source of the power to modify is of course the fact that an injunction often requires continuing supervision by the issuing court and always a continuing willingness to apply its powers and processes on behalf of the party who obtained that equitable relief.” 364 U.S. 642, 647 (1961); *see also United States v. United Shoe Machinery Corp.*, 391 U.S. 244, 252, (1968) (if an injunction has failed to achieve its intended results, the [] court has the power and the duty to modify the order).

Thus, the question before the court is whether modification of the PI is required in order to fulfill its original objective, to avoid inequity to Plaintiffs, and to preserve the status quo while the Government's appeal is pending. The court concludes that the Plaintiffs have met this burden and modification of the PI is warranted. Maintaining the status quo requires modifying the PI to explicitly include and enjoin any enforcement of the *Second Withdrawal*. The original PI was premised upon the court's conclusion that the *First Withdrawal* likely violated the APA's requirement of notice and comment and the prohibition on arbitrary and capricious agency decisions. *Invenergy I*, 422 F. Supp. 3d at 1286–88. As stated above, the court notes that the Government now confesses error in relation to the *First Withdrawal* and the court vacates that decision. Thus, the PI cannot continue in

its current form. However, because the court concludes that the *Second Withdrawal* presents changed circumstances that, if implemented, would likely result in the very inequity to the Plaintiffs the PI sought to prevent, modification of the PI is warranted. The court concludes that the *Second Withdrawal* is likely arbitrary and capricious and so the court will modify the PI in order to give effect to its purpose—to shield Plaintiffs from the effects of an agency decision that was undertaken in violation of the APA.

The court disagrees with Plaintiffs that the *Second Withdrawal* was part of the same unlawful decision to withdraw the Exclusion that was the *First Withdrawal*. *See, e.g.*, Pls.’ Br. at 2 (“[T]he challenged action is essentially the same. The [*Second Withdrawal*] does exactly the same thing as the [*First Withdrawal*]”). As the court stated in *Invenergy II*, the *January 2020 Notice* initiated a separate process to reach a new final decision, independent of the *First Withdrawal*. 427 F. Supp. 3d at 1407. Thus, the court left open review of that process and subsequent final decision when directly challenged by Plaintiffs or another interested party. The court did not at that point rule on the merits of the *January 2020 Notice* or dismiss the case as to the *First Withdrawal* as requested by the Government because to do so would have stripped the court of jurisdiction before USTR issued a new final decision. *See also* Transcript of Oral Arg. of Feb. 12, 2020 at 31, 35, 56, 83 (all parties expressing concerns and doubts over the court’s jurisdiction over the *January 2020 Notice* and any subsequent decision at that point in the litigation).⁴ Neither did the court block USTR from

⁴ The court notes that at various points the parties have argued about the applicability of *SKF USA, Inc. v. United States*, 254 F.3d 1022 (Fed. Cir. 2001), to this case. *See, e.g.*, Pls.’ Br. at 8 (arguing that USTR should have sought a remand pursuant to *SKF USA*); Transcript of Oral Arg. of Feb. 12, 2020 at 45–46 (Government arguing that *SKF USA* is distinguishable from this case because it was an antidumping case reviewing the retrospective application of duties). In that case the Federal Circuit stated that “when agency action is reviewed by the courts” an agency may, inter alia, “request a remand, without confessing error, to reconsider its previous position” or “request a remand because it believes that its original decision was incorrect on the merits and it wishes to change the results.” *SKF USA*, 254 F.3d at 1027–28. While the Government’s arguments about USTR’s *January 2020 Notice*, *Second Withdrawal*, and *June 2020 Rescission* seem to fit these descriptions of an agency wishing to change its previously challenged decision, no motion for remand was ever made in this case. The Government unilaterally proceeded with the *January 2020 Notice* without asking the court to stay the case pending that new determination and without asking for a voluntary remand. Therefore, the court proceeded with litigation while USTR undertook this new process. Contrary to the Government’s claim that the court would not have allowed USTR to proceed with the process initiated with the *January 2020 Notice* if remand were required, Def.’s Br. at 17, USTR decided to undertake this process without the court’s guidance or oversight. Thus, the Government is correct that a remand request was not required to end the *First Withdrawal* or to come to a new decision to withdraw the *June 2019 Exclusion*. However, that the Government chose to ask for forgiveness instead of permission to go forward with this process cannot overcome the court’s review of that process while the court retains jurisdiction over the *First Withdrawal* and the *Second Withdrawal*.

proceeding with the new process as requested by Plaintiffs because the court had no basis to presume that USTR's new decision would be legally deficient. *See also Center for Science in the Public Interest v. Regan*, 727 F.2d 1161, 1164 (D.C. Cir. 1984) (“we begin with the established proposition that it is not improper for an agency to engage in new rulemaking to supersede defective rulemaking.”); *NAACP, Jefferson County Branch v. Donovan*, 737 F.2d 67, 72 (D.C. Cir. 1984) (same). The court now exercises jurisdiction over the *Second Withdrawal* in light of the challenges in Plaintiffs' amended complaint. Am. Compls., May 27, 2020, ECF Nos. 190–94. Thus, the court is not ignoring the presumption of regularity that the Government argues applies to USTR's decision as a new agency determination. Def.'s Br. at 19–21. Rather, the court concludes that Plaintiffs sufficiently rebutted this presumption by showing that the *Second Withdrawal* was likely arbitrary and capricious and that they would suffer from the same procedural harm through a decision that did not comply with APA requirements.

Plaintiffs have shown that the *Second Withdrawal* is likely arbitrary and capricious under the well-developed caselaw defining what is required of an agency in adequately explaining its determinations, particularly where that determination contradicts previous factual findings. The court need not reach each of Plaintiffs' challenges to the *Second Withdrawal* at this preliminary stage, and thus does not reach Plaintiffs' challenges to USTR's statutory authority for withdrawing an exclusion granted pursuant to *Presidential Proclamation 9693*.

1. Relevance of the Gerrish Memo

First, the court addresses the scope of the agency's decision. *See U.S. Dep't of Homeland Sec. v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891, 1907 (2020) (“*Regents*”) (“Deciding whether agency action was adequately explained requires, first, knowing where to look for the agency's explanation.”). The parties disagree about whether the Gerrish Memo, made public for the first time through a filing by the Government in response to the court's questions, can be considered part of USTR's statement of basis and purpose and adequate explanation of the *Second Withdrawal*. The Plaintiffs argue that it cannot be part of the determination because it “was not provided with or even referenced in the [*Second Withdrawal*]” and thus was a “ground[] that the agency invoked when it” acted. Pls.' Br. at 19 (quoting *Regents*, 140 S. Ct. at 1907); *see also* Pls.' Br. at 22–25. Plaintiffs further highlight the importance of making the explanation of the decision available to the public so that it may “assess the lawfulness

of the [a]gency's action." *Id.* at 23. The Government responds that the Gerrish Memo constitutes explanation of the agency decision which the court may review in determining "whether an agency has provided a rational basis, based on the relevant factors, for the conclusion it reached." Def.'s Br. at 18. It argues that this is true despite the Gerrish Memo not being published in the Federal Register. *Id.* at 18–19.

Precedent indicates that the Gerrish Memo cannot supply the basis and purpose or adequate explanation of the *Second Withdrawal*. An agency is required to "incorporate in the rules adopted a concise general statement of their basis and purpose." 5 U.S.C. § 553(c). "The purpose of requiring a statement of the basis and purpose is to enable courts, which have the duty to exercise review, to be aware of the legal and factual framework underlying the agency's actions." *Am. Standard, Inc. v. United States*, 602 F.2d 256, 269 (Ct. Cl. 1979) (citing *Sec. Exch. Comm'n v. Chenery Corp.*, 318 U.S. 80, 94 (1943) ("*Chenery*").) "In addition, inextricably intertwined with the basis and purpose requirement of 5 U.S.C. § 553(c) is the agency's need to respond, in a reasoned manner, to any comments received by the agency that raise significant issues with respect to a proposed rule. However, the agency need not respond to each comment, and the detail of the agency's response depends upon the subject matter of the regulation and the comments received." *Disabled Am. Veterans v. Gober*, 234 F.3d 682, 692 (Fed. Cir. 2000) (citation omitted). A separate, but related requirement, is that the agency provide adequate and reasoned explanation for its decisions. *See* 5 U.S.C. § 706 ("reviewing court shall ... hold unlawful and set aside agency action, findings, and conclusions found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."); *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402 (1971) (requiring agencies to provide adequate reasons for their decisions), *abrogated on other grounds by Califano v. Sanders*, 430 U.S. 99 (1977); *Motor Vehicles Mfrs. Ass'n of U.S. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) ("*State Farm*") (stating the agency "must examine the relevant data and articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made'" (quoting *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962))).⁵

⁵ Defendant-Intervenors note that the statement of basis and purpose requirement in 5 U.S.C. § 553 is distinct from the prohibition on arbitrary and capricious decision in 5 U.S.C. § 706. *See* Def.-Inters.' Br. at 6–7. This is true in that the requirements are distinct and have different scopes depending on the nature of the agency decision. *Compare* 5 U.S.C. § 553 (requiring a statement of basis and purpose for agency rulemaking) *with* 5 U.S.C. § 706 (providing for judicial review for arbitrary and capricious agency actions). However, here,

The Supreme Court’s recent decision in *Regents* outlines the principles behind an agency’s adequate explanation of its actions and informs the court’s analysis in the instant litigation. 140 S. Ct. 1891. “It is a ‘foundational principle of administrative law’ that judicial review of agency action is limited to ‘the grounds that the agency invoked when it took the action.’” *Id.* at 1907 (citing *Michigan v. EPA*, 576 U.S. 743, 758 (2015)). See also *Chenery*, 322 U.S. at 196–97 (1947) (noting that the court reviews “the propriety of [agency] action solely by the grounds invoked by the agency”). In *Regents*, the Court rejected a post hoc explanation of an agency’s decision in the form of a memo published nine months after the agency action was announced and held that explanation of an agency’s action must be contemporaneous with its decision. 140 S. Ct. at 1908–09. The court noted that the “agency can offer a fuller explanation of the agency’s reasoning at the time of the agency action” but that “this route has important limitations.” *Regents*, 140 S. Ct. at 1907–08 (citing *Pension Benefit Guaranty Corp. v. LTV Corp.*, 496 U.S. 633, 654 (1990)). In reaching its conclusion, the Court highlighted the importance of agency accountability that is furthered by a contemporaneous explanation of an agency’s actions “by ensuring that parties and the public can respond fully and in a timely manner to an agency’s exercise of authority.” *Regents*, 140 S. Ct. at 1909 (citing *Bowen v. Am. Hosp. Ass’n.*, 476 U.S. 610, 643 (1986); *Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142, 155 (2012)) (“Considering only contemporaneous explanations for agency action also instills confidence that the reasons given are not simply convenient litigating positions.”). In sum, the Supreme Court stated, “The basic rule here is clear: An agency must defend its actions based on the reasons it gave when it acted. This is not the case for cutting corners to allow DHS to rely upon reasons absent from its original decision.” *Regents*, 140 S. Ct. 1909–10.

The principles outlined in *Regents* are not new in the realm of administrative law. As the Supreme Court explained last year, “[t]he

both requirements are applicable, because as the court previously held, the *June 2019 Exclusion* was a rulemaking and thus a withdrawal of that rule is also a rulemaking. See *Invenergy I*, 422 F. Supp. 3d at 1283–86. Further, these two requirements act in conjunction to form the “hard look” review requirement that courts impose on decisions through informal rulemaking by agencies. See, e.g., Catherine Sharkey, *Federalism Accountability: “Agency-Forcing” Measures*, 58 Duke L.J. 2125, 2181 (2009) (“[*State Farm*] articulates a standard of ‘hard look’ review in the context of determining whether a regulation is ‘arbitrary and capricious’ under § 706 of the APA. *State Farm* solidifies previously articulated agency standards imposed by lower courts (under § 553 of the APA), such as the *United States v. Nova Scotia Food Products Corp.*], 568 F.2d 240 (2d Cir. 1977),] obligation to respond to significant comments during the notice-and-comment period.”) (citations omitted).

[APA's] reasoned explanation requirement . . . is meant to ensure that agencies offer genuine justifications for important decisions, reasons that can be scrutinized by the courts *and the interested public.*" *Dep't of Commerce v. New York*, 139 S. Ct. 2551, 2575–76 (2019) (emphasis added). Further, as the Ninth Circuit explained in the opinion that the Supreme Court affirmed in part in *Regents*, public accountability for agency action can only be achieved if the electorate knows how to apportion praise for good measures and blame for bad ones. *Regents of the Univ. of Cal. v. Dep't of Homeland Sec.*, 908 F.3d 478 (9th Cir. 2018) ("*Regents 2018*") (citing *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 498 (2010)) ("Without knowing the true source of an objectionable agency action, "the public cannot 'determine on whom the blame or the punishment of a pernicious measure, or series of pernicious measures ought really to fall.'" (quoting *The Federalist No. 70*, at 476 (Alexander Hamilton) (Jacob E. Cooke ed. 1961))). Quoting then-Professor Kagan, the Ninth Circuit also noted that "the degree to which the public can understand the sources and levers of bureaucratic action' is 'a fundamental precondition of accountability in administration.'" *Regents 2018*, 908 F.3d at 499 (quoting Elena Kagan, *Presidential Administration*, 114 *Harvard L. Rev.* 2245, 2332 (2001)). The D.C. Circuit has clearly identified a publication requirement in connection with the basis and purpose requirement of APA. See *Action on Smoking and Health v. C.A.B.*, 713 F.2d 795, 799 (D.C. Cir. 1982) ("[A] basis and purpose statement need not be published 'at precisely the same moment as the regulations,' [however] the enquiry must be whether the rules and statement are published close enough together in time so that there is no doubt that the statement accompanies, rather than rationalizes the rules." (quoting *Tabor v. Joint Bd. for Enrollment of Actuaries*, 566 F.2d 705, 711 (D.C. Cir. 1977))). Accountability concerns have practical effects on parties impacted by agency rules. For example, the D.C. Circuit, in *Tabor v. Joint Bd. for Enrollment of Actuaries*, explained that the APA also guarantees that parties who are unhappy with an agency decision or finds error in a decision may petition the agency to reconsider. 566 F.2d at 711 ("the Board's failure to publish a contemporaneous statement of basis and purpose made it practically impossible to file an intelligent petition for reconsideration. As a result, appellants lost a method of challenge less expensive and time-consuming than judicial review; the Board lost an early opportunity to be apprised of and to correct any errors it might have made. Each agency shall give an interested person the right to petition for repeal of a rule.").

Unlike the memo at issue in *Regents*, the Gerrish Memo is contemporaneous with the *Second Withdrawal*. However, also unlike that memo, it is uncontested that the Gerrish Memo has never been made publicly available outside this litigation. See Pls.’ Br. at 19; Def.’s Br. at 19; Def.-Inters.’ Suppl. Br. at 9. The Government characterizes this point as a mere formality that did not prejudice Plaintiffs’ substantial rights. Def.’s Suppl. Br. at 7 (citations omitted). “In administrative law . . . there is a harmless error rule: § 706 of the [APA], 5 U.S.C. § 706, instructs reviewing courts to take ‘due account . . . of the rule of prejudicial error.’ If the agency’s mistake did not affect the outcome, if it did not prejudice the petitioner, it would be senseless to vacate and remand for reconsideration.” *PDK Lab’ys, Inc. v. US DEA*, 362 F.3d 786, 799 (D.C. Cir. 2004); see also *Nat’l Ass’n of Home Builders v. Def. of Wildlife*, 551 U.S. 644, 659 (2007) (“Mindful of Congress’ admonition that in reviewing agency action, ‘due account shall be taken of the rule of prejudicial error,’ 5 U.S.C. § 706, we do not believe that this stray statement, which could have had no effect on the underlying agency action being challenged, requires that we further delay the transfer of permitting authority to Arizona by remanding to the Agency for clarification.”).

The court does not agree that this error did not prejudice interested parties affected by the *Second Withdrawal*. First, Plaintiffs do not encompass the entirety of the interested public. See Invenery’s Suppl. Br. at 5 (“Plaintiffs are only a few of the dozens of commenters who supported maintaining the [*June 2019 Exclusion*]. Others included small businesses, environmental groups, and municipalities . . .”). As Plaintiffs note, “[h]ad Plaintiffs not pursued this litigation, no one outside of USTR would ever have seen the Gerrish Memo” and “the public still cannot see any of USTR’s . . . reasoning unless they happen to have a PACER account” and find the memo as attached to the Government’s pre-oral argument questions from May or the administrative record filed in June. *Id.* at 4. Second, providing explanation in an internal memorandum does not serve the APA’s mandate that an agency decision be adequately explained, i.e., not arbitrary and capricious, or the principles of administrative law that require transparency and public accountability. An explanation that is never made available to the parties or to the public at large is not one that can be considered transparent or of use to those who participated outside the agency.⁶ Rather, interested parties cannot understand

⁶ The Government cites to several cases in which courts held that publication was not required. Def.’s Br. at 19 (citing *Tourus Records Inc. v. DEA*, 259 F.3d 731, 738 (D.C. Cir. 2001); *Baltimore & Ohio Chicago Terminal Railroad Co. v. United States*, 583 F.2d 678, 688 (3d Cir. 1978) (“*Baltimore & O.C.T.R.*”)); Def.’s Suppl. Br. at 6–7 (citing *Miller v. Lehman*, 801 F.2d 492, 497 (D.C. Cir. 1986); *Tabor*, 566 F.2d at 709–12 n.14 (D.C. Cir. 1977)). Two of

and thus rebut or correct the rationale behind a rule that applies to them when that rationale exists only in an internal memo.

Furthermore, the *Second Withdrawal* does not refer to or cite to any additional documents that may tip off interested parties to the existence of explanation outside of the Federal Register notice announcing the decision. See *Morton v. Ruiz*, 415 U.S. 199, 233 n.27 (1974) (quoting the House Report accompanying the APA requirement to publish substantive rules, H.R. Rep. No. 1497, 89th Cong., 2d Sess., 7 (1966), which stated that “[a]n added incentive for agencies to publish the necessary details about their official activities in the Federal Register is the provision that no person shall be adversely affected by material required to be published—or *incorporated by reference*—in the Federal Register but not so published.” (emphasis added)). The court is not holding that an agency may not provide adequate explanation in a document outside of four corners of the Federal Register notice announcing a new agency decision, nor could it in line with APA caselaw. See, e.g., *Baltimore & Ohio Chicago Terminal Railroad Co. v. United States*, 583 F.2d 678, 684–88 (3d Cir. 1978) (“*Baltimore & O.C.T.R.*”) (reviewing the final rule, interim report, and final report of the Interstate Commerce Commission for arbitrary and capricious decision making). However, the court is stating that adequate explanation of the agency’s decision has to be made public somewhere or in some manner allowing interested parties to review and scrutinize it. USTR did not provide access to its explanation here and thus it cannot be considered as part of the grounds invoked by the agency when it acted. See *Regents*, 140 S. Ct.

those cases concerned agency adjudications and thus do not apply to rulemakings. See *Tourus Records*, 259 F.3d at 737 (finding DEA’s letter of denial of an application to proceed in forma pauperis in a forfeiture proceeding to be arbitrary and capricious for lack of adequate reasoning); *Miller*, 801 F.2d at 497 (finding no legal error of Secretary of the Navy’s letter of censure in a service record). Unlike rulemakings, adjudications involve agency decisions that apply specifically and retroactively. *Invenergy I*, 422 F. Supp. 3d at 1285. Rulemakings, by contrast, apply generally and prospectively. *Id.* The importance of publicly available reasoning is more important in decisions that apply broadly and prospectively rather than decisions that affect one party who would have received the pertinent information from the agency during the course of the adjudication. Notably, the other two cases cited, *Tabor* and *Baltimore & O.C.T.R.*, did involve rulemakings. However, in *Tabor* the D.C. Circuit held that a “statement of reasons” for the agency’s action submitted during litigation were not part of the agency action to be reviewed for the court for compliance with the APA’s § 553 “basis and purpose” requirement. 566 F.2d at 711–12. The court further stated that “the Board’s failure to publish a contemporaneous statement of basis and purpose made it practically impossible to file an intelligent petition for reconsideration[, thus,] appellants lost a method of challenge less expensive and time-consuming than judicial review.” *Id.* at 711. Similarly, in *Baltimore & O.C.T.R.*, the Supreme Court held a regulation of the Interstate Commerce Commission (“ICC”) to have complied with both APA § 706(2)(A) and § 553(c). 583 F.2d at 684–88. There were no allegations of the ICC’s interim or final decisions not being publicly available and the court held that the rule as published in the Federal Register provided the requisite statement of basis and purpose. See *id.* at 687–88.

at 1907; *Chenery*, 322 U.S. at 196–97 (citations omitted). Requiring that the parties litigate a final agency decision in order to gain knowledge of and access to the agency’s rationale wastes judicial resources and delays corrective agency action that would otherwise be addressed by the agency in the first instance.

Finally, the Government and Defendant-Intervenors claim that the Gerrish Memo is reviewable by the court as part of the agency record. Def.’s Br. at 19 (“The Gerrish Memo is part of the full administrative record that was before the Trade Representative at the time he made his decision.”) (internal quotation omitted); Def.-Inters.’ Br. at 10 (“[A] reviewing court must take account of the whole administrative record (of which the Gerrish Memo is undeniably a part) under the APA”). However, the need for publication of an agency’s explanation of its decision is distinct from the documents that may constitute the record when a decision is challenged and on review by a court. The record includes everything that is before the agency when it makes its decision, regardless of what the agency relied on or found persuasive in making its determination. *Ammex, Inc. v. United States*, 23 CIT 549, 554–55, 62 F. Supp. 2d 1148, 1156 (1999). As the Supreme Court explained in *State Farm*, “Congress required a record of the rulemaking proceedings to be compiled and submitted to a reviewing court, 15 U.S.C. § 1394, and intended that agency findings under the Act would be supported by ‘substantial evidence on the record considered as a whole.’” 463 U.S. at 43–44 (citing S.Rep. No. 1301, 89th Cong., 2d Sess. 8 (1966); H.R.Rep. No. 1776, 89th Cong., 2d Sess. 21 (1966)). Further, as recently summarized by this court, “[p]rivileged and deliberative documents reflecting an agency’s internal deliberations do not form part of the administrative record, and, generally, are not discoverable so as to merit a privilege log, unless there is a showing of bad faith or improper behavior.” *JSW Steel (USA) Inc. v. United States*, 44 CIT __, __, Slip Op. 20–111 at 14 (citing *Stand Up for California! v. U.S. Dep’t of Interior*, 71 F. Supp. 3d 109, 122–23 (D.D.C. 2014); *Oceana, Inc. v. Ross*, 920 F.3d 855, 865 (D.C. Cir. 2019)). Rather, as the court in *JSW Steel* stated, “[t]he purpose of limiting review to the record actually before the agency is to guard against courts using new evidence to convert the arbitrary and capricious standard into effectively de novo review.” *JSW Steel*, Slip Op. 20–111 at 14 (quoting *Axiom Res. Mgmt., Inc. v. United States*, 564 F.3d 1374, 1380 (Fed. Cir. 2009)) (citations omitted). Thus, there is a distinction between the public documents in which the agency acts and explains its actions and the record documents which allow the reviewing court to examine the record that was before the agency and determine if its final decision was based on substantial evidence,

addressed major issues and evidence that detracted from its conclusion, and whether its explanation is adequate in light of the information before the agency. The fact that a detailed explanation of the agency's action exists somewhere is irrelevant to the question of whether the agency explained itself to the public when it acted. *See State Farm*, 463 U.S. at 43 (listing examples of situations in which an agency's decision is arbitrary and capricious: (1) when it relies on factors that Congress did not intend for it to consider, (2) when it fails to consider an important aspect of the problem, or (3) when it offers an explanation running counter to the evidence or is implausible to the point where it cannot be ascribed to expertise or a difference in view.). Thus, because the Gerrish Memo was never made public or referenced in the *Second Withdrawal* as published in the Federal Register, it cannot form part of the agency's decision or an explanation reviewable by the court for the agency's action.

In sum, the court notes that the Gerrish Memo is not part of USTR's *Second Withdrawal* and thus the court will not consider it in assessing whether USTR provided adequate basis and purpose and explanation for that decision.

2. The Second Withdrawal Is Likely Arbitrary and Capricious.

Plaintiffs argue that the *Second Withdrawal* is an arbitrary and capricious agency decision in violation of the APA because: (1) USTR did not adequately explain the reasoning between the facts found and its ultimate conclusion, including by not responding to comments from interested parties, Pls.' Br. at 19–20; (2) USTR did not adequately acknowledge and explain its changed position between the *June 2019 Exclusion* and the *Second Withdrawal*, *id.* at 25–29; (3) USTR failed to consider an important part of the problem—the economic and social costs of the *Second Withdrawal* compared to its benefits, *id.* at 29–36; (4) USTR failed to adequately consider other obvious policy alternatives, *id.* at 26–40; and (5) the *Second Withdrawal* is unsupported by the record evidence, *id.* at 40–47.

The Government and Defendant-Intervenors respond that the *Second Withdrawal* was not an arbitrary and capricious decision because USTR addressed all material issues and made a decision based on substantial record evidence. Def.'s Br. at 22–37; Def.-Inters.' Br. at 6–27. However, the Government, in making those arguments often relied on the Gerrish Memo as providing the required explanation for USTR's decision. *See, e.g.*, Def.'s Br. at 24 (citing Gerrish Memo at 3); Def.'s Br. at 30 (quoting Gerrish Memo); Def.'s Br. at 35 (citing Gerrish Memo at 8, 14); Def.-Inters.' Br. at 19 (citing Gerrish Memo at

14); Def.-Inters.’ Br. at 21 (citing Gerrish Memo at 12). As discussed above, the explanation provided by the Gerrish Memo is not part of the court’s analysis of whether the *Second Withdrawal* was arbitrary and capricious, and thus the following makes no reference to this document.

The APA dictates that a court shall hold unlawful any agency action that is arbitrary and capricious. 5 U.S.C. § 706(2)(A). The Supreme Court explained this review as: “we determine only whether [the agency] examined ‘the relevant data’ and articulated ‘a satisfactory explanation’ for [its] decision, ‘including a rational connection between the facts found and the choice made.’ We may not substitute our judgment for that of [the agency], but instead must confine ourselves to ensuring that [it] remained ‘within the bounds of reasoned decisionmaking.’” *Dept of Commerce v. New York*, 139 S. Ct. 2551, 2569 (2019) (first quoting *State Farm*, 463 U.S. at 43; then quoting *Balt. Gas & Elec. Co. v. Nat. Res. Def. Council, Inc.*, 462 U.S. 87, 105 (1983)). This also includes addressing significant comments made by interested parties during the notice and comment process in developing its final rule. *Disabled Am. Veterans*, 234 F.3d at 692.

Furthermore, when an agency changes its position, the Supreme Court stated that an agency must acknowledge its change and provide a rational explanation for the change. *F.C.C. v. Fox Television Stations, Inc.*, 556 U.S. 502, 517 (2009). There, the Court explained that this does not require an agency to demonstrate that the reasons for the new policy are better than the reasons for the old so long as the agency believes the new reasons to be better. *Id.* at 515. However, the Court acknowledged an exception to this standard where the agency’s “new policy rests upon factual findings that contradict those which underlay its prior policy; or when its prior policy has engendered serious reliance interests that must be taken into account.” *Id.* at 515 (citations omitted). See also *Perez v. Mortgage Bankers Ass’n*, 575 U.S. 92, 106 (2015) (“[T]he APA requires an agency to provide more substantial justification when its new policy rests upon factual findings that contradict those which underlay its prior policy; or when its prior policy has engendered serious reliance interests that must be taken into account.”). Similarly, the Court held in *Encino Motorcars v. Navarro* that an “[u]nexplained inconsistency” in agency policy is “a reason for holding an interpretation to be an arbitrary and capricious change from agency practice.” 136 S. Ct. 2117, 2120, 2125–26 (2016) (quoting *Nat’l Cable & Telecomm. Ass’n v. Brand X Internet Servs.*, 545 U.S. 967, 981 (2005)) (“Agencies are free to change their existing policies as long as they provide a reasoned explanation for the change.”).

The court concludes that the *Second Withdrawal* is likely arbitrary and capricious because USTR failed to adequately explain its reasoning and did not provide an adequate explanation of its change in position between the *June 2019 Exclusion* and the *Second Withdrawal* of that exclusion.

The *Second Withdrawal* is deficient in that it does not respond to certain of Plaintiffs' comments raising significant issues nor does it address evidence that detracts from its conclusion. First, in response to the *January 2020 Notice* and request for comments, Plaintiffs submitted comments disputing USTR's authority to withdraw a previously granted exclusion to the President's safeguard measure. Pls.' Br. at 21; e.g., A.R. 65–67, June 5, 2020, ECF No. 196 (Invenergy's comments to USTR on USTR's authority to withdraw the exclusion); A.R. 38 (EDF-R's comments to USTR on USTR's authority to withdraw the exclusion"). USTR summarizes its authority to grant exclusions as delegated by the President in Proclamation 9693, highlighting that its authority is limited by "the objectives of the safeguard measures." *Second Withdrawal*, 85 Fed. Reg. at 21,498. However, this statement does not address Plaintiffs' contention that the safeguard statute itself prevents USTR from withdrawing the exclusion or its comments that the President did not delegate that authority. See, e.g., A.R. 65–67 (Invenergy's comments); A.R. 38 (EDF-R's comments). Second, the *Second Withdrawal* does not address or explain evidence presented by Plaintiffs that bifacial solar panels and monofacial solar panels are not substitutable. See, e.g., A.R. 711–14 (SEIA's comments on substitutability). USTR merely concludes, "[b]ifacial solar panels and monofacial solar panels are substitutes from the perspective of utilities planning solar generating facilities in locations where both are cost-competitive with conventional forms of energy." *Second Withdrawal*, 85 Fed. Reg. at 21,498. In their comments to USTR, SEIA explained its position that bifacial and monofacial solar panels have "limited substitutability . . . in utility-scale versus residential/commercial applications." A.R. 711. Further, SEIA presented evidence in support of this claim in the form of many exhibits showing the price, weight, and energy production capacity differences between bifacial and monofacial solar panels. See A.R. 711–13 (providing citations to exhibits submitted with SEIA's comments). USTR itself acknowledges that "[b]ifacial solar panels are expected to offer a 5 to 10 percent improvement in energy output over a same-size monofacial panel." *Second Withdrawal*, 85 Fed. Reg. at 21,498. It is not apparent what evidence or reasoning USTR followed

in light of this statement, which seems to indicate that bifacial solar panels are not interchangeable, and Plaintiffs' evidence to reach the conclusion that bifacial and monofacial solar panels are substitutable. *NMB Singapore Ltd. v. United States*, 557 F.3d 1316, 1319 (Fed. Cir. 2009) (“[W]hile its explanations do not have to be perfect, the path of [an agency’s] decision must be reasonably discernable to a reviewing court.”). These two gaps in USTR’s reasoning support at least a preliminary conclusion that the *Second Withdrawal* is arbitrary and capricious.

The *Second Withdrawal* is also likely arbitrary and capricious in its failure to explain the change in its position that an exclusion on bifacial solar panels was warranted. The court notes that USTR did acknowledge its position change between the *June 2019 Exclusion* and the *Second Withdrawal* in both the *January 2020 Notice* and *Second Withdrawal*. *January 2020 Notice*, 85 Fed. Reg. at 4,756 (“USTR is seeking public comment on whether the U.S. Trade Representative should maintain the exclusion of bifacial solar panels from the safeguard measure, withdraw the exclusion, or take some other action within its authority with respect to this exclusion”); *Second Withdrawal*, 85 Fed. Reg. at 21,497 (“[USTR] established procedures to consider whether to maintain, withdraw, or take some other action with respect to the exclusion of bifacial solar panels from the safeguard measure.”). However, this acknowledgement and USTR’s conclusory statements about the impact of the bifacial exclusion do not meet the standard of explaining its change in position as set forth in long-established caselaw on what is required of an agency when it changes its position. *F.C.C. v. Fox*, 556 U.S. at 517. USTR fails to explain what information it received or what facts changed since the issuance of the *June 2019 Exclusion* that led it to believe that withdraw was the more appropriate action, thus its decision was not adequately reasoned in this respect. See *Encino Motorcars*, 136 S. Ct. at 2125–26. USTR instead states that “[i]mports of bifacial solar panels were rising even before the bifacial exclusion and continued to increase after the exclusion.” *Second Withdrawal*, 85 Fed. Reg. at 21,498. USTR explains the impact of bifacial imports by stating, “[b]y disincentivizing domestic producers’ production of bifacial solar panels, interfering with their ability to increase sales of monofacial and bifacial products into the utility segment, and having a depressive effect on prices for monofacial solar panels, the bifacial exclusion is hindering the domestic industry’s adjustment to import competition.” *Id.* at 21,498–99. However, as explained, the court cannot discern what facts or information have come to USTR’s attention since it granted the *June 2019 Exclusion* that justifies this conclusion in light

of the information before USTR when it granted the *June 2019 Exclusion*. See *June 2019 Exclusion*, 84 Fed. Reg. at 27,684 (“Based on an evaluation of the factors set out in the February 14 notice, which are summarized above, the Trade Representative has determined to grant the product exclusions set out in the Annex to this notice”). Defendant-Intervenors state that “[t]he [*June 2019 Exclusion*] did not elaborate any specific factual findings but summarily stated that USTR would only grant exclusions that did not undermine the objective of the safeguard measure, implying that in granting the [*June 2019 Exclusion*] it had determined this requirement was met.” Def.-Inters.’ Suppl. Br. at 12. It was not merely a passing inference or implication that allowed USTR to exclude bifacial panels in the *June 2019 Exclusion*, but its sole basis for this decision after considering evidence placed on the record for a year and a half was that it did not undermine the objectives of the safeguard measure. *June 2019 Exclusion*, 84 Fed. Reg. at 27,684 (noting that USTR “would only grant exclusions that did undermine the objectives of the safeguard measure”). Again, the court does not and should not decide that one position is superior to another. See *F.C.C. v. Fox*, 556 U.S. at 515. Rather, the court merely requires transparency from USTR in explaining why it is changing its position on the *June 2019 Exclusion*. This justification need not be more than what was provided in granting the *June 2019 Exclusion*, but some explanation of the change is required given that “its new policy [seems] to rest[] upon factual findings that contradict those which underlay its prior policy.” *Id.* USTR failed to provide that explanation in the *Second Withdrawal*, and thus its decision is likely arbitrary and capricious.⁷

The court does not address the remainder of Plaintiffs’ assertions in support of its argument that the *Second Withdrawal* is arbitrary and capricious. The court need not decide these claims in deciding this still preliminary motion to modify the PI. Rather, the court will address these claims upon deciding the merits of Plaintiffs’ challenge to the *Second Withdrawal*. However, as explained, the court finds sufficient deficiency with the *Second Withdrawal* to conclude that Plaintiffs’ claims that the *Second Withdrawal* is also arbitrary and capricious are likely to succeed on the merits. Thus, the *Second Withdrawal* suffers from at least some of the same flaws as the *First Withdrawal*. See *Invenergy I*, 422 F. Supp. 3d at 1287–88; see also *id.* at 1265 (“[A]t stake here is whether USTR undertook reasoned deci-

⁷ The court further notes that, because the Government did not provide record documents showing what factual information USTR relied on in making its *June 2019 Exclusion*, as discussed below regarding Plaintiffs’ motion to complete the administrative record, it is hard at this stage to determine what facts the agency had before it in deciding to withdraw the previously granted exclusion for bifacial solar modules.

sion making to implement the [*First Withdrawal*], as required by the APA, including provision for meaningful participation by interested parties.”).

3. Continuing Procedural Irreparable Harm Justifies Modification of the PI to Avoid Inequity to Plaintiffs.

The court concludes that the *Second Withdrawal* is likely arbitrary and capricious. However, this conclusion alone does not justify modification of the PI. Plaintiffs must also show that there would be inequity in not modifying the PI. *Ad Hoc Shrimp*, 32 CIT at 670. Here, the inequity of not modifying the PI is the prospect that Plaintiffs’ would face the same irreparable procedural harm in being subject to an arbitrary and capricious decision as they faced when the court issued the PI enjoining enforcement of the *First Withdrawal*.

As the court explained in *Invenergy I*:

The [irreparable harm] inquiry focuses on whether the court must act now to prevent a loss that cannot later be remedied. *See, e.g., CPC Int’l Inc. v. United States*, 19 CIT 978, 979, 896 F. Supp. 1240, 1242–44 (1995) (irreparable harm includes “costs, expenditures, business disruption or other financial losses” that plaintiff has “no legal redress to recover in court”). To determine whether an injury is irreparable, the court analyzes the magnitude and immediacy of the injury, and the inadequacy of future relief. *Queen’s Flowers de Colombia v. United States*, 20 CIT 1122, 1125, 947 F. Supp. 503[, 506] (1996). Harm such as “loss of goodwill, damage to reputation and loss of business opportunities are all valid grounds for finding irreparable harm.” [*Celsis In Vitro, Inc. v. CellzDirect, Inc.*, 664 F.3d 992, 930 (Fed. Cir. 2012)]. Furthermore, unlike injury for constitutional standing purposes, a procedural injury can itself constitute irreparable harm. A procedural violation can give rise to irreparable harm justifying injunctive relief because lack of process cannot be remedied with monetary damages or post-hoc relief by a court.

...

Therefore, the court concludes that this likely procedural harm is irreparable, and thus merits preliminary injunctive relief because they cannot be remedied after the [*First Withdrawal*] goes into effect. The alleged violation of the APA should be further enjoined to avoid the business uncertainty that flows

from such a procedural violation. The [*First Withdrawal*] causes irreparable harm by eliminating the business certainty required by the solar industry to plan and develop future projects.

422 F. Supp. 3d at 1290–91.

Plaintiffs face these same irreparable harms from implementation of the *Second Withdrawal*. Being subject to a procedurally flawed and inadequately explained decision would allow an agency decision to go into effect that also does not address significant comments from the interested public. A decision that does not evince meaningful consideration of public comments is no different than a decision implemented without opportunity for the public to comment. In both scenarios, there is the potential that the agency will establish a new status quo and engender new reliance interests on a decision that did not take account of public input as required by the APA. See *N. Mariana Islands v. United States*, 686 F. Supp. 2d 7, 18 (D.D.C. 2009) (noting that once the regulatory change “has begun operation as scheduled . . . [the agency] is far less likely to be receptive to comments.”). The APA’s notice and comment requirement is not a pro forma requirement, but a substantive requirement that the agency account for the concerns and opinions of the interested public before implementing or changing its policies. Thus, if the *Second Withdrawal* were to go into effect and then later held to provide inadequate response to comments, Plaintiffs would face harms from a procedurally deficient agency decision for which the court would be unable to remedy. Thus, Plaintiffs’ continue to face irreparable harm as a result of USTR’s actions and it would inequitable to not modify the PI to include the *Second Withdrawal*.⁸

In sum, the court concludes that the PI should be modified in order to fulfill its intended purpose and to avoid inequity to Plaintiffs. The court finds that the *Second Withdrawal* is likely arbitrary and capricious and lacking a sufficient basis and purpose in accordance with APA requirements because USTR did not address significant comments from Plaintiffs and did not explain the basis for its change in policy between the *June 2019 Exclusion* and the *Second Withdrawal*. The existence of the unpublished, internal Gerrish Memo does not remedy these deficiencies and these deficiencies are not harmless errors. Therefore, the court grants Plaintiffs’ cross-motion to modify the PI to include the *Second Withdrawal*.

⁸ This conclusion does not mean that the court has assumed the same defect from the *First Withdrawal* but reflects that Plaintiffs have independently shown that the *Second Withdrawal* would harm them in the same way as *First Withdrawal*, but for different reasons. “[N]either the plaintiff nor the court should be subjected to the unnecessary burden of re-establishing what has once been decided.” *Sys Fed’n No. 91 v. Wright*, 364 U.S. 642, 647 (1961).

III. Plaintiffs' Motion to Complete the Agency Record

Two weeks after the Government filed the administrative record, Plaintiffs filed a motion to complete the record. Pls.' Mot. to Complete A.R. Plaintiffs claim that the record as submitted did not include key documents necessary for the court to review both the *First Withdrawal* and *Second Withdrawal*. *Id.* at 5. Specifically, Plaintiffs request that the court order completion of the record as to four categories:

- (1) All documents, including (but not limited to) any interested party comments, agency memoranda, inter-agency consultations, and ex parte communications, related to the June 13, 2019 determination to exclude bifacial solar modules from the safeguard measure;
- (2) All documents, including (but not limited to) any interested party comments, agency memoranda, inter-agency consultations, and ex parte communications, related to USTR's October 9, 2019 determination to withdraw the bifacial solar module exclusion;
- (3) All documents, including (but not limited to) any interested party comments, agency memoranda, inter-agency consultations, and ex parte communications, related to the issuance of the January 27, 2020 notice regarding the procedures to reconsider the bifacial module exclusion;
- (4) Any other documents prepared by, submitted to, or otherwise possessed by or under the control of USTR pertaining to the bifacial module exclusion or its withdrawal, including (but not limited to) documents related to any meetings, calls, or other communications that USTR had between February 2018 and the April Withdrawal, with members of the solar industry, congressional members or their staff, and/or members of the executive branch regarding the bifacial panel exclusion and subsequent withdrawals.

Id. at 2.

The Government and Defendant-Intervenors responded in opposition to this motion. The Government claims that the record it submitted is entitled to a presumption of regularity and that the record submitted is complete. Def.'s Resp. to Mot. to Complete A.R. at 7. The Government also argues that USTR made the decision to issue the *Second Withdrawal* on the basis of "a clean slate" so that any documents before the agency related to its past decisions are irrelevant to

the record on the *Second Withdrawal*. *Id.* The Defendant-Intervenors make similar arguments and claim that “Plaintiffs’ motion will unnecessarily delay any resolution of the dispute.” Def.-Inters.’ Resp. to Mot. to Complete A.R. at 2.

In addressing Plaintiffs’ motion to complete the record, the court notes that Plaintiffs characterize their request as completing the record, while the Government argues that Plaintiffs seek to supplement an already complete record. The court applies different standards when deciding whether a record should be completed and when deciding whether a record should be supplemented. *See, e.g., Giorgio Foods, Inc. v. United States*, 35 CIT 297, 300, 755 F. Supp. 2d 1342, 1346 (2011) (“Supplementing the administrative record with outside information is somewhat distinct from supplementing the record ‘upon a showing that the administrative record is not complete.’” (quoting *Advanced Tech. Materials Co. v. United States*, 34 CIT 598, 603 (2010))). While completing the record requires only that the moving party show that the record filed is not complete, supplementing the record requires the further burden of showing bad faith by the agency. *Compare Overton Park*, 401 U.S. at 419–20 (noting that completion of the record is required where the produced record “clearly do[es] not constitute the whole record compiled by the agency”) (citations omitted) *with Ammex*, 23 CIT at 556 (noting that supplementation of the record is required upon a “strong showing of bad faith or improper behavior” by the agency) (quotation omitted). *See also JSW Steel*, Slip Op. 20–111 at 15. Here, Plaintiffs moved the court to order the Government to complete the record because the record did not include all documents that were before USTR in making its decision on the *First Withdrawal* and *Second Withdrawal*. Pls.’ Mot. to Complete A.R. at 2. Plaintiffs made no allegations of bad faith on the part of the Government in filing the record. *See id.* Thus, the court decides the motion under the standard of completing the record.

As the court explained in *Giorgio Foods*, the court assumes the record is complete where it has been certified by the agency. 35 CIT at 300, 755 F. Supp. 2d at 1346. “In a motion to complete the administrative record, a party must do more than simply allege that the record is incomplete. Rather, a party must provide the [c]ourt with reasonable, non-speculative grounds to believe that materials considered in the decision-making process are not included in the record.” *Def. of Wildlife v. Dalton*, 24 CIT 1116, 1119 (2000) (citations and quotations omitted). A complete record includes all material directly or indirectly considered by the agency, including evidence presented to the agency that is contrary to its ultimate decision and not relied

on by the agency. See *Ammex*, 23 CIT at 554–55, 62 F. Supp. 2d at 1155–56 (citations omitted). This is broader than those documents cited by and relied upon by the agency, but also includes “all materials that might have influenced the agency’s decision.” *Amfac Resorts LLC v. U.S. Dep’t of Interior*, 143 F. Supp. 2d 7, 12 (D.D.C. 2001) (quotation omitted); see also *Thompson v. U.S. Dep’t of Labor*, 885 F.3d 551, 555 (9th Cir. 1989) (“The whole administrative record, therefore, consists of all documents and materials directly or indirectly considered by agency decision-makers and includes evidence contrary to the agency’s position.”) (quotation omitted). Furthermore, because USTR here reconsidered its previous decision, the *June 2019 Exclusion*, USTR’s change in position must be explained in light of the record on which it made its past decision, even if its new decision is based on the same evidence that it previously considered. See, e.g., *Encino Motorcars*, 136 S. Ct. at 2122–23 (comparing record and history of original agency decision to that of the agency’s new decision); *State Farm*, 463 U.S. at 52–55 (comparing agency’s rationale of rescission with its rationale for its original decision); *F.C.C. v. Fox*, 556 U.S. at 507–08 (same). Thus, the parties may develop arguments and the court may review the agency’s reconsideration decision only by reviewing the record before the agency at the time of its original both its original decision and its reconsideration. *Walter O. Boswell Mem’l Hosp. v. Heckler*, 749 F.2d 788, 792 (D.C. Cir. 1984) (“To review less than the full administrative record might allow a party to withhold evidence unfavorable to its case, and so the APA requires review of the whole record.”) (citations omitted). See also *Giorgio Foods*, 755 F. Supp. 2d at 1348 (“[W]hat the ITC directly consulted does not necessarily determine the administrative record. The records of the underlying investigations necessarily created the environment in which the decision was made by the ITC and were hence indirectly consulted.”).

The court agrees with Plaintiffs that the record submitted by the Government on June 5, 2020 is incomplete. That record was limited to submissions to USTR by interested parties as a result of the *January 2020 Notice*, reports of the ITC, agency consultations, the *Second Withdrawal*, and the internal USTR memoranda. See A.R. (index to public administrative record). As Plaintiffs note, the record does not include any documents before the agency at the time of the *June 2019 Exclusion*, “any evidence of inter-agency consultation regarding the exclusion requests, or even the [*June 2019 Exclusion*] determination.” Pls.’ Mot. to Complete A.R. at 8. Plaintiffs have rebutted the court’s presumption that the record is complete by showing that the Government failed to include documents that were both directly relied on by USTR and documents that were before USTR at

the time it made the *Second Withdrawal* and the *June 2019 Exclusion*, but that it did may not have relied on.⁹ Therefore, the court grants Plaintiffs motion as to the first category and orders that the Government complete the record with documents related to the *June 2019 Exclusion* of bifacial solar modules.

The court also grants Plaintiffs' motion as to the third category covering documents related to the *January 2020 Notice*. As Plaintiffs state, "the [*January 2020 Notice*] described a number of concerns that USTR had with the Exclusion . . . and those concerns grew from somewhere." Pls.' Mot to Complete A.R. at 12. The court notes that the record filed by the Government does not include the *January 2020 Notice* as published in the Federal Register. See A.R. The Government argued at oral argument that that document was provided to the court through litigation, Transcript of Oral Arg. of Aug. 10, 2020 at 103, but this omission does support Plaintiffs' contention that the submitted record is incomplete. Documents related to the *January 2020 Notice* would further shed light on USTR's decision to reconsider its *June 2019 Exclusion* decision by including documents that were directly or indirectly considered by agency decision-makers starting at the time they formally decided to reconsider their past decision. See *Thompson*, 885 F.2d at 555. Therefore, the court grants Plaintiffs' motion as to the third category and orders the Government to complete the record with all documents related to the *January 2020 Notice*.

Further, Plaintiffs request the court to order the Government to complete the record as to the *First Withdrawal* and as to a broad fourth category of documents. Pls.' Mot. to Complete A.R. at 2. The court denies Plaintiffs' request as to documents related to the *First Withdrawal* because, with this decision, the court vacates the *First Withdrawal* on the merits as an unlawful agency rulemaking that was procedurally deficient under the APA. Further, the court denies Plaintiffs request as to documents related to the fourth category. Because the first and third categories suffice to produce the requisite record documents missing from the record, the court need not grant the Plaintiffs' request which may encompass documents outside the court's scope of review.

⁹ The court notes that the Government's original filing of the Administrative Record did not include a certification of completeness by the agency. See A.R. However, the Government filed a certification in its response to Plaintiffs' Motion and stated that its omission was inadvertent. Def.'s Resp. to Mot. to Compl. at Attach. 1, ECF No. 210-1 (Declaration by Dax Terrill); Transcript of Oral Arg. of Aug. 10, 2020 at 99-100.

CONCLUSION

The court vacates the *First Withdrawal* as an agency decision that should be set aside as unlawful because it did not comply with the APA requirements as described in *Invenergy I*. The court denies the Government's motion to dissolve the PI because it does not have jurisdiction to do so pending the Government's appeal and because the court instead modifies the PI. The court grants Plaintiffs' cross-motion to modify the PI to reflect the *Second Withdrawal* and Plaintiffs' challenge of that decision in their amended complaints. The court also grants Plaintiffs' motion to complete the agency record, in part, and denies the motion as to the *First Withdrawal* and the fourth category of documents. The Plaintiffs' motion to stay is denied.

The court notes that if presented with an adequate record and explanation of USTR's action, the court could proceed, in accordance with well-established administrative law standards, to review USTR's decision to withdraw it previously granted exclusion from safeguard duties on imported bifacial solar modules. However, various procedural missteps by USTR mean that the court cannot reach that point now. As the court has stated,

The court acknowledges the Government and Defendant-Intervenors' concern that domestic industries may face a threat of material injury due to USTR's decision to exclude bifacial solar products from safeguard duties. The court also acknowledges the concerns of Plaintiffs (consumers, purchasers and importers of utility-grade bifacial solar panels), who oppose safeguard duties that they claim increase the cost of bifacial solar panels.

Invenergy III, 450 F. Supp. 3d at 1365 (citations omitted). The court takes no position on the efficacy of safeguard duties in providing protection to the domestic solar industry or of a decision to exclude products from those safeguard duties. *Id.* Once again, the court merely continues to require the Government to follow its own laws when it acts.

SO ORDERED.

Dated: October 15, 2020
New York, New York

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

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